

1995

Lowell Gerber v. Mary Jo Gerber : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS
STATE OF UTAH

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DOCKET NO. 950613-CA

LOWELL GERBER,

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Plaintiff/Appellant,

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vs.

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Case No. 950613-CA

)

District Court No. 924905415

MARY JO GERBER,

)

Priority No. 15

)

Defendant/Appellee.

)

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APPELLEE'S BRIEF

AN APPEAL FROM FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER MODIFYING DECREE OF DIVORCE ENTERED BY
THE HONORABLE DOUGLAS L. CORNABY, ON JUNE 16, 1995
AND AN ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL
AND OBJECTIONS TO PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW SIGNED AND ENTERED
ON AUGUST 15, 1995, BY THE HONORABLE SANDRA A. PUELLER
THIRD JUDICIAL DISTRICT COURT, COUNTY OF SALT LAKE, STATE OF UTAH

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FILED

JUN 20 1996

COURT OF APPEALS

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STATE OF UTAH

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APPELLEE'S BRIEF

JURISDICTION OF THE COURT

This Court has jurisdiction to hear this matter pursuant to Utah Code Ann. § 78-2A-3(2)(I) and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Does Plaintiff/Appellant Lowell Gerber's ("Dr. Gerber") failure to properly marshal the evidence in support of the trial court's factual findings preclude this Court's review of those findings and the trial court's legal conclusions based on those findings?

This Court has articulated the following standard for appellants challenging factual findings of a trial court:

In challenging the trial court's Findings, Dr. Gerber:

must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even reviewing the

evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the Appellant fails to marshal the evidence, the appellate court assumes the record supports the findings of the trial court and proceeds to review the accuracy of the lower court's conclusions of law and the application of that law in the case.

Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991) (citations omitted). Peterson v. Peterson, 818 P.2d 1305, 1308 (Utah App. 1991).

2. Did the trial court properly award alimony to Defendant/Appellee Mary Jo Gerber ("Ms. Gerber") pursuant to the parties' stipulation which was incorporated in the final Decree of Divorce? To the extent that the trial court's ruling can be considered an initial award of alimony as reserved under the parties' agreed language in paragraph three of the Decree of Divorce, the appropriate standard of review on appeal is that: "Trial courts have considerable discretion in determining alimony . . . and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." Howell v. Howell, 806 P.2d 1209, 1211 (Utah App. 1991), cert. denied 817 P.2d 327 (Utah 1991). "Further, [this Court] review[s] a trial court's conclusion of law with respect to alimony awards for correctness, according no deference to the trial court." Id. "If, however, [this Court is] charged with the task of reviewing the trial court's findings of fact, [the Court] will reverse only if the findings are clearly erroneous." Id.; see also Breinholt v. Breinholt, 905 P.2d 877, 879 (Utah App. 1995).

3. Did the trial court properly determine that there had been no material change in circumstances of the parties since the entry of the parties' Decree of Divorce which would justify a drastic modification or termination of the parties' agreed upon

alimony award? To the extent that Dr. Gerber challenges the factual finding of the trial court that there has not been a substantial change of circumstances since the entry of the parties' Divorce Decree, the appropriate standard of review is: "The determination of the trial court that there [has or has not] been a substantial change of circumstances . . . is presumed valid." Mitchell v. Mitchell, 527 P.2d 1359, 1361 (Utah 1974). "Therefore, [the Court] review[s] the trial court's ruling of no substantial change of circumstances for an abuse of discretion." Id.; see also Wells v. Wells, 871 P.2d 1036, 1038 (Utah App. 1994).

DETERMINATIVE AUTHORITY

There is no specific constitutional or statutory provision, ordinance, rule or regulation which is determinative of the issues presented in this appeal. Ms. Gerber's position is supported by the case authorities presented in this brief summarized in the table of cases, page iii, supra.

STATEMENT OF THE CASE

This action began when Dr. Gerber filed for divorce on December 29, 1992. The matter came before the trial court for pretrial settlement conference on June 23, 1993 at which time the parties advised the court they had settled the case (Record 70-71). The parties' agreement included alimony of \$4,000.00 per month to Ms. Gerber commencing in July, 1993. This figure was based on the incomes shown on the parties' Financial Declarations and the fact that Ms. Gerber was suffering from a broken wrist which the parties agreed limited her earning ability. The parties further agreed that the alimony amount would be reviewed in one year and that Ms. Gerber would use her best efforts to seek employment and to rehabilitate herself from her injury.

The parties specifically reserved the issue of whether Ms. Gerber should seek full-time or part-time employment based on Ms. Gerber's concern that she be available to care for the parties' children (Record 70, 71). The stipulated Decree of Divorce was thereafter entered on November 26, 1993. As part of that Decree, the parties divided their property with each receiving property valued at \$512,118.00; Ms. Gerber received the equity in the marital home and Dr. Gerber received that much more of the retirement accounts (Record 77-78).

On February 24, 1994, Dr. Gerber filed a Petition to Modify the Decree, alleging that he was entitled to have Ms. Gerber's alimony reviewed under paragraph 3 of the Decree because Ms. Gerber had allegedly not taken the actions necessary to rehabilitate herself and was voluntarily continuing her disability. Dr. Gerber further asserted that his then current monthly income of \$16,666.67 was insufficient to meet his living needs (Record 87-89). Ms. Gerber resisted the Petition and asserted that it was not made in good faith and requested that her attorney's fees and costs be awarded to her (Record 91-92).

The Petition came before the Honorable Douglas L. Cornaby presiding in place of Judge Richard H. Moffat, who was physically unable to preside over the trial on November 15, 1994. After hearing the testimony and considering the exhibits offered by the parties, Judge Cornaby found there had been no substantial change of circumstances which would justify reducing Ms. Gerber's alimony. In making that finding, he focused in part on the parties' agreed language of the Decree which provided:

The issue is reserved as to whether defendant's employment should be full or part-time based upon the needs of the children. At the time of the review, each party should have the right to express her or his respective positions

on this issue, as the plaintiff's position is that the defendant should seek and obtain full-time employment, and the defendant's position is that she should seek and obtain part-time employment due to the children's needs. (Record 444) (emphasis added).

Judge Cornaby ruled that the parties had the financial ability to allow Ms. Gerber to function as a mother for the children for a substantial period of time and work only part time. He therefore denied Dr. Gerber's Petition. However, the court did order that the alimony amount Ms. Gerber would receive should remain at \$4,000.00 a month until December 1, 1995, when it will be reduced by \$500.00 to \$3,500.00 per month, and then a year later, December 1, 1996, be reduced by an additional \$500.00 to \$3,000.00 per month where it would remain (Record 444-450, 452). Further, the court found there was no economic change of circumstances which would justify Dr. Gerber's request that there be an immediate drastic reduction or termination of alimony.

Judge Cornaby's ruling was thereafter formalized in proposed Findings of Facts and Conclusions of Law which were executed on June 16, 1995 and entered on June 20, 1995 (Record 151, 162). The Order of the court overruling Dr. Gerber's objections to the proposed Findings and his Motion for a New trial was denied those same dates (Record 163, 165). In deciding Dr. Gerber's Motion, the court issued a formal, written ruling June 16, 1995 that was entered June 20, 1995 (Record 148-149). In addition to denying Dr. Gerber's motion, the court awarded Ms. Gerber a reasonable attorney fee for defending against that motion. This modified the original ruling of the court that no attorney's fees would be awarded after Dr. Gerber advised Ms. Gerber that he was going to keep her in court until he had forced her to use up all of the \$500,000.00 that had been "given" to

her at the time of the Decree (Record 133-135). The trial court awarded Ms. Gerber attorney's fees in the amount of \$892.00 on October 4, 1995 (Record 187-188).

STATEMENT OF FACTS

After hearing all the evidence and reviewing the exhibits presented by the parties, the court made the following Findings of Fact:

3. The plaintiff in his Financial Declaration of June of 1993 declared he had an income of \$16,666.67 per month. In his Financial Declaration of August, 1994, he declared income of \$16,669.23 per month (Record 153);

4. At the time the plaintiff submitted his Financial Declaration in June of 1993, he had already moved from Utah to Florida, established a residence, entered into practice and declared monthly living expenses of \$6,344.00 per month. At the time he filed his August, 1994 Financial Declaration, the plaintiff claimed living expenses of \$6,370.00 per month, which when tested in cross-examination, he admitted he was not fully expending (Record 153);

5. Considering the Financial Declaration submitted by the plaintiff in June of 1993, upon which the settlement of the matters reached by the parties were made and that submitted in August of 1994, as well as his testimony of November 15, 1994, the court finds no substantial change in the financial status or circumstances of the plaintiff between the date of the agreement of the parties, the entry of the Decree of Divorce and the trial of this matter on November 15, 1994 (Record 153);

6. The defendant submitted a Financial Declaration in June of 1993, stating she had no income and filed a Financial Declaration in August of 1994, declaring an income of \$244.41 per month from substitute teaching. This, she testified, had increased to \$300.00 per month at the time of trial (Record 153);

7. In June of 1993 the plaintiff claimed living expenses of \$7,017.00 per month for herself and the minor children of the parties. In August of 1994, the defendant claimed living expenses of \$5,817.00 per month for herself and the minor children with reservations of several anticipated capital expenditures (Record 153-154);

8. The court finds no substantial change in the financial status or circumstances of the defendant between the time of the agreement of the

parties and the entry of the Decree of Divorce and the trial of this matter on November 15, 1994 (Record 154);

9. The court determines that there was and has been no substantial change in the financial circumstances of the parties which would justify a modification of a Decree of Divorce between the time of the entry of their Agreement in June of 1993 and the trial of this matter in November of 1994 (Record 154); and

10. The court finds that the issue which it heard on November 15, 1994 was the reserved issue under paragraph 5 of the Findings of Fact and paragraph 3 of the Decree of Divorce which was whether or not the defendant's employment should be full time or part time based upon the needs of the children, and the position of each in this regard, was specifically reserved for trial, which the court heard and now determines (Record 154);

11. The court finds that the parties entered into an Agreement and the plaintiff agreed at that time that based upon his earnings, he had the ability to pay the defendant \$4,000.00 per month as alimony and the defendant had a need for \$4,000.00 per month as alimony and had no income at that time from which to contribute to her own support and while defendant claimed she needed a greater sum than \$4,000.00 per month in order to maintain the standard of living that she had enjoyed during the course of the marriage, she accepted that sum as a compromise of those claims in the belief that she could maintain an appropriate standard of living accepting that sum (Record 154).

12. The parties are in conflict with the plaintiff desiring his children to obtain religious instruction and participate in swimming, and other sport activities. It takes transportation and parental direction for those goals to be achieved. They do not just happen. Children are motivated largely by parents who are at home, not by a neighbor who picks them up and takes them some place. In order to have the children pursue their religious and sports activities, it is necessary that the defendant be involved with them in doing so. Consequently, while the plaintiff desires the defendant to work full time, he also wants her to provide the direction, support, and transportation the children need for their religious and sports training and activities. Practically speaking, if the defendant is working full time and keeping up a household, she does not have the time to provide transportation and support for the children in the religious and sports activities the plaintiff wishes the children to pursue (Record 155);

13. Plaintiff desires the defendant to work full time as a dental hygienist and represents to the court that she could earn \$4,000.00 per month if she were doing so. The defendant does not disagree with the potential earnings asserted by the plaintiff but has pointed out to the court that she must work for a dentist and work the hours the dentist dictate that she work if she works as a dental hygienist. If she does this she will not be able to provide the transportation and support required by the children to carry out their religious training, sports and activities (Record 155);

14. The defendant cannot be both a full time dental hygienist and look after the children and provide the support for their children in their religious and sports training as both plaintiff and defendant want her to do. The court heard testimony from physicians offered by each party as to whether or not the defendant will require surgery to be able to function as dental hygienist. It is the defendant's position that she could function as a dental hygienist if she could practice and get tactile sensitivity restored to her injured wrist. Surgery will not affect the tactility problem that exists. Surgery may increase her mobility, but it will not affect her ability to feel which she testified is necessary if she is to function as a dental hygienist (Record 155-156);

15. The court finds that the defendant excelled in the dental hygienist examination in those portions of the test that were written, achieving a perfect score. She failed those portions that were practical because she did not have the tactile ability to function as required in order to be a dental hygienist. The defendant testified she did not know of any program where she could practice working with patients which is necessary in order to get her tactile functioning restored if it is possible to do so. A program might be available to do this, but it appears to the court that the real issue is what are the needs of the children and measure this against the fiscal requirements to maintain the standard of living established in the Decree. This issue was specifically reserved in the Findings of Fact and Decree effecting the agreement of the parties (Record 156);

16. The defendant is employed as a substitute school teacher and she has been able to work on a consistent basis those hours where her children are in school and this work is the most the defendant is going to be able to undertake and provide the religious and sports training support and transportation that she has provided to the children during the marriage of the parties and since the entry of the Decree. The defendant would not be able to secure similar hours as a dental hygienist because a dentist's hours do not coincide with school hours as do those of the substitute teaching in which the defendant has been engaging. The defendant transports the

children to their religious training, their swimming, their ball games, scouting and all of the various activities in which they are involved. This does not give her freedom to work more than she is already working. She is working 32 hours per week, and that is what the court finds that she could work and provide for the children as she has (Record 156-157);

17. The court finds from hearing the testimony of the plaintiff and the defendant, and considering the positions taken by them in their pleadings, that the plaintiff requests this court to choose to sacrifice the children and order the defendant to work. The defendant has chosen not to sacrifice the interests of the children, but to put them in a paramount position and to work on a secondary basis, and in working 32 hours per week, is working all that she can work and still provide the support to the children that they need to continue with their activities (Record 157); and

18. The court has determined that the defendant could earn \$25.00 per hour instead of \$5.90 if she were working as a dental hygienist rather than as a substitute teacher, but to do so would require her to not provide the parental support to the minor children of the parties that both plaintiff and defendant desire her to provide. If she does not increase her earnings above their present level, she will over the course of the court's Order as is hereinafter provided, decrease her income by \$1,000.00 per month in order to provide that assistance to her children (Record 157).

SUMMARY OF ARGUMENTS

I. DR. GERBER HAS FAILED TO PROPERLY MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DECISION AND THIS COURT SHOULD REJECT HIS APPEAL.

This Court requires an appellant challenging factual findings to marshal all the evidence which supports those findings and demonstrate why that evidence when viewed in a light most favorable to the findings does not support those findings. Saunders, 806 P.2d at 199; Peterson, 818 P.2d 1305. Dr. Gerber's brief contains no discussion whatsoever, let alone a challenge to, or marshaling of, the evidence which supports the trial court's Findings of Fact numbers 10, 12, 13, 14, 16, 17 and 18 where the court made

the factual finding that Ms. Gerber was acting appropriately in serving as an involved parent who worked part time and was extensively involved with the childrens' lives. By failing to properly address these findings, this Court should refuse to review the challenge to these findings and the conclusions of law the trial court made based on these facts.

II. THE TRIAL COURT APPROPRIATELY AWARDED ALIMONY
TO MS. GERBER BASED ON THE PARTIES' AGREED LANGUAGE
IN THE DECREE OF DIVORCE

The parties agreed to the inclusion of the following language in their Decree of Divorce:

The issue is reserved as to whether defendant's employment should be full or part-time based upon the needs of the children. At the time of the review, each party shall have the right to express his or her respective positions on this issue, as plaintiff's position is that the defendant should seek and obtain full-time employment and the defendant's position is that she should seek and obtain part-time employment due to the children's needs. (Record 76).

Ms. Gerber presented her position as to the needs of the children in terms of the childrens' school, sports, religious training and social activities. She also presented evidence that she could work part time as a substitute teacher, have hours that matched her childrens', and meet both the childrens' needs and her commitment to provide income to the family. The trial court, after hearing the testimony of the parties on this question, ruled that Dr. Gerber should pay the agreed amount of alimony at the rate of \$4,000.00 per month with a gradual reduction in that amount to \$3,000.00 per month and then continue at that rate. The court heard and determined that Dr. Gerber's income had not changed from prior to the entry of the Decree nor had Dr. Gerber's living expenses changed sufficiently to justify a further change in Ms. Gerber's alimony.

The court heard Ms. Gerber's testimony concerning her living standards and her ability to provide income for herself in light of the parties' agreement that she should continue to provide for the needs of the children. Noting that Dr. Gerber retained \$10,500.00 per month of his salary while \$6,100.00 thereof was transmitted to Ms. Gerber and the parties' children and after the effective date of the declines Dr. Gerber would retain \$11,500.00 of his earnings (until the child support terminated) at which time he will be retaining \$13,666.00 of his monthly income and transmitting \$3,000.00 of his monthly income as alimony, the trial court concluded that there was no justification for changing the alimony amount. The court appropriately considered the needs of Ms. Gerber, less her ability to provide support for herself, and Dr. Gerber's ability to pay, keeping in mind the goal of permitting the parties to maintain as nearly as possible the standard of living enjoyed by the parties during their marriage and the needs of the parties' children. There simply was no error in the trial court's conclusion.

III. THE TRIAL COURT'S FACTUAL FINDING
THAT THERE HAD BEEN NO SUBSTANTIAL CHANGE
IN CIRCUMSTANCES JUSTIFYING A MODIFICATION
OF THE DECREE IS AMPLY SUPPORTED
BY THE RECORD.

The trial court correctly made the factual finding that there had been no change in Dr. Gerber's income and no real change in the living expenses of either of the parties which would justify an immediate change in Ms. Gerber's alimony. As Judge Cornaby stated on the record:

Now, so far as the parties and the standard of living to be maintained, let me just say that I think as I have gone through these extensive documents that have been given to the court that the plaintiff is really not in need of

having it reduced. There is no question that he has a desire to have it reduced. There's no question that he spent a lot more money and has maintained a lifestyle or even changed a lifestyle that's required more money, but I think that's all voluntary choice.

By the same token, the defendant really has no great new needs or -- we do have her salary increase of \$755.00, or whatever it is, per month which adds to her income which was anticipated.

...

Yes, so, if you want to talk about what needs are, I think there is -- I would look at those needs of both parties and say, "Yeah, there's inflation in both of those that are not needs in a technical sense, that there is needs in the sense that you want to maintain that standard of living that you've always had. And even though you've got much more money than most cases talk about when they come before the Court, you both still got lots of things that you could cut out if you chose to." You are just not being forced to, I guess, only by your own income and needs.

(Record 452-453). As noted by the trial court, Dr. Gerber simply presented insufficient evidence to justify an immediate change in the amount of alimony. This Court should affirm the trial court's decision.

ARGUMENT

POINT I

DR. GERBER'S FAILURE TO MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FACTUAL FINDINGS PRECLUDES THIS COURT'S REVIEW.

This Court has articulated the following test for appellants challenging factual findings of a trial court:

In challenging the trial court's factual Findings, Dr. Gerber:

must marshall all evidence in favor of the facts as found by the trial court and then demonstrate that even reviewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the Appellant fails to marshall the evidence, the appellate court

assumes the record supports the findings of the trial court and proceeds to review the accuracy of the lower court's conclusions of law and the application of that law in the case.

Saunders, 806 P.2d at 199 (citations omitted), Peterson, 818 P.2d at 1308. An examination of Dr. Gerber's brief demonstrates that none of the trial court's findings of fact are properly challenged. While the Court is cited to portions of the Record that Dr. Gerber believes supports his challenge, no effort is made to show all of the relevant facts presented to the trial court, much less is there an attempt to properly challenge any of the factual findings of the court. Dr. Gerber simply states that the court erred in its exercise of its discretion without marshaling all the evidence which supported that decision.

The marshaling rule was adopted so that there would be an understanding by both the appellee and this Court as to what evidence exists in support of a ruling by the trial court. This is required so that this Court is not put in the position of simply retrying the case without seeing or hearing the witnesses. As the Utah Supreme Court stated in a similar case, Nilson v. Nilson:

this court is reluctant to reconsider evidence that a trial court is in an advantaged position to weigh. Our removal from the participants in a trial puts us in the disadvantaged position of reviewing testimony from a cold record. On review, we cannot judge the intonation of voice, or the manner and demeanor of witnesses as the trial judge is able to do.

652 P.2d 1323, 1324-1324 (Utah 1982).¹

¹ See also Envirotech Corp. v. Callahan, 872 P.2d 487, 495 (Utah App. 1994): Callahan does not properly attack the findings of the trial court on that issue. He attempts to draw our attention to the testimony of witnesses, which tends to be contrary to the findings, and he conveniently ignores the testimony of witnesses that support the findings. Callahan ignores his affirmative duty to properly attack the findings by marshaling the evidence.

Dr. Gerber has simply attempted to retry and re-argue the matter to this Court by claiming that the trial court's decision was somehow "unfair". He ignores Ms. Gerber's role as child care provider as well as the fact that he specifically agreed to have the issue of alimony reviewed within a year. Now, after that review, he wants this Court to ignore the trial court's position as the finder of fact and review the evidence presented in that review without following the Court's explicit marshaling mandate.

Rather than marshaling the evidence that supported the trial court's conclusion, he has downplayed it or made it difficult to find. By arguing the evidence that was not accepted by the trial court, he asks this Court to reject the findings of the trial court without marshaling the evidence which supports those findings. This is a procedure which this Court has unequivocally ruled is inappropriate. By taking this course, Dr. Gerber has failed to properly present his appeal and this Court should "assume[]" that the record supports the findings of the trial court . . ." Procon Corp. v. Utah Dept. of Transportation, 876 P.2d 890, 894 (Utah App. 1994) and based thereon, that the trial court properly exercised its discretion in its ruling.

Because of Callahan's failure to marshall the evidence, we assume the record supports the findings of the trial court.

POINT II

THE TRIAL COURT APPROPRIATELY AWARDED ALIMONY
TO MS. GERBER IN LIGHT OF THE ABILITY OF DR. GERBER
TO PAY, THE NEED OF MS. GERBER TO MAINTAIN
THE STANDARD OF LIVING ENJOYED BY
THE PARTIES DURING THE MARRIAGE AND
MS. GERBER'S ABILITY TO EARN INCOME.

Even if the Court were to ignore Dr. Gerber's failure to properly marshal the evidence in support of the trial court's decision, a review of the relevant facts demonstrates that the trial court did not err in its factual findings or in its legal conclusion that the amount of alimony should not immediately drastically change or terminate. On June 23, 1993, the parties stipulated that Dr. Gerber was to pay \$4,000.00 per month as alimony to Ms. Gerber. They specifically reserved the issue as to whether or not the alimony should be based on a full-time or part-time employment based on the needs of the children and the physical disability which Ms. Gerber was suffering at the time of the entry of the making of the agreement.² When that question came back before the court

²While Dr. Gerber only focuses on a portion of the stipulation, the relevant portion provides in whole:

Defendant is awarded alimony from plaintiff in the sum of \$4,000 a month commencing with the month of July, 1993, based upon the current financial circumstances of the parties as shown in their Financial Declarations and under circumstances where defendant is currently unable to work based upon her present physical disability.

There shall be an automatic review of this alimony award in one year from the date of the entry of the Decree of Divorce, or earlier if circumstances warrant, based upon the anticipation that defendant will use her best efforts to seek and obtain employment at the highest economic level and will, further, use her best efforts to rehabilitate herself from her disability to help her achieve her best employment opportunities.

for trial on November 15, 1994, the court found there had been no substantial change in the financial circumstances of the party which would justify a drastic reduction or termination of alimony. Dr. Gerber was earning the same amount of income that he had been earning at the time he entered the agreement and the parties had living expenses that were basically unchanged.³

In Finding of Fact number 18 (Record 157), the court determined Ms. Gerber's income earning ability and her ability to meet her needs without alimony. In making its order regarding alimony, the trial court carried out the directions of this Court and the Utah Supreme Court. As the rule has been articulated:

It is well established that the "function of alimony is to provide support for the [receiving spouse] as nearly as possible at the standard of living [he or]

The issue is reserved as to whether defendant's employment should be full or part-time based upon the needs of the children. At the time of the review, each party shall have the right to express his or her respective position on this issue, as plaintiff's position is that defendant should seek and obtain full-time employment and defendant's position is that she should seek and obtain part-time employment due to the children's needs.

Plaintiff shall have the right to request defendant to obtain a physical examination by a hand expert currently, with a further examination six months from the entry of the Decree of Divorce and a second further examination one year from the entry of the Decree of Divorce to assist the Court in determining defendant's ability to obtain employment.

(Emphasis added).

³It should be noted that, had the trial court considered the alternative examined by the Utah Supreme Court in Gardner v. Gardner, 748 P.2d 1076 (Utah 1988) of dividing the income of the parties to maintain each of them at the same standard of living, a substantially higher alimony award could have been made. 748 P.2d at 1081.

she enjoyed during the marriage and to prevent the [receiving spouse] from becoming a public charge.”

Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) quoting English v. English, 565 P.2d 409, 411 (Utah 1977).

The parties presented conflicting testimony over the issue of whether or not Ms. Gerber could work as a dental hygienist. However, there was no question that she did not have a license and did not have sufficient tactile ability to allow her to function so as to obtain the license necessary to practice as a dental hygienist. The issues of whether or not that tactility could be restored to her or a training program existed which would allow her eventually receive a license could not be resolved. As Judge Cornaby declared in his ruling of June 16, 1995 on Dr. Gerber’s Motion for a New Trial:

The plaintiff wants the defendant to work full time and earn \$4,000.00 per month as a dental hygienist. Presumably, if she did earn \$4,000.00, he would not have to pay alimony. . . .

A new trial could not prove that the Defendant has the tactile ability to be a dental hygienist. It could not prove that the Defendant would qualify for admission to Weber’s Dental Hygiene School, that a special program would in fact be designed, that after completing the program the Defendant would have the tactile ability to function as a dental hygienist, and that the Defendant would in fact be certified.

The Court at trial concluded that the Defendant should be able to earn more than her current monthly income of \$300.00 per month. The Court gave her until December, 1995, to increase her income by \$500 per month, and until December, 1996, to increase her income by another \$500 per month. The Court knew this would be full time work and would not be in the children’s best interest. The Plaintiff, however, insisted upon it. (Record 148-149).

