

1995

Joyce A. Pendleton v. Robert L. Pendleton : Brief of Appellee

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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950314

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OF THE STATE OF UTAH

JOYCE A. PENDLETON,	:	
Plaintiff-Appellee,	:	
vs.	:	Appeal No. 950314
ROBERT L. PENDLETON,	:	Oral Argument Priority 15
Defendant-Appellant.	:	

BRIEF OF APPELLEE JOYCE A. PENDLETON

APPEAL FROM FINAL ORDER OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE KENNETH RIGTRUP
No. 904900500DA

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code
Annotated Sections 78-2-2(4) (Supp. 1995), and 78-2a-3(2)(k)
(Supp. 1995).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court properly refuse to terminate appellee's right to alimony based on the "residency" requirement of Utah Code Annotated Section 30-3-5(6) and the "cohabitation" clause of the Decree of Divorce?

This issue is a mixed question of fact and law. Haddow v. Haddow, 707 P.2d 669, 671 (Utah 1985). Appellate courts give great deference to the trial court's finding of fact in divorce cases and do not overturn them unless they are clearly erroneous. Barnes v. Barnes, 857 P.2d 257, 259 (Utah App. 1993); see also Barber v. Barber, 792 P.2d 134, 136 (Utah App. 1990) (trial court's termination of temporary alimony affirmed on appeal because appellant failed to marshal relevant evidence and failed to show trial court's findings of fact to be clearly erroneous). Conclusions of law arising from factual findings are to be reviewed for correctness, and are given no special deference on appeal. Bingham v. Bingham, 872 P.2d 1065, 1067 (Utah App. 1994); see also, Judge Norman H. Jackson, Utah Standards of Appellate Review, Utah Bar Journal, October 1994, at 24-27.

2. Should this Court award appellee's costs and attorneys fees on appeal?

This question does not involve issues raised at the trial level, and therefore there is no applicable standard of appellate review. If a trial court's order is affirmed on appeal, "costs shall be taxed against appellant unless otherwise

ordered." Rule 34(a), Utah Rules of Appellate Procedure (1995). Moreover, attorney fees on appeal may be granted in the discretion of the court in conformance with statute or rule. Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989) (citing Utah Code Ann. § 30-3-3 (1984)).

DETERMINATIVE LAW

Utah Code Ann. Section 30-3-3(1) (1995) states:

In any action filed under Title 30, chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

Utah Code Ann. Section 30-3-5(6) (1989) states:

Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

Rule 34(a), Utah Rules of Appellate Procedure (1995) states:

Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment or order is affirmed, costs shall be

taxed against appellant unless otherwise ordered;

STATEMENT OF THE CASE

A. Nature of the Case

This appeal involves whether or not Appellant Robert L. Pendleton ("Appellant") is entitled to a termination of alimony payments to his former wife, Appellee Joyce A. Pendleton ("Appellee"). Appellant filed his Petition for Termination of Alimony ("Petition") with the trial court on October 26, 1993. (R. 233). Appellee filed her Answer to Petition for Termination of Alimony on January 19, 1994. (R. 247). The Honorable Judge Kenneth Rigtrup conducted a bench trial of the relevant issues on January 27, 1995. (R. 347). Although Judge Rigtrup discussed his findings from the bench (R. 445-50), he subsequently entered Findings of Fact and Conclusions of Law (R. 281-85) and an Order dismissing Appellant's Petition for Termination of Alimony without prejudice. (R. 286-87). Judge Rigtrup concluded that the residency requirement under Utah Code Annotated Section 30-3-5(6) contemplates more than just sexual relations, and requires some "duration, continuity, [and] some commitment to a shared, beneficial relationship." (R. 284, Conclusions of Law ¶¶ 4, 6).

B. Statement of Facts

The material facts in this case are generally not disputed. With the exception of some minor factual statements

made by Appellant for which there is no citation to the record, or the record citation does not support, Appellee generally accepts the "Statement of Facts" section contained on pages 5-9 of Appellant's brief. For clarification and further development, Appellee sets forth the following facts, many of which have been completely ignored by Appellant.

Appellant and Appellee were divorced on March 5, 1991. Paragraph 13 of the Decree of divorce states as follows regarding alimony:

The plaintiff [Appellee] shall be awarded permanent alimony of Four Hundred and no/100 Dollars (\$400.00) a month. The defendant is ordered to pay alimony until the death of the plaintiff, the remarriage of the plaintiff, cohabitation of the plaintiff, or further order of this Court.

(R. 176-77) (emphasis added).

At trial, Appellant testified that he first became aware, in August of 1993, that Appellee had entered into a relationship with Bill Hunter ("Hunter"). (R. 431 L22-24). Based on suspected cohabitation, Appellant filed a Petition for Termination of Alimony in October 1993, ceased making alimony payments to Appellee, and began depositing said payments into a holding account. (R. 281-82, Findings of Fact ¶¶ 1-2).

Appellee and Hunter commenced an eight-month sexual relationship in July of 1993 which continued through February of 1994, during which time they spent most of their free time together. (R. 282, Findings of Fact ¶¶ 3, 5; R. 354 L12-25; R.

355 L18-22). Following a hiatus in their relationship, from August of 1994 through January of 1995, they established a fairly consistent pattern of sexual relations. (Id. ¶ 4; R. 401 L3-5).

