

2007

# Lana Gean Anderton v. Carl Lyle Anderton : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LANA GEAN ANDERTON,	)	REPLY BRIEF OF APPELLANT
	)	
Petitioner-Appellee.	)	
	)	
vs.	)	
	)	
CARL LYLE ANDERTON,	)	
	)	Trial Case No.: 054000065 CA
Respondent-Appellant.	)	App. Case No.: 20060704-CA
	)	

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APPEAL FROM THE FINAL DECREE OF DIVORCE OF THE EIGHTH DISTRICT  
COURT IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT,  
STATE OF UTAH, THE HONORABLE JOHN R. ANDERSON, PRESIDING

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**FILED**  
**UTAH APPELLATE COURTS**

**NOV 28 2007**

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## II. TABLE OF AUTHORITIES

### STATUTES

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### III. SUMMARY OF THE ARGUMENT

There was no actual or implied conclusion of law determining that Mr. Anderton was “underemployment,” for purposes of imputing income for a child support award, as required by UTAH CODE ANN. § 78-45-7.5. Nor were there factual findings entered which would support a conclusion of “underemployment.”

In the alternative, even if a conclusion were made that Mr. Anderton was underemployed, insufficient findings were entered regarding the “amount” to impute, as required by UTAH CODE ANN. § 78-45-7.5(7)(a). Specifically, no findings were entered regarding “occupation qualifications,” “prevailing earnings for persons of similar backgrounds in the community,” or “median earning[s] for persons in the same occupation.” *Id.*

In the alternative, no findings were entered regarding Mr. Anderton’s “necessary expenses” related to his firewood-cutting business. Thus, such income could not be included as “self-employment” earnings under UTAH CODE ANN. §78-45-7.5(4)(a) (2006).

Mr. Anderton submitted ample evidence of his income and expenses. Moreover, Ms. Anderton’s evidence and testimony only supported, at best, a finding that Mr. Anderton’s gross income from his fire wood cutting business was \$10,000 per year. A finding that such income was \$30,000 per year simply was not supported by the evidence, or by adequate findings.

The necessary factual findings for an award of alimony, addressing the recipient

spouse's need, the payor spouse's ability to pay, and the recipient spouse's ability to meet her own expenses, were not entered. The resulting award of alimony constituted an abuse of discretion.

The ruling regarding the value of the parties' home was based upon inadmissible evidence from a realtor, received over objection from Mr. Anderton. Additionally, the ruling was based, at least in part, upon a mathematical error, which should be considered and corrected.

#### IV. ARGUMENT

##### A. Tacit Finding of Underemployment

Ms. Anderton alleges<sup>1</sup> that the following statement constitutes a "tacit finding" of underemployment, justifying the imputation of income from Mr. Anderton's second job for purposes of child support and alimony:

I'm also a little bit confused about why with this oil economy the way it is and the company he works for doesn't have more work and I think he could be working more hours if he looked around but I don't now [sic]. But, even taking his gross income now on his, on his oil field business at \$35,000 a year I think that I could easily find that he is making in addition of \$30,000 a year out of that wood business or could be, or could be. I think his capability is in that range.

(Rec. 202:1-10, *Add. to Appellant Brief*, Ex. 8.)

However, under the applicable statute and case law, discussed at length in

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<sup>1</sup>*Brief of Appellee*, p. 8.

Appellant's brief<sup>2</sup>, a determination of underemployment is a "conclusion of law"<sup>3</sup>, which must be specifically made, as a "threshold requirement" for imputing income<sup>4</sup>.

Additionally, conclusions of law must be supported by specific, detailed factual findings.<sup>5</sup>.

The above language does not constitute a conclusion of underemployment, nor does it constitute findings of fact supporting such a conclusion. In fact, it appears from the wording that the judge specifically determined he "did not know" if there was a possible issue of underemployment.

Such a conclusion was appropriate, as there was no evidence in the record regarding the present status of the oil economy, no evidence regarding how many hours Mr. Anderton was working at his oil field job, and no evidence that additional hours could be worked by Mr. Anderton.

Following its discussion of such possible, but unestablished issues, the Court found, "[b]ut, even taking his gross income now on his, on his oil field business at \$35,000 a year **I think that I could easily find that he is making in addition of \$30,000 a year out of that wood business or could be, or could be. I think his capability is in**

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<sup>2</sup>See *Appellants Brief*, pp. 26-30, citing UTAH CODE ANN. §78-45-7.5 (2006), *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993), and other applicable case law.