Judge Cornaby’s findings of fact reveal that he considered all of the factors mandated by this Court and the Utah Supreme Court in making his alimony

determination. He made an award that requires Ms. Gerber to gradually increase her earnings. As he said, unfortunately, this will cause her to have less time to spend with the children. Judge Cornaby made clear that he ordered the reduction only because Dr. Gerber demanded it and not because of any change in the parties' circumstances. The court did note that his decision was made in part because of the relatively large amount of assets that each party controlled and would have controlled had they remained married. Despite obtaining his goal, Dr. Gerber pursues an appeal to this Court to try to take away the \$3,000.00 which Judge Cornaby, on a long-term basis, awarded to Ms. Gerber.

Dr. Gerber's income was \$16,666.67 per month and while there was evidence that he may have changed his tax withholdings (Record 282-287), his gross income remained the same as that at the time of the Decree. His living expenses remained basically the same. (Exhibits 2, 9 and 10). His testimony also revealed that he knew what his mortgage and basic living expenses would be when he entered into the parties' agreement to settle the matter on June 23, 1993 (Record 289). He also acknowledged on cross examination that he made claims for living expenses on Exhibit 2 which he was not in fact paying (Record 339). The trial court's findings reflect the evidence presented that Dr. Gerber's ability to pay alimony has not significantly changed since the parties' agreement.

Ms. Gerber testified that her needs were basically the same as at the time the parties' stipulated the alimony amount. She testified that she still was in need of the \$4,000.00 in alimony and \$2,100.00 in child support to support herself and the children in the standard of living enjoyed during the marriage (Record 393). Again, the trial court did

not err in finding that Ms. Gerber needed additional money to live in the lifestyle the parties' enjoyed during their marriage.

Dr. Gerber currently earns \$16,666.67 per month. Even if Ms. Gerber could earn \$4,000.00 per month, Dr. Gerber would ask this Court to say that he is entitled to all \$16,666.67 and that Ms. Gerber is entitled to nothing. If she could earn \$4,000.00 and he were paying \$3,000.00, she would then have a gross income of \$7,000.00 per month. He would have \$13,666.67 per month. The trial court appropriately entered an order after considering all of the mandated factors. That order should be affirmed.

POINT III

NO SUBSTANTIAL CHANGE IN CIRCUMSTANCE HAS OCCURRED JUSTIFYING THE TERMINATION OF MS. GERBER'S ALIMONY

Dr. Gerber asserts that the trial court erred in not terminating Ms. Gerber's alimony. He asserts that the trial court erred in not finding that Ms. Gerber could be earning \$4,000.00 per month and thus replace the \$4,000.00 Dr. Gerber is currently paying. Dr. Gerber asks this Court to hold the trial court erred in finding that Ms. Gerber's testimony regarding having insufficient tactile ability to function as a dental hygienist was credible. As Judge Cornaby said in ruling on Dr. Gerber's Motion for a New Trial:

A new trial could not prove that Defendant has the tactile ability to be a dental hygienist. It could not prove that the Defendant would qualify for admission to Weber's Dental Hygiene School, that a special program would in fact be designed, that after completing the program, the Defendant would have the tactile ability to function as a dental hygienist, and that the Defendant would in fact be certified.

Ms. Gerber did obtain part-time employment as a substitute school teacher. Her earnings were gradually increasing. To reflect that fact, Judge Cornaby ruled that the alimony paid by Dr. Gerber would decrease by \$500.00 per month in one year, that is, on December 1, 1995, and an additional \$500.00 per month on December 1, 1996. Despite the fact that Judge Cornaby thus has forced Ms. Gerber, at Dr. Gerber's insistence, to either suffer a decline in her living standards or cease providing extensive care and support for the parties' children (though he could clearly afford to make these payments and chooses not to), he pursues an appeal to this Court, asserting that there has been a significant change of circumstances that justify a termination, not a reduction, in the alimony award. The trial court appropriately rejected this assertion.

This Court recently addressed a similar issue in Wells v. Wells, 871 P.2d 1036, 1038 (Utah App. 1994). There, the Court noted that in order to modify an alimony award, the petitioner must demonstrate a substantial change in circumstances. Id. at 1040. The Court noted that a threefold increase in a spouse's earnings was a "change", "but that plaintiff 'has not shown a substantial change in circumstances,' presumably because she was employed at the time of the hearing." Id. at 1040, n. 5. Here, Ms. Gerber was unemployed at the time of the Decree. Her obtaining employment was a change in circumstances, but not a substantial change warranting modification of the alimony amount.

Dr. Gerber receives \$10,566.00 of his earnings each month while Ms. Gerber and the parties' children receive \$6,100.00 of his earnings. Ms. Gerber was able to earn an additional \$300.00 per month substitute teaching, though she believed that amount would

rise as she did more. The parties envisioned that she would return to work. She did. Judge Cornaby's ruling, carried to its full effect, means that by the time this Court hears this case, Dr. Gerber will receive \$11,566.00 of his earnings each month while Ms. Gerber and the parties' children receive \$5,100.00 of his earnings and presumably \$1,300.00 of her earnings. When the children are emancipated, assuming no further changes, Ms. Gerber will have \$3,000.00 per month of Dr. Gerber's earnings. He will have \$13,667.00 of his earnings each month.

Ms. Gerber, at this point, cannot be a dental hygienist. But even if she were able to do so and earn the \$4,000.00 per month which Dr. Gerber asserts she should earn, she would then have income of \$7,000.00 per month versus his \$13,667.00 per month. In establishing alimony, the court is to try to maintain parties as nearly as possible and the living standard that they enjoyed during their marriage. Iones, supra, Gardner, supra. Clearly, Dr. Gerber will enjoy a higher living standard than Ms. Gerber under these circumstances and under the more probable set of circumstances, he will have income of no less than \$13,667.00 per month while she will have income of \$4,300.00 per month. As this Court ruled in Moore v. Moore, 872 P.2d 1054 (Utah App. 1994), where it was anticipated that wife would return to work, that employment and the income that resulted from it would not be considered a substantial change in circumstances justifying a modification of the Decree of Divorce. This Court should likewise affirm the trial court's finding that has not been a change in circumstances which would justify a drastic reduction or termination of alimony.

CONCLUSION

This appeal is clearly a frivolous appeal by Dr. Gerber who is carrying out the threat he made to Ms. Gerber on April 20, 1995 to involve her in legal proceedings until he had forced her to use all of the money that was awarded to her in the Decree for legal fees. Not only has he failed to marshall the evidence that supported the trial judge's factual findings, he completely ignored one of the two bases on which the ruling of the trial court was made, that is, the ability and desire of Ms. Gerber to function as a mother in supporting the children in school, social, sport and religious activities. The findings of the trial court clearly support the alimony award made and there is no substantial change in circumstances justifying re-examination of the Decree.

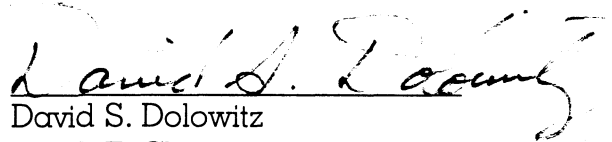
This appeal is a frivolous appeal. It should be treated accordingly. Allred v. Allred, 807 P.2d 350 (Utah App. 1991); Porco v. Porco, 752 P.2d 365 (Utah App. 1988). Accordingly, this Court should affirm the trial court's findings and order and impose all permitted sanctions.

REQUEST FOR FEES ON APPEAL

Just as Judge Cornaby awarded Ms. Gerber fees for having to fight the Motion for a New Trial and to resist Dr. Gerber's challenge to the Findings of Facts and Conclusions of Law as well as the Order implementing the judge's decision (Record, 149, 178, 187-188), this Court should, in addition to the sanctions for frivolous appeal, award Ms. Gerber the attorney's fees that she has incurred in responding to the appeal.

DATED this 17 day of June, 1996.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David S. Dolowitz".

David S. Dolowitz

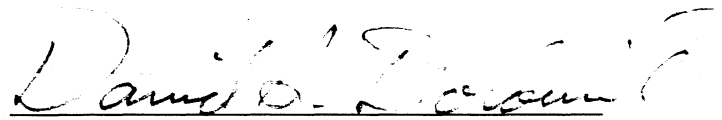
Ralph E. Chamness

Attorneys for Appellee Ms. Gerber

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed by U.S. Mail a true and correct copy of the foregoing APPELLEE'S BRIEF on this 20th day of June, 1996, to the following individuals

Bert L. Dart, Esq.
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A handwritten signature in dark ink, appearing to read "David S. Dolowitz", is written over a horizontal line.

David S. Dolowitz
Ralph E. Chamness