

2006

# Kynda Kay Richardson v. Kenneth Andrew Richardson : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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KYNDA KAY RICHARDSON,

Petitioner/Appellant,

vs.

KENNETH ANDREW RICHARDSON,

Respondent/Appellee,

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Appellate Case No. 20060575

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## ARGUMENT

### 1. The Court Abused Its Discretion By Making a Future Alimony Adjustment That Requires Mr. Richardson to Provide Support for His Adult Children

It was an abuse of discretion for the trial court to grant future alimony adjustments based upon the minor children reaching majority and respondent no longer making child support payments. Ms. Richardson argues that Mr. Richardson failed to adequately marshal the evidence. *See Appellee's Brief*, at pp. 14-15. However, Mr. Richardson is not challenging a finding of fact, but rather a determination of law. Therefore, there is no evidence to marshal in this matter.

The trial court's decision to raise alimony was based, not on the past behavior of the parties or increases in the cost of living. The increase in alimony is based on the fact that Mr. Richardson would no longer be making child support payments. There are no facts to marshal in this case because it is not an erroneous finding of fact, but simply an abuse of discretion, for any court to force Respondent to provide financial support for his able bodied children over age eighteen. Furthermore, even if marshaling of the facts was required, such has been done. The findings of the court do not support an award granting future increases in alimony.

With few exceptions, parents do not have an obligation to provide support to adult children. The *Uniform Civil Liability for Support Act* found at Utah Code Ann. §§ 78-45-1 through §§ 78-45-13 requires a parent to provide for children over age eighteen only when the child is still in high school or when the child is incapacitated or otherwise unable to support themselves. *See id.* at subsections (b) and (c). There was absolutely no evidence introduced that

any of the parties' children are incapacitated or will be otherwise unable to support themselves upon reaching age eighteen. Such was not at issue. Therefore, it was an abuse of discretion for the court to require Mr. Richardson to provide support after the children reach the age of majority.

Not only was it an abuse of discretion to require Mr. Richardson to provide support for his adult children, but it was also an abuse for the court to make future alimony adjustments based on speculative events. The general rule governing future adjustments to alimony is set forth by Utah Code Ann § 30-3-5(8)(g)(ii). It states:

The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

There are no such extenuating circumstances in this case. Mr. Richardson recognizes that courts have, on rare occasions, found extenuating circumstances justifying deviation from the general rule. However, such cases deviate from the well established standard and are easily distinguishable from our case. In *Westenskow v. Westenskow*, 562 P.2d 1256 (Utah 1977), the court allowed a future adjustment of alimony because it found that the party paying the alimony was likely to have a significant increase in income. In that case, after granting future alimony increases, the court said that if the party's income was seriously and permanently decreased he could at that point prove the necessity for a modification. *Id.* at 1257. There the party paying the alimony would know that they needed to petition for a modification. In our case the alimony increases are based, not on an increase in Mr. Richardson's income, but in a decrease in the child support payments Ms. Richardson is receiving.

At the time when alimony adjusts in the future, Ms. Richardson's income (hence her ability to meet her needs) is now not known; her marital circumstances (hence, contribution to joint living expenses is now not known; and the physical ability for the Parties to be able to work is now not known. Under *Westenskow*, the future knowledge of the circumstances are with the person paying the alimony, not the person receiving it.

The Utah Supreme Court stated well the rule of law that governs this case, “[w]e deem it best that the changes in alimony either downward or upward should be left to future determinations by the court under its continuing jurisdiction.” *McLean v. McLean*, 523 P.2d 862, 863 (Utah 1974). The parties have not made an agreement that they will support the children past age eighteen and the minor children have not stated that they intend to reside with Ms. Richardson after they turn eighteen. Therefore, the determination of the need for alimony should be left until such time as it becomes necessary. If Ms. Richardson finds that as the children reach eighteen and the child support payments stop that she is unable to maintain her standard of living then, and only then, will it be proper for her to petition the court for an increase in alimony. As it stands, the trial court's award runs contrary to the Uniform Civil Liability for Support Act found at Utah Code Ann. §§ 78-45-1 through 78-45-13, the statute governing future alimony adjustments found at Utah Code Ann. § 30-3-5, and the rule set forth in multiple cases cited in this reply and the appeal brief. Therefore, the trial court's award granting future alimony increases is an abuse of discretion and must be reversed.

## 2. The Court Abused Its Discretion in Awarding Retroactive Alimony



The award of retroactive alimony was an abuse of discretion. Utah Code Ann. § 30-3-3 explains when it is proper to grant interim alimony. It states that the court may “order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.” Ms. Richardson’s brief states clearly why the retroactive alimony was incorrect. “Mr. Richardson had voluntarily made at least partial payments of temporary support during the pendency of action, which made it unnecessary for Ms. Richardson to request interim alimony.” Appellee’s Brief, at p. 23. Again, Mr. Richardson’s interim payments made it unnecessary for Ms. Richardson to request interim alimony. Therefore, if the interim alimony was unnecessary, the justification for retroactive alimony set forth in § 30-3-3 was defeated and any award was an abuse of discretion and must be reversed.

### **CONCLUSION**

For the foregoing reasons, Kenneth Richardson requests a reversal of the Decree, insofar as it mandates increases in alimony as each of the minor children reaches the age of eighteen. He also requests that the award of retroactive alimony be reversed.

RESPECTFULLY SUBMITTED this 14 day of February, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the above and foregoing, postage prepaid, first class mail, this 15<sup>th</sup> day of February, 2007, directed to:

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