<sup>3</sup>*Hall*, 858 P.2d at 1025 (Utah Ct. App. 1993), *Add. to Appellant Brief*, Ex. 5 ("'[F]inding' on the ultimate issue of voluntary underemployment is in reality more like a legal conclusion. . . .").

<sup>4</sup>*Hall*, 858 P.2d at 1018, *Add. to Appellant Brief*, Ex. 5.

<sup>5</sup>*Haumont v. Haumont*, 793 P.2d 421, 423 (Utah Ct. App. 1990).

**that range.”** (Rec. 202:7-10, *Add. to Appellant Brief*, Ex. 8.)

This does not constitute a conclusion that Mr. Anderton was underemployed, but rather, a conclusion that he was capable of, or should be, earning at least \$30,000 from the wood business. However, there were no specific, detailed, factual findings supporting this conclusion, and no discussion of how it was reached.

In fact, only one of the factors required by UTAH CODE ANN. § 78-45-7.5(7)(a) (2006) – work history – was even arguably addressed. Section § 78-45-7.5(7)(a) states:

If income is imputed to a parent, the income **shall** be based upon employment potential and probable earnings **as derived from work history, occupation qualifications, and prevailing earnings** for persons of similar backgrounds in the community, or the **median earning** for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

No testimony or evidence was received regarding occupational qualifications or prevailing earnings in the logging field or the fire wood cutting business. No median earnings for either of these professions were discussed. In regards to Mr. Anderton’s work history, only 2005 was discussed. Moreover, an income of \$30,000 for 2005 simply was not supported by the evidence.

An alternative basis for determining income from self-employment is set forth in UTAH CODE ANN. §78-45-7.5(4)(a) (2006), which states:

Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. . . .

UTAH CODE ANN. § 78-45-7.5(4)(a) (2006), contained in *Add. to Appellant Brief*, Ex. 4:

In this case, no findings were entered regarding Mr. Anderton's "necessary expenses" related to his firewood-cutting business. Undisputed testimony was introduced indicating that one-fourth of the gross income from the business was set aside for expenses. (Rec. 160:24-161:2, 169:13-21). Testimony was developed regarding the nature of such expenses. Tax returns were introduced reflecting such expenses. (*Add. to Appellant Brief*, Ex. 13, 14). However, no findings were entered regarding this issue.

**B. Evidence of Income**

Ms. Anderton claims<sup>6</sup> that the only information Mr. Anderton submitted regarding his income and expenses was a partial financial declaration, thus he should not be allowed to complain about the Court's determination regarding his income and expenses.

However, Mr. Anderton introduced the parties' joint 2004<sup>7</sup> and 2005<sup>8</sup> tax returns, reflecting income and expenses from his W-2 job, and income and expenses from his logging business. Mr. Anderton introduced a written statement of his expenses<sup>9</sup>, which was not challenged by Ms. Anderton through testimony or argument of counsel. Further, Mr. Anderton testified regarding all such evidence.

Ms. Anderton sought to prove that Mr. Anderton's income from his firewood

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<sup>6</sup>*Appellee Brief*, p. 9.

<sup>7</sup>See Defendant's Trial Exhibit #13, 2004 Tax Return, contained in *Add. to Appellant Brief*, Ex. 13.

<sup>8</sup>See Defendant's Trial Exhibit #14, 2005 Tax Return, contained in *Add. to Appellant Brief*, Ex. 14.

<sup>9</sup>See Defendant's Trial Exhibit #15, *Add. to Appellant Brief*, Ex. 20.

cutting business exceeded what was evidenced by the joint tax returns, through testimony<sup>10</sup> and bank statements<sup>11</sup>. However, her testimony supported only, at most, a gross income of \$10,000 for Mr. Anderton.<sup>12</sup> Further, the bank statements she submitted supported only a gross income of \$9,511.<sup>13</sup>

In summary, Mr. Anderton submitted ample evidence of his income and expenses. At most, Ms. Anderton provided evidence indicating that Mr. Anderton's gross income from his fire wood cutting business was \$10,000. Thus, the Court's finding that such income was \$30,000 per year simply was not supported by the evidence, or by adequate findings.

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<sup>10</sup>(Rec. 25:20-31:6, 32:25-36:5, *Add. to Appellant Brief*, Ex. 12)

<sup>11</sup>See Plaintiff's Trial Exhibits 5 and 6, contained in *Add. to Appellant Brief*, Ex. 15 and Ex. 16.

<sup>12</sup>See *Appellant Brief*, pages 35, citing Rec. 64:23-24, 65:3-65:5, *Add. to Appellant Brief*, Ex. 12 (Ms. Anderton testified that she believed the gross income to be \$30,000 to \$40,000 per year); and Rec. 160:24-161:2, 169:13-21, *Add. to Appellant Brief*, Ex. 12 (Mr. Anderton testified to expenses being one-fourth of gross income, with the remaining three-fourth's split three ways between he and his sons. Such testimony was undisputed by Ms. Anderton.)

<sup>13</sup>See *Appellant Brief*, pages 35-37, citing Rec. 25:20-31:6, 32:25-36:5, *Add. to Appellant Brief*, Ex. 12, Ex. 15, Ex. 16; Rec. 68:4-21, *Add. to Appellant Brief*, Ex. 12, Ex.15, Ex. 16; Rec. 158:24-25, 159:20-23, 161:14-16, *Add. to Appellant Brief*, Ex. 12; *Add. to Appellant Brief*, Ex 14 and 16. (Mr. Anderton's deposits of \$73,416, less tax refunds of \$5,347, less net W2 earnings of \$26,315, less unemployment compensation benefits of \$3,710 leaves \$38,044 in deposits. Divided by four based upon undisputed testimony that one-fourth went to expenses, one-fourth to Mr. Anderton, one-fourth to Chris, and one-fourth to Adam, yields possible earnings from the firewood-cutting business, based upon the deposits, of \$9,511).

**C. Consideration of Alimony**

Ms. Anderton argues<sup>14</sup> that the three (3) required alimony factors were addressed, as certain information was presented to the Court. However, the fact that evidence was submitted regarding relevant factors, does not mean that the required oral or written “findings” were entered regarding those factors. In fact, only one conclusory statement was made in the Court’s ruling regarding alimony:

I'm going to award alimony on the basis of the findings that I've talked about financially. I think \$750.00 a month. . . . (Rec. 205:21-24, *Add. to Appellant Brief*, Ex. 17).

The only findings which had been previously talked about were the statements pertaining to an income of \$35,000 plus \$30,000, discussed at length throughout Appellant’s brief. No statement was made at any point in the record regarding whether or not any expenses claimed by either party were found to be high, low, unnecessary, or ordered to be paid by another party. No findings were entered at any point regarding which, if any, of Mr. Anderton’s business expenses were found to be legitimate or were excluded. No findings were entered at any point regarding Mr. Anderton’s net income from his business. No indication was made at any point of what either party’s “net” income was, after taxes, for purposes of alimony. No findings were made at any point indicating what Mr. Anderton’s ability to pay was, or what Ms. Anderton’s needs were.

Contrary to Ms. Anderton’s assertions that all factors were considered, the sole

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<sup>14</sup>See *Appellee Brief*, pages 11-12.

issue specifically addressed regarding alimony was “gross” income.<sup>15</sup> This was, in and of itself, err, as taxes were not identified and deducted to determine the parties’ respective net incomes for purposes of calculating alimony.<sup>16</sup>

In short, the necessary factual findings regarding need, ability to pay, and the parties’ respective expenses simply were not entered. As explained by the Utah Court of Appeals in *Hall*, a “trial court abuses its discretion when it fails to enter specific, detailed findings supporting its financial determinations.” *Hall*, 858 P.2d at 1018, *Add. to Appellant Brief*, Ex. 5.

#### **D. Mathematical Error**

The Court’s oral ruling clearly reflects a mathematical error in regards to the home, as argued by Mr. Anderton in his Appellant Brief, and further evidenced by Ms. Anderton’s brief. Either the Court erred in adding **\$120,000** plus **\$24,000** to reach **\$165,000**, as alleged by Mr. Anderton.<sup>17</sup> Or, the Court erred in stating that the property had increased **\$24,000**, based on the fact Ms. Anderton points out, that the appraiser

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<sup>15</sup>See Rec. 201:8-202:10, *Add. to Appellant Brief*, Ex. 8; and Rec. 208:1-3, 212:5-7, 212:10-11, *Add. to Appellant Brief*, Ex. 17.

<sup>16</sup>See *Hanson v. Hanson*, 2007 Ut. App. 348 (Utah Ct. App. 2007) (holding that it was reversible error for the trial court to understate legitimate deductions for taxes and insurance in determining an alimony award. “We cannot agree with Appellee that the error is harmless because ‘we cannot, with any degree of assurance,’ determine if the trial court would have made the same alimony award had it had Appellant's actual net income in mind.”)

<sup>17</sup>See *Appellant Brief*, pp. 46-47.

testified that the increase was 25-30%, which would have been **\$30,000 - \$36,000**.<sup>18</sup>

Either way, the Court's ruling was based at least in part upon a mathematical error, which should be considered and corrected.

**E. Rule 60(b) Motion**

Ms. Anderton asserts<sup>19</sup> that Mr. Anderton should have filed a Rule 60(b) motion if there were a mathematical error made by the Court in determining the value of the home.

If this were the sole issue requiring appeal, Mr. Anderton would agree. However, the consideration of a "realtor's" appraisal was in error. Further, the award of alimony required appeal, regardless of whether or not the mathematical error on the real property was resolved.

It makes no sense for a party to pay attorney's fees to pursue two court actions, nor is it in the interest of judicial economy to have two courts considering the same matter, when all issues may appropriately be included in one action.

Moreover, there is no legal requirement that a party file a Rule 60(b) motion prior to appealing an issue.

**F. Attorney's Fees**

Attorney's fees should not be granted in this matter, as this appeal has been pursued based upon Mr. Anderton's good faith belief that significant portions of the ruling below were in error and inequitable.

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<sup>18</sup>See *Appellee Brief*, p. 13.

<sup>19</sup>See *Appellee Brief*, p. 14.

## VIII. CONCLUSION

The determination to impute \$30,000 in income to Mr. Anderton for child support and alimony purposes was inappropriate. No threshold finding of “voluntary underemployment” was made, as required for child support by UTAH CODE ANN. § 78-45-7.5(7)(a) (2006). Additionally, the analysis of the “amount” of Mr. Anderton’s income from self employment for child support purposes did not meet the requirements of subsection (4) or (7) of UTAH CODE ANN. § 78-45-7.5 (2006).

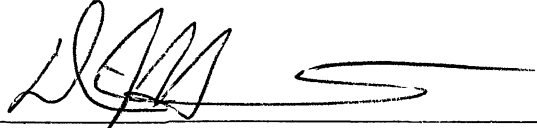
Even considering the evidence in the light most favorable to the Court’s ruling, the determination that Mr. Anderton makes \$30,000 from this business, in addition to his full-time earnings, was clearly erroneous.

Insufficient findings were entered regarding the three factors which must be considered in determining alimony under UTAH CODE ANN. § 30-3-5 (2006), and applicable case law – the recipient spouse’s need, the payor spouses ability to pay, and recipient spouse’s ability to assist in meeting her own needs.

Finally, the Trial Court’s determination of the value of the parties’ marital home should be modified, based upon the improper admission of evidence, over objection, and based upon mathematical error.

DATED this 27<sup>th</sup> day of November, 2007.

HUNTSMAN EVANS AND LOFGRAN, PLLC

A handwritten signature in black ink, appearing to read 'Diana J. Huntsman', written over a horizontal line.

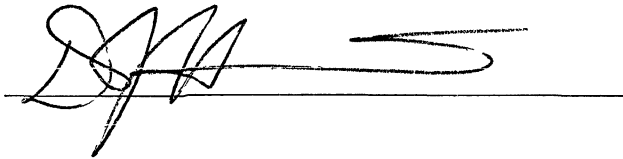
DIANA J. HUNTSMAN

Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 27<sup>th</sup> day of November, 2007, two true and correct copies of this document were sent via first class mail, postage pre-paid, to the following:

MATT BRIMLEY  
43 EAST 200 NORTH  
PROVO, UTAH 84606

A handwritten signature in black ink, appearing to read 'Matt Brimley', written over a horizontal line.