

1995

## Moore v. Moore : Reply Brief

Utah Court of Appeals

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D. VET NO.

IN THE UTAH COURT OF APPEALS

Priority Sixteen

Very truly,  
Yours,  
C. J. Smith



TABLE OF CONTENTS

SUMMARY OF ARGUMENT . . . . .	1
ARGUMENT . . . . .	2
POINT I.	
THE DEFENDANT MAY NOT ASSERT A CLAIM FOR ALIMONY BASED ON AN ALLEGED NEED FOR A NEW AUTOMOBILE WHERE SHE VOLUNTARILY ALLOWS HER CAPABLE ADULT DAUGHTER TO DRIVE ANOTHER NEW VEHICLE THAT SHE OWNS . . .	3
POINT II.	
THE DEFENDANT'S SUPPORT OF HER CAPABLE ADULT CHILDREN EXTENDS SUBSTANTIALLY BEYOND HER FIXED EXPENSES. . . . .	6
POINT III.	
THE PARTIES DID NOT SUPPORT ABLE-BODIED ADULT CHILDREN DURING THE MARRIAGE. . . . .	8
POINT IV.	
THE SUPPORT OF THE PARTIES' ADULT CHILDREN IS NOT A DISCRETIONARY ACT THAT WARRANTS AN AWARD OF ALIMONY. . . . .	9
POINT V.	
THE TRIAL COURT WAS JUSTIFIED IN REDUCING THE AMOUNT OF DEFENDANT'S ALIMONY AWARD IN LIGHT OF THE DEFENDANT'S REFUSAL TO SPECIFY THE AMOUNT OF ONLY HER NEEDS. . . . .	11
CONCLUSION . . . . .	12

## TABLE OF AUTHORITIES

### Cases

<u>Carlson v. Carlson,</u> 584 P.2d 864 (Utah 1978) . . . . .	9
<u>Ferguson v. Ferguson,</u> 578 P.2d 1274 (Utah 1978) . . . . .	9
<u>Gramme v. Gramme,</u> 587 P.2d 144 (Utah 1979) . . . . .	8
<u>Grapin v. Grapin,</u> 450 So. 2d 853 (Fla. 1984) . . . . .	9
<u>Jones v. Jones,</u> 700 P.2d 1072, 1975 (Utah 1985) . . . . .	3

### Statutes

Utah Code Ann. § 78-45-7.14 . . . . .	10
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### SUMMARY OF ARGUMENT

The defendant has failed to show that she needs alimony to purchase a new vehicle because she voluntarily allows her daughter to drive a nearly new, debt-free Hyundai automobile. If plaintiff did not allow the parties' adult daughter to drive the Hyundai, the defendant would have no need for a new vehicle. The defendant actually seeks to be paid three times by plaintiff for her purchase of the Hyundai.

In addition to the new automobile that defendant provides for the parties' adult daughter, the defendant's support of her adult children extends substantially beyond the defendant's fixed expenses. At least \$1,100 could be trimmed from the defendant's list of necessary expenses if the defendant's support of the adult children is not included.

The parties did not support their children as adults during their marriage. Their oldest child was only 16 at the time of the divorce. Defendant's assertion that plaintiff must continue to pay for the support of the parties' adult children through alimony because the children were supported during the marriage ignores all case law and statutory authority regarding the bases for awarding alimony.

The defendant lacks the discretion to unilaterally include the support of the adult children in her necessary expenses for alimony purposes. Defendant confuses a custodial parent's discretion in spending child support payments with the factors that determine the amount of alimony. The two areas simply are not related.

Finally, the trial court was justified in presuming that the defendant had sufficient income to provide for her needs based on the defendant's refusal to identify her expenses at trial without also including the support of the adult children. The trial court erred only in allowing the defendant's support of the adult children to be included in her alimony award until November of 1992. Accordingly, the trial court's award of alimony until November of 1992 should be reversed and the defendant's alimony award should be lowered to \$1 per month as of October 30, 1989.

#### ARGUMENT

Plaintiff and Cross-Appellant Roy B. Moore has only cross-appealed the issue of whether the trial court erred in including the defendant's support of the parties' capable adult children as part of the defendant's necessary expenses in determining alimony. The defendant's reply brief has raised several new matters regarding this issue in response to plaintiff's appellate brief. Although plaintiff strongly contests all arguments presented in defendant's reply brief, plaintiff replies pursuant to Utah Rule of Appellate Procedure 24(c) only to those new matters raised by defendant that specifically relate to plaintiff's cross-appeal. Plaintiff replies to the arguments in the order they have been presented in defendant's reply brief.

POINT I.