The trial court made the following additional findings of fact:

6. During that eight-month period, Mr. Hunter and Ms. Pendleton ate a few meals together and shared some expenses; although it appears that Mr. Hunter bought most frequently when they went out. [R. 380 L19-21] Mr. Hunter did eat meals free at Ms. Pendleton's house when she did fix meals. [R. 357 L18-19; R. 358 L23-25; R. 364 L15-17]

7. Mr. Hunter had, on occasion, his clothes at the house of Ms. Pendleton and occasionally he had a briefcase there. [R. 363 L3-11; R. 367 L16-20; R. 376 L1-5]

8. Ms. Pendleton did some token laundry for Mr. Hunter [R. 361 L22 - R. 362 L23], and carried some of his dry cleaning to the cleaning establishment next door. Mr. Hunter reimbursed Ms. Pendleton for the dry cleaning that she had had done on his behalf. [R. 374 L20 - R. 375 L5; R. 380 L22 - R. 381 L23]

9. Mr. Hunter shaved, showered, and prepared himself for the day at her residence after having spent the night with Ms. Pendleton. [R. 396 L18 - R. 397 L5]

10. It appears that Mr. Hunter rented an apartment approximately one (1) day prior to the filing of Defendant's petition; however, Mr. Hunter's wife and children were living in the Magna area. Some of his belongings were in that home, some of his things were in his vehicle, and some items were at Joyce Pendleton's. [R. 303 L6-13; R. 305 L21-24; R. 312 L23 - R. 313 L7]

11. Mr. Hunter did not use Ms. Pendleton's residence as a mailing address. [R. 373 L17-18; R. 338 L7-8] Mr. Hunter and Ms. Pendleton did not share any assets or any financial arrangements of any kind except to the extent that there was a nominal sharing

of a vehicle for transportation purposes.
[R. 365 L7-18; R. 376 L6-23]

12. Mr. Hunter and Ms. Pendleton did travel on several overnight trips and there was some sharing of expenses during these trips. [R. 359 L23 - R. 360 L13; R. 382 L12 - R. 383 L4]

13. The evidence is clear and unmistakable that Mr. Hunter made no significant or casual contribution to Ms. Pendleton for any household expenses. [R. 364 L18-20; R. 374 L9-11; R. 378 L17-19; R. 405 L22 - R. 406 L9] He made no mortgage payments or utility payments, and there was no commitment to do so. [R. 373 L19-21]

(R. 283-84) (supporting citations to the record added).

As of January 27, 1995, Appellee and Hunter had only seen each other 10-12 days within the last three months. Hunter testified that he had been in town more than that "taking care of other things," but he has business in town that he takes care of and then he has to leave. (R. 400 L14-19). In addition, from August 1994 to October 1994, Hunter was residing with his wife and dependent children in Montana. (R. 371 L9 - R. 372 L10; R. 403 L4-9). From November 1994 to the time of trial in January of 1995, Hunter spent less than five nights a month at Appellee's home. (R. 372 L23 - R. 373 L27)

Although Appellee and Hunter had discussed getting married, they never set any dates. (R. 403 L1-4; R. 339 L23-25). Hunter testified that they were not ready to commit because he had not settled things with his current wife. (R. 312 L2-5). The trial court found: Janet Hunter, Hunter's wife, lives in Montana with their dependent children; Hunter maintains a marital

relationship with Janet; and Hunter was not divorced from his wife, nor had he filed for divorce. (R. 283, Findings of Fact ¶ 14; R. 378 L9-16).

Admittedly, Hunter had a key to Appellee's residence, which did give him access to her home, but he did not obtain this key until some time after the relationship began, and only after "some serious problems with [Appellee's] son and a lot of threats." (R. 358 L6-19; R. 386 L4-8). These problems included a physical confrontation which involved Appellee's son's use of drugs. (R. 327 L23-24). Moreover, Hunter testified that, when he was in town, he would go over to Appellee's house three to four times a day so that he could check on the house. (R. 386 L10-13). Things were being stolen from the house every day. (R. 388 L22-23; R. 406 L25 - R. 408 L3). Hunter testified that he would not just go over to relax, or take a nap, when Appellee was not there. (R. 318 L25 - R. 319 L14). Furthermore, Appellee had a key to Hunter's apartment in case she needed a place to go if she had any problems with her son. (R. 387 L15-19).

Appellee had a key to Hunter's Oldsmobile that was stored at her house from July 1994 to December 1994, which she drove when she was sick and unable to walk the two blocks to work. (R. 376 L6-23; R. 369 L7-8; R. 376 L6 - R. 377 L7).

Hunter testified that he spent at least 1-2 hours a day at his own apartment, which, considering his work in real estate and average daily travel of a hundred miles, was a considerable

amount of time to spend at that location. (R. 312 L13-21; R. 395 L15 - 396 L11). Hunter accompanied Appellee to a couple gatherings of her family, and family members were aware that they had a "serious relationship." (R. 340 L3-12; R. 314 L20 - R. 315 L2).

Hunter never moved any furniture into Appellee's home, or bought any furniture for her. (R. 375 L6-11). In fact, at the time of trial, Hunter had no clothes or other personal property at Appellee's home. (R. 375 L11-16).

In addition, Hunter did not assist in any way with the cost of maintaining Appellee's home, nor did he perform any regular household duties in order to help maintain Appellee's home (with the exception of repairing a toilet that he broke himself). (R. 406 L5-19).

SUMMARY OF THE ARGUMENT

Appellee and Hunter did not "reside" together within the meaning of Utah's termination of alimony statute. Although their relationship was admittedly more than that of casual friends, Appellee and Hunter did not enter into a relationship consistent with marriage. Sexual contact alone, even over an extended period of time, is insufficient to establish the residency required under the statute. The facts supporting non-residency in this case include, but are not limited to: Hunter's maintenance of a separate residence; his marriage to another

individual; and perhaps most importantly, the utter lack of any financial interdependence consistent with the traditional marriage relationship.

Utah Supreme Court precedent supports the trial court's conclusion that Hunter was not residing with Appellee. In addition, appellate decisions from other jurisdictions also support the trial court's decision not to terminate alimony. The appellate decisions Appellant relies on are readily distinguishable from the instant case.

Appellee's association with Hunter is the type of relationship the legislature contemplated would fall outside the termination of alimony statute. Utah's legislators envisioned the statute operating to terminate alimony when the receiving spouse was living with another individual under conditions consistent with marriage. They expressed concern that the statute not operate so as to terminate alimony based solely on post-marital sexual involvement with another. The statute was designed to allow for the termination of alimony when the receiving spouse entered into a continuous residency relationship, with accompanying financial interdependence.

Finally, pursuant to established rule, statute, and case law precedent, Appellee should be awarded her costs and reasonable attorney fees incurred on appeal. The costs of defending this matter below, and now on appeal, have greatly increased Appellee's need for financial assistance. The trial

court's decision should be affirmed, and the case remanded on the narrow issue of determining the amount of Appellee's costs and attorney fees incurred on appeal.

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO TERMINATE ALIMONY.

Based on the "residency" requirement of Utah Code Annotated Section 30-3-5(6), and the "cohabitation" clause of the Decree of Divorce, the trial court properly refused to terminate alimony. Paragraph 13 of the Decree of Divorce orders Appellant to pay Appellee alimony "until the death of the Plaintiff, the remarriage of the Plaintiff, cohabitation of the Plaintiff, or further order of this court." R. 176-77 (emphasis added). In addition, Section 30-3-5(6) (1989) of Utah Code Annotated states:

Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(Emphasis added).¹ Appellee admits that her relationship with

¹This is the version of the termination of alimony statute that was in force at all relevant times below. The current version, which became effective May 1, 1995, is found at Utah Code Ann. § 30-3-5(9)(Supp. 1995) and states as follows:

Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony

Hunter included sexual contact, therefore the only issue on appeal is whether the "residency" requirement of the statute was satisfied.

As discussed in each of the following subsections: (A) "Cohabitation" and "residency" both require an element of continuity and shared financial responsibilities; (B) Appellant has failed to establish that Appellee was "residing" with a person of the opposite sex; (C) Appellate decisions from other jurisdictions support a holding of non-residency in this case; and (D) the appellate decisions Appellant relies on are readily distinguishable from the instant case. Accordingly, the trial court properly dismissed Appellant's Petition for Termination of Alimony because he failed to establish that Appellee "resid[ed] with a person of the opposite sex."

A. "Cohabitation" and "Residency" Both Require an Element of Continuity and Shared Financial Responsibilities.

"Cohabitation" in the Decree of divorce is not a defined term. Construing the term "cohabitation" in a decree of divorce, the Utah Supreme Court in Haddow v. Haddow, 707 P.2d

that the former spouse is cohabitating with another person.

(Emphasis added). Representative Haymond, sponsor of House Bill 36 which amended the statute, admitted "[t]he Bill does nothing to try to define [cohabitation]." 51st Legislature, Utah House of Representatives, Floor Debate, Tape No. 1, January 23, 1995, morning session. See also infra at 32-33 (discussing legislative history of this amendment).

669, 671 (Utah 1985) recognized, as did the trial court in that case, that the term "does not lend itself to a universal definition that is applicable in all settings." The Haddow court recognized the definition adopted by a majority of cases and statutes which follow the dictionary definition: "To live together as husband and wife." Id. (citing Black's Law Dictionary 236 (5th ed. 1979)²; Webster's Ninth New Collegiate Dictionary 257 (1984)).³ See also, Lynn D. Wardle et al.,

²The current edition of Black's Law Dictionary defines "cohabitation" as follows:

To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.

Black's Law Dictionary 260 (6th ed. 1990) (emphasis added) (citations omitted).

³Utah's Cohabitant Abuse Act defines the term "cohabitant" as follows:

[A]n emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

- (a) is or was a spouse of the other party;
- (b) is or was living as if a spouse of the other party;
- (c) is related by blood or marriage to the other party;
- (d) has one or more children in common with the other party; or
- (e) resides or has resided in the same residence as the other party.

Utah Code Ann. § 30-6-1(2) (Supp. 1995) (emphasis added). This definition of "cohabitant" includes elements of de facto marriage

Contemporary Family Law: Principles, Policy and Practice § 32:11 at 57 (Vol. 3, 1988) ("Cohabitation is defined variously, but generally means living together 'on a resident, continuing and conjugal basis.'" (footnote omitted).

In Haddow, the court held that there were two key elements to the term "cohabitation": "common residency and sexual contact evidencing a conjugal association." Id. at 672 (adopting within the term "cohabitation" the requirement of "residency") (emphasis added).⁴ The Court went on to state that "common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." Id. "Cohabitation is not a sojourn, nor a habit of visiting, nor even remaining with for a time; the term implies continuity." Id. at 673 (quoting Burke v. Burke, 340 P.2d 948, 950 (Or. 1959)). The court in Haddow also stated that the residency clause of the termination of alimony statute was drafted for the same purpose as the cohabitation clause in the decree of divorce. Id.

and residency.

⁴Appellant incorrectly asserts: "The continuing sexual aspect o[f] this relationship satisfies the requirement of 'cohabitation' as set forth in the Decree of Divorce." Appellant's Brief at 10. Appellant's assertion completely ignores the elements of "common residency" and "mutual assumption of marital rights, duties and obligations usually manifested by married people" which are implicit in the term "cohabitation."

"Residency" is not a defined term in the termination of alimony statute, however, the Utah Supreme Court has defined the word "residing" as used in the statute as: "To dwell permanently or for a length of time; to have a settled abode for a time." Knuteson v. Knuteson, 619 P.2d 1387, 1389 (Utah 1980) (quoting Webster's New Twentieth Century Dictionary, 2nd. Edition).

Both "cohabitation" and "residency" require permanency or continuity. Therefore, the application of either of these definitions to the facts of this case would be essentially identical.⁵ Appellant admitted at the trial court that for purposes of this case, "residing . . . is equivalent to cohabitation" R. 350 L24-25.⁶ Accordingly, it is appropriate to focus on the statutory requirement of "residency."

B. Appellant has Failed to Establish that Appellee was "Residing" with a Person of the Opposite Sex.

As set forth above, the Knuteson court defined the word "residing" as used in the statute as: "To dwell permanently or for a length of time; to have a settled abode for a time."

⁵Judge Rigtrup concluded that the termination of alimony statute was controlling in this case, and did not address the "cohabitation" provision in the Decree of divorce. (R. 284, Conclusions of Law ¶ 1). Judge Rigtrup also stated that "residency contemplates some duration, some continuity, some commitment to a shared beneficial relationship. (R. 449 L14-16).

⁶Appellant's unsupported first-time argument on appeal, that proof of "residence" is less precise than that of "cohabitation" is not only incorrect, but is inconsistent with his own admission below.

Knuteson v. Knuteson, 619 P.2d 1387, 1389 (Utah 1980) (quoting Webster's New Twentieth Century Dictionary, 2nd. Edition) (emphasis added). Under this definition, Hunter never resided with Appellee.

The Utah Supreme Court in Knuteson, affirmed Third District Judge Christine M. Durham's decision not to terminate the recipient spouse's alimony based on the termination of alimony statute. In Knuteson, the recipient spouse moved in with a neighbor for roughly two months and ten days, at least in part because of the grim financial situation brought about by her ex-husband's non-payment of alimony. Although she candidly confessed to having sexual relations with the neighbor, Mr. Conder, the reviewing court refused to terminate her right to receive alimony because "the wording of the statute does not appear to cover a temporary stay at another's home." Id. at 1389. Although admittedly somewhat distinguishable on its facts, the Knuteson decision supports the trial court's decision in this case. Like the temporary stay of the recipient spouse in Knuteson with her neighbor, Hunter's overnight visits were temporary and short term. There was clearly never any effort to make Appellee's home his permanent dwelling or settled abode. He never kept any belongings there, except occasionally a few articles of clothing and a briefcase. He maintained a separate residence, and never received any mail at Appellee's home. These facts, as well as those discussed below in the context of the

Haddow decision, demonstrate that Appellee and Hunter never resided together within the meaning of the termination of alimony statute.

The Haddow decision, nearly identical on its facts, is a powerful precedent for this case. In Haddow, the Utah Supreme Court reversed the trial court's order that the ex-wife pay her former husband one-half of the equity in the home in which she was living pursuant to an equitable lien established in the divorce decree. The reviewing court held that the trial court had improperly construed the "cohabitation" language in the decree. Haddow, 707 P.2d at 670. The trial court found that the spouse spent most of her free time with her boyfriend, Mr. Hudson. Mr. Hudson had dinner at the spouse's house five or six times a week, and spent the night with her approximately once a week. Mr. Hudson would leave clothes at her home, which she would launder, and sometimes take to the dry cleaner. He would sometimes shower and change at her home. Mr. Hudson maintained a separate residence at his parent's home. He did use her home as a mailing address for a couple of bank accounts. There was no evidence that they shared any assets or had any joint financial accounts, projects, or liabilities. Mr. Hudson gave the spouse money to reimburse her for the food he ate, and took her car to be serviced at a car dealership where he worked. "Beyond that, Mr. Hudson made no financial or tangible contributions to appellant or to her household, nor did he share living expenses

with her in any sense." Id. at 670-71. The court found it significant that Mr. Hudson did not pay any of the receiving spouse's living expenses, or consistently share her assets. He did not contribute to the mortgage payment, the insurance on the house, or the utility bills. They rarely shared automobiles. Id. at 673-74. The court recognized Mr. Hudson's reimbursements for food and dry cleaning as evidence of their intent that each bear their own expenses. Id. at 674. In addition, the court was not critical of the fact that Mr. Hudson left a van parked at the receiving spouse's home for several months for storage purposes, rather than for the convenience of daily use. Mr. Hudson and the spouse had been dating each other exclusively for about fourteen months. They also took trips together to Hawaii and Elko, Nevada. Id. at 672.

The facts of this case are nearly identical to those in Haddow. Like the receiving spouse and her boyfriend in Haddow, Appellee and Hunter spent much of their free time together, if Hunter was in town. Hunter would sometimes eat a meal at Appellee's home, and would spend the night at her home. Hunter would occasionally leave clothes and a briefcase at Appellee's home. Appellee did some token laundry for Hunter, and carried some of his laundry to the dry cleaner, for which she was later reimbursed by Hunter. Hunter would sometimes shower and change at Appellee's home. Unlike the boyfriend in Haddow, Hunter did not use Appellee's address to receive any of his mail, thus

making the case for non-residency even stronger here than in Haddow. In addition, the evidence is "clear and unmistakable" that Hunter and Appellee shared no financial obligations or expenses. R. 283. Hunter did not contribute toward the mortgage or utility payments. Like the boyfriend in Haddow, Hunter left a vehicle stored at Appellee's home for storage purposes, which Appellee used only on those occasions when she was sick and unable to walk the two blocks to work. This vehicle was clearly not intended for Appellee's daily use. Appellee and Hunter also took some short weekend trips together. As further indicia of his non-residence with Appellee, Hunter testified that he did not assist in any way with the cost of maintaining Appellee's home, nor did he perform any regular household duties in order to help maintain Appellee's home (with the exception of repairing a toilet that he broke himself). R. 406 L5-19.

Based on these facts, the Haddow decision strongly supports the trial court's finding that Appellant failed to establish that Appellee was residing with Hunter. Obviously neither Appellee nor Hunter considered Appellee's home his principal residence, nor did his visits to the home rise to the level of continuity required under the statute.

That Appellee and Hunter engaged in a fairly consistent pattern of sexual relations is not disputed. (R. 282, Findings of Fact ¶ 4; R. 401 L3-5). Nevertheless, sex alone does not constitute "residency." See Haddow, 707 P.2d at 672-73 ("sexual

contact, even if extensive, does not alone constitute cohabitation"); Knight v. Knight, 500 So. 2d 1113, 1116 (Ala. Civ. App. 1986) ("regular social and sexual companions is insufficient to prove cohabitation"). Appellant's emphasis on the duration of the sexual relationship is therefore misplaced. See Appellant's Brief at 16. Furthermore, the morality of their conduct is not at issue.⁷ The statute does not call for the termination of alimony solely upon proof that the recipient spouse has engaged in sexual relations, but rather requires a commitment to a shared relationship established by residency. The legislature certainly intended to strike a balance between the occasional sexual sojourn and common law marriage. See infra Argument II at 30-34 (discussing legislative history of termination of alimony statute).

Appellant places much emphasis on Hunter's possession of a key to Appellee's home, which allegedly conferred upon him free access to the home, even when Appellee was not there. Admittedly, the Haddow court considered non-possession of a key

⁷In amending the termination of alimony statute, legislators stated:

It is not the intent of the Legislature that termination of alimony based on cohabitation with another person in accordance with Subsection 30-3-5(9), be interpreted in any way to condone such a relationship for any purpose.

Utah Legislative Report 1995 at 36 ("legislative intent").

in that case as evidence supporting non-residency. Id. at 673. In this case, however, Hunter was given a key so that he could, as a favor to Appellee, help check on the house because of the problems Appellee was having with her drug-abusing son. Hunter testified that he did not use the key, when Appellee was not there, to "pop a cool one", take a nap, or just relax. R. 318 L25 - R. 319 L14. Hunter's possession of a key was to help him keep Appellee's home and its contents secure, and was not intended to grant him the access of a cohabitant.

The Utah Supreme Court's decision in Wacker v. Wacker, 668 P.2d 533 (Utah 1983) (per curiam), is also very persuasive. In Wacker, the trial court's refusal to terminate alimony pursuant to the statute was reversed on appeal. In that case, the recipient spouse lived with her boyfriend for approximately three years in a shared financial relationship that included sexual contact. There was evidence that the receiving spouse shared the rent, utility, and grocery bills. Id. at 534. The reviewing court held that the residency requirement of the statute had been satisfied under these circumstances, and alimony should therefore be terminated. The facts in the instant case obviously weigh in favor of the opposite result. The period of Appellee and Hunter's most significant contact is eight months, during which time, and all other times, they did not share any meaningful financial responsibilities or obligations. Other

appellate courts that have examined similar cases have come to the same conclusion.

C. Appellate Decisions From Other Jurisdictions Support a Holding of Non-Residency in this Case.

Numerous other jurisdictions have addressed the issue on appeal in this case, and support the conclusion that Hunter never resided with Appellee.

Alabama has a statute, similar to Utah's, which provides for the termination of alimony "upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex." Jones v. Jones, 387 So. 2d 217, 218 (Ala. Civ. App.), cert. denied, Ex parte Jones, 387 So. 2d 219 (Ala. 1980) (quoting Ala. Code § 30-2-55, 1975).⁸

In Jones, the reviewing court affirmed the trial court's refusal to terminate alimony based on cohabitation. Id. at 219. The receiving spouse and her boyfriend had been dating and taking trips together over a period of five years. They engaged in sexual relations, and the boyfriend spent the night at the spouse's home on many occasions. They sometimes went to restaurants and bars together, and he would drive her car. He occasionally performed maintenance on the home. He did not have

⁸Appellee's research reveals that Alabama has rendered the majority of appellate decisions dealing with the termination of alimony based on cohabitation.

a wardrobe, nor did he receive his mail at the spouse's home. He did not make any contribution towards the spouse's household expenses or groceries. Id. at 218. Based on these facts, the Jones court refused to reverse the trial court's decision that the former husband failed to meet his burden of proof that his ex-wife was cohabiting with a member of the opposite sex. Id.⁹

The facts of this case are similar, most notably, the lack of any shared financial relationship. Jones supports a holding of no-residency in this case. Unlike the boyfriend in Jones, Hunter testified that he did not assist in any way with the cost of maintaining Appellee's home, nor did he perform any regular household duties in order to help maintain Appellee's home (with the exception of repairing a toilet that he broke himself). (R. 406 L5-19). The facts of this case are therefore actually even stronger than those in Jones.

More recent Alabama appellate cases have affirmed the trial courts' decisions not to terminate alimony. For example, in Ayers v. Ayers, 643 So.2d 1375, 1376 (Ala. Civ. App.) cert. denied, Ex parte Ayers, 643 So. 2d 1377 (Ala. 1994), the court

⁹The Alabama cases have unanimously adopted the abuse of discretion standard of review on the issue of cohabitation. The appellate court will not substitute its judgment for that of the trial court on the issue of cohabitation "unless [it] was clearly and palpably wrong." Jones, 387 So.2d at 218; see also Ayers v. Ayers, 643 So. 2d 1375, 1377 (Ala. Civ. App. 1994) (question of cohabitation question of fact determined by trial court and will be upheld unless based upon all of the evidence and reasonable inferences, it is plainly and palpably wrong); Knight v. Knight, 500 So. 2d 1113, 1115 (Ala. Civ. App. 1986) (same).

affirmed the decision below that the husband had not sufficiently proved cohabitation. The court employed the long-standing definition of cohabitation that had been developed under Alabama case law: "some permanency of relationship coupled with more than occasional sexual activity between the cohabitants." Id. at 1377. "Factors suggesting permanency of relationship include occupation of the same dwelling and the sharing of household expenses." Id. In Ayers, the court upheld, with little discussion, the trial court's conclusion that "all of the evidence as to the relationship between the [wife] and [the alleged cohabitant] gave the Court a brief snapshot of a three-year romantic friendship between them but did not meet the burden of proof sufficient to establish cohabitation as a matter of law." Ayers, 643 So. 2d at 1377. Appellee and Hunter's relationship was similar to a close romantic friendship. Simply put, they did not live together as husband and wife.

The facts in the Alabama case of Knight v. Knight, 500 So. 2d 1113 (Ala. Civ. App. 1986) are also similar to those in the instant case. In Knight, the court found that Mrs. Knight and her boyfriend, Mr. Cole, maintained separate residences. Neither contributed anything toward the other's debts, expenses or support. There was no evidence that they used each other's homes for mail, or any other purpose. They were regular social

companions and sexual lovers who intended to marry.¹⁰ Id. at 1116. Based on these facts, the reviewing court reversed the trial court's termination of alimony, holding that there was no cohabitation. Id. Like the individuals in Knight, Appellee and Hunter maintained separate residences, did not contribute to one another's financial obligations, did not receive mail at each other's homes, and even discussed possible marriage, although no definite plans were ever made. Based on these facts, it is clear that Appellee and Hunter were not living together as husband and wife, and were therefore not "residing" together as contemplated by the termination of alimony statute.

Other Alabama cases have held that the evidence was insufficient to prove cohabitation. See, e.g., Snipes v. Snipes, 651 So. 2d 19, 21 (Ala. Civ. App. 1994) (trial court's refusal to terminate alimony affirmed); Wilcoxson v. Wilcoxson, 498 So. 2d 1238 (Ala. Civ. App. 1986) (trial court's refusal to terminate alimony affirmed; talked about marriage but no definite plans; stored furniture at his house; saw each other quite frequently and occasional sexual intercourse); Hicks v. Hicks, 405 So. 2d

¹⁰The court also noted "[t]here is no evidence that either of them kept any clothing or other personal effects in the other's home, or that either had a key to the other's house." Id. at 1116. Admittedly, there is evidence of these facts existing in this case, however, the clothing kept in Appellee's home was negligible, and Hunter's possession of a key was to allow him, as a favor, to watch over the home and its contents, rather than to grant him the free and unlimited access of a resident or cohabitant.

31, 33 (Ala. Civ. App. 1981)(trial court's termination of alimony reversed; evidence insufficient to support cohabitation; dated for two to three times per week for about a year but no evidence shared a common dwelling; no factors indicating permanency of relationship).

In addition, other states have held, under similar circumstances, that alimony to the receiving spouse should not be terminated. See, e.g., Daniels v. Daniels, 374 S.E.2d 735 (Ga. 1989)(trial court's termination of alimony pursuant to "live-in lover" statute reversed; evidence supported finding of periodic sexual encounters, but insufficient to show dwelled together continuously or openly); Reiter v. Reiter, 365 S.E.2d 826 (Ga. 1988)(cohabitation necessary to modify alimony under "live-in lover" statute, "must go beyond periodic, physical interludes"); Matter of Marriage of Wessling, 747 P.2d 187 (Kan. App. 1987)(trial court's refusal to terminate alimony pursuant to "cohabitation" clause in divorce settlement affirmed; kept separate residences; shared no living expenses; no jointly owned property); Miller v. Miller, 508 A.2d 550 (Pa. Super. 1986)(trial court's refusal to terminate alimony pursuant to "cohabitation" statute affirmed; maintained separate residences; not share incomes or expenses); see also Annotation, Divorced Woman's Subsequent Sexual Relations or misconduct as Warranting, Alone or With Other Circumstances, Modification of Alimony Decree, 98

A.L.R.3d 453 (1980) (discussing numerous cases dealing with modification of alimony based on cohabitation).

In re Marriage of Gibson, 320 N.W.2d 822 (Iowa 1982), also considered the alleged cohabitant's possession of a key to the receiving spouse's home. In Gibson, the trial court's decision to terminate alimony was reversed. Id. at 824. The receiving spouse had a boyfriend who stayed in the residence at least four times a week, and he often ate there. He would enjoy the use of the utilities and would occasionally bring clothes to the home. He maintained another residence where he kept his clothing and furniture, received his mail, and maintained his own telephone. Id. at 823. On these facts, the court held as follows:

The time [the recipient spouse's] boyfriend spent in the dwelling was extensive, easily sufficient to qualify as residence if time alone controlled. But the time was not spent as a resident. He maintained a separate residence and shared none of the expenses of this one. He did not even have a key or the freedom to enter it except when petitioner was present. In simple terms he did not live there. The trial court erred in finding [the recipient spouse] cohabited with a nonrelated male under the dissolution decree.

Id. at 824. The facts of Gibson are very similar to this one, even though Hunter at some point acquired a key to Appellee's home. As previously discussed, his acquisition of a key was not intended to provide him with the unlimited access of a co-resident. Furthermore, there is no question that, particularly

during their eight-month relationship, Hunter and Appellee spent a substantial amount of time together. As the Gibson court pointed out, however, time alone, even if extensive, is insufficient to establish residency. Residency under the statute surely contemplates more than the mere occupation of space over time.

Like the boyfriend in Gibson, Hunter maintained a separate residence, where he received his mail, kept his clothes and other personal belongings, and maintained a telephone. Most importantly, he never shared in the expenses of maintaining Appellee's home. In fact, he would even reimburse Appellee for his dry cleaning, on those occasions that she paid for it, thus, evidencing an intent to keep their financial responsibilities separate. On these facts, the trial court properly refused to terminate alimony.

D. The Appellate Decisions Appellant Relies on are Readily Distinguishable from the Instant Case.

Appellant has cited a number of cases in support of his position, including several cases from Alabama. Appellant fails to point out, however, that the standard of appellate review in Alabama is the clearly erroneous standard. See supra n.9. Each of these cases is therefore easily distinguishable. For instance, the underlying facts in McCluskey v. McCluskey, 528 So. 2d 328 (Ala. Civ. App. 1988) are quite similar to this case, as discussed on pages 21-24 of Appellant's Brief. The McCluskey

court specifically recognized, however, that "[w]hile the trial court, in its discretion, could have reached a contrary decision under the evidence, we find no abuse of discretion." Id. at 331 (emphasis added). In addition, the clear trend of the more recent cases in Alabama, is to hold that the evidence was insufficient to establish cohabitation, particularly when there was no evidence of sharing household expenses. See, e.g., Ayers, So. 2d at 1377; Snipes, 651 So. 2d at 21.

The other cases cited by Appellant are also distinguishable on their facts, and actually, in this case, weigh in favor of continued alimony for failure to establish residency. See Daniels v. Daniels, 599 So. 2d 1208 (Ala. Civ. App. 1992) (trial court decision terminating alimony affirmed; ex-wife moved in with boyfriend; parties lived together seven years; shared utility payments; traded housework for rent payments; car in both names); Kennedy v. Kennedy, 598 So. 2d 985 (Ala. Civ. App. 1992) (trial court's decision terminating alimony affirmed; parties lived together five years; shared responsibilities and expenses); Taylor v. Taylor, 550 So. 2d 996 (Ala. Civ. App. 1989) (trial court's decision terminating alimony affirmed; moved his clothes into wife's house; received house key; paid utility bills, mortgage notes, and legal fees; contributed to household expenses and maintenance); In re Marriage of Frasco, 638 N.E.2d 655 (Ill. App. 1994) (trial court's refusal to terminate alimony reversed; was traditional model of marriage; live together not

enough, need de facto husband and wife relationship; divided household responsibilities; took all meals together; created joint checking account, and commingled funds; put boyfriend's name on certificate of deposit); In re Marriage of Harvey, 466 N.W.2d 916 (Iowa 1991) (trial court's termination of alimony affirmed; spent three to four nights a week together; sublet other apartment and told landlord giving it up; kept substantial part of clothes at wife's home; performed household duties; performed duties of a father to wife's children; kept two motorcycles and car at wife's home; free and unlimited access to wife's home; in short, boyfriend lived at wife's home).

**II. THE LEGISLATIVE HISTORY OF UTAH'S
TERMINATION OF ALIMONY STATUTE SUPPORTS
A FINDING OF NON-RESIDENCY IN THIS CASE.**

Appellant erroneously relies on legislative history to support his position. As Appellant has alleged, Representative Pace, the sponsor of House Bill 188, stated during the debate in the Utah State House of Representatives, that the purpose of the new law was to establish a public policy that if a couple decides to "share the bed," then they must "share the board." 43rd Legislature, Utah House of Representatives, Floor Debate, Disc. No. 5, February 26, 1979; see also Appellant's Brief at 17. The legislature went on to acknowledge, however, as Appellant admits, that the purpose of the statute is "to allow courts to grant supporting spouses relief from alimony when the receiving spouse

choose to live with a person of the opposite sex 'under conditions consistent with marriage.'" Appellant's Brief at 17-18 (quoting 43rd Legislature, Utah House of Representatives, Floor Debate, Disc. No. 5, February 26, 1979,¹¹ morning session). By "sharing the bed," legislators obviously contemplated the parties engaging in more than just sexual relations, but rather envisioned the sharing of possessions and responsibilities "under conditions consistent with marriage."

This distinction was raised by Representative Rowe:

This Bill has, in my opinion, a diametrically opposed purpose. We have alimony on one hand which is designed for the support of the spouse after or during separation and after divorce, and then we have living-in arrangement, on the other hand, related primarily to sex and sexual exchanges. I don't really see where the two really come together.

But in the case of alimony, if a young woman or a man takes up a living-in arrangement with another person of the opposite sex, then that arrangement may be or may not be related to the financial support of that individual and alimony is to provide that support. If we attach alimony to an overnight stand or one afternoon or a week-long episode or whatever, we may still not be providing the necessary support for that individual to have, to provide the basic living requirements of food, shelter, clothing, etc.

We are very likely to put someone out on the street . . . without any support at all thereby becoming wards of the state and having to be supported by the state through

¹¹Appellant cites the date as 1989, however, this is clearly a typographical error since House Bill 188 was actually debated, adopted, and became law in 1979.

our tax bills. I don't think this is intended either. I think alimony is for support and we have to protect it.

43rd Legislature, Utah House of Representatives, Floor Debate, Disc No. 6, February 26, 1979, morning session (emphasis added). Representative Rowe's statement emphasizes the legislature's concern that the statute not be used to terminate alimony based solely on the receiving spouse's post-marital sexual relationship with another. Legislators clearly envisioned the termination of alimony taking place upon a showing that the receiving spouse had entered into a shared financial relationship consistent with marriage.

Senator Jeffs also stated as follows with respect to the residency requirement:

This statute not only implements present law, namely that upon remarriage alimony stops, but also has a provision that in the event the spouse who is collecting alimony assumes residing, permanent residency, with another person as if they were their spouse, it [alimony] will terminate, even if they don't marry them.

43rd Legislature, Utah Senate, Floor Debate, Disc. No. 306, March 6, 1979, general session. Obviously, "as if they were their spouse" envisions more than just a sexual relationship, but includes continuous residency coupled with financial interdependence.

There is also some useful information found in the legislative history of the 1995 amendment of the termination of

alimony statute which changed the language from "residing" to "cohabitating". See supra, n.1. Senator Hillyard mentioned that the basis for changing the statute to require "cohabitating" instead of "residing" was to bring the language of the statute in line with the Utah Supreme Court's decision in Haddow. 51st Legislature, Utah Senate, Floor Debate, Tape No. 26, February 16, 1995, general session. This renders Haddow an even more persuasive precedent for non-residency in this case.

Furthermore, Representative Howard, in response to a question regarding the general intent behind the 1995 amendment, stated as follows:

If someone really is cohabiting, they are living with another person in that companionship relationship that is at least commensurate with marriage, then alimony ought to stop.

If they are in a substitute marriage relationship, alimony ought to end.

51st Legislature, Utah House of Representatives, Floor Debate, Tape No. 1, January 23, 1995, morning session.

The foregoing legislative history demonstrates that lawmakers did not intend to terminate alimony based solely on a receiving spouse's sexual involvement with another following marriage. Legislators contemplated continuous, permanent residency, including shared financial responsibilities. Appellee and Hunter's actions were not consistent with marriage, therefore there was no attempt to circumvent the statute by entering into a de facto marriage. In short, legislative history supports the

trial court's conclusion that Appellant failed to establish the residency required under the statute.

III. APPELLEE SHOULD BE AWARDED HER COSTS AND ATTORNEY FEES ON APPEAL.

Appellee is without financial resources to meet her legal expenses. Moreover, Appellee's financial situation has deteriorated further due to the trial below and this appeal, and is therefore in need of financial assistance. Rule 34(a) of the Utah Rules of Appellate Procedure (1995) states in relevant part: "if a judgment or order is affirmed, costs shall be taxed against appellant unless otherwise ordered." Accordingly, if this Court affirms the decision of the trial court, Appellee should be awarded her costs incurred on appeal.

In addition, Appellee should be awarded her reasonable attorneys' fees incurred on appeal.¹² Utah Code Annotated Section 30-3-3(1) (1995) allows a court to award costs and reasonable attorney fees incurred in defending an action relating to the payment of alimony. Pursuant to Section 30-3-3(1), this Court may order Appellant to pay costs and attorney fees incurred on appeal. Bagshaw v. Bagshaw, 788 P.2d 1057, 1061-62 (Utah App. 1990); Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989).

¹²Although Appellee claimed reimbursement of her costs to defend this action below (R. 247), the trial court ordered that each party in this case would bear their own costs and attorney fees through trial. (R. 285). This ruling is not contested by either party on appeal.

In an appeal of the trial court's refusal to terminate alimony, the Utah Supreme Court stated as follows:

[Appellee] argues that inasmuch as the [appellant] was unwilling to abide by the trial court's judgment, and that she has been put to the necessity of defending this appeal, the [appellant] should have to bear the costs thereof, including reasonable attorney's fees for her counsel. We agree with the reasonableness and propriety of her request. Therefore, the case is remanded for the purpose of determining and awarding her such attorney's fees as the trial court finds to be reasonable and properly incurred on this appeal.

Carter v. Carter, 584 P.2d 904, 906 (Utah 1978) (footnotes omitted).

If the decision of the trial court is affirmed, this Court should remand the case to the trial court to determine the narrow issue of Appellee's reasonable attorney fees on appeal. See Riche v. Riche, 784 P.2d 465, 470 (Utah App. 1989) (remanding narrow issue of attorney fees on appeal to trial court).


CONCLUSION

Based on the foregoing points and authorities, this Court should affirm Judge Rigtrup's refusal to terminate alimony. Appellant has clearly failed to establish that Appellee resided with Hunter. Sexual relations alone, do not satisfy the residency requirement of the termination of alimony statute. Appellate decisions from Utah and other jurisdictions, as well as relevant legislative history, strongly support non-residency in

this case. Furthermore, this Court should award Appellee's costs and reasonable attorney fees incurred in defending this appeal.

RESPECTFULLY SUBMITTED this 4 day of October, 1995.

SCALLEY & READING



J. Bruce Reading
Wesley D. Hutchins

Attorneys for Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of October, 1995, I caused to be mailed, first-class postage pre-paid, four true and exact copies of the foregoing Brief of Appellee Joyce A. Pendleton to the following:

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