THE DEFENDANT MAY NOT ASSERT A CLAIM FOR ALIMONY BASED ON AN ALLEGED NEED FOR A NEW AUTOMOBILE WHERE SHE VOLUNTARILY ALLOWS HER CAPABLE ADULT DAUGHTER TO DRIVE ANOTHER NEW VEHICLE THAT SHE OWNS.

Defendant asserts that she needs alimony to purchase a new vehicle, even though she allows her capable adult daughter to drive her nearly new, debt-free Hyundai automobile. Defendant contends in her reply brief that she purchased the Hyundai with funds that she received from the sale of the parties home' which she was awarded as part of her property distribution award. She asserts that since she was awarded the home, she was free to give her equity to her adult child without affecting her alimony award. (Defendant's Reply Brief at 7-9.) Several flaws exist in defendant's reasoning.

First, defendant's rationale ignores that an alimony award must be based on the three factors set forth in Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). Two of the three factors are at issue in the present case: (1) the financial condition and needs of the receiving spouse; and (2) the ability of the receiving spouse to produce sufficient income for him- or herself.

If the defendant has excess resources sufficient to allow her adult daughter to drive the defendant's debt-free Hyundai, then defendant, by definition, must not have the financial need to require plaintiff to provide her with alimony for a new car. The defendant not only has financial resources sufficient for her own needs, she also has enough resources to provide a nearly new



vehicle for one of the parties' adult children. Therefore, defendant fails the first factor in determining alimony.

Second, defendant has failed to show that she is not capable of providing a vehicle for herself if her support of the adult children is not included in the her needs. The defendant earned in excess of \$23,000 annually at the time of trial on the petition to modify. (R. 247). This salary should be more than sufficient to support the defendant at the same standard of living enjoyed during the marriage. However, because defendant consciously refused at trial to itemize only her financial needs without including the support of the adult children (R. 357; 369), the court simply could not determine whether the defendant's salary was sufficient to meet only her needs. The trial court, accordingly, could presume that the defendant had sufficient resources to meet her needs and buy her own vehicle. The defendant fails the second factor in determining alimony.

Third, defendant implies that plaintiff somehow is responsible for the purchase of the Hyundai because he stopped paying alimony for a short time-period after he filed his petition to modify. Defendant asserts that she was forced to purchase the Hyundai through utilizing the equity in her home. Defendant's rationale is not entirely clear to plaintiff because defendant apparently asserts that she was entitled to purchase the Hyundai for the parties' adult daughter through alimony funds, the exact issue that plaintiff now contests. In any event, plaintiff paid all amounts of alimony that were past due as ordered by the lower court. If defendant had in fact been required to substitute her equity in her

home to obtain the vehicle, then she should have been able to restore the equity in the home when the alimony was ultimately paid.

Defendant actually seeks to be paid three times by plaintiff for the Hyundai. First, by moving to an upgraded condominium and taking equity from her home for the purchase of the Hyundai, defendant has increased her monthly house payment (including insurance and association fees) by approximately \$237, from \$350 to \$587. (R. 352-353.) Defendant has included this increased payment in her living expenses. Second, defendant was paid for the Hyundai when plaintiff paid the delinquent alimony. Third, defendant now seeks to have the plaintiff pay for a new vehicle because defendant has given the Hyundai to the parties' daughter to drive. She seeks to have the plaintiff pay for the vehicle once through her increased house payment, second through the alimony actually paid by plaintiff, and third through a reserve payment for a new vehicle. Such a triple counting of the defendant's automobile needs is clearly unfair to plaintiff.

Finally, but for the defendant's providing the debt-free Hyundai to the parties' adult daughter, the defendant would have a new vehicle of her own to drive. If the defendant kept and utilized this vehicle, then defendant would have no need for plaintiff to provide her with a new vehicle through alimony. The defendant cannot expect to give away her property and still make a claim for alimony to make up the difference. Therefore, the defendant may not assert a claim for alimony based on the need for a new vehicle.

POINT II.

THE DEFENDANT'S SUPPORT OF HER CAPABLE ADULT CHILDREN EXTENDS SUBSTANTIALLY BEYOND HER FIXED EXPENSES.

Defendant implies in her reply brief that she would have the same expenses regardless of whether the adult children lived with her because her expenses for "condo payment, gas payment, electric payment, sewer payment, etc." would remain unaffected by the number of people living in her home. (Defendant's Reply Brief at 13). This implication ignores the undisputed facts presented at trial. As explained above, the defendant included \$300 as a reserve fund in her necessary expenses to allow her to purchase a new automobile because her 1984 Regal is worn out (R. 367-368), even though she allows her daughter to drive her nearly new, debt-free Hyundai. (R. 354-355.) Obviously, this \$300 reserve "expense" would not exist if the defendant did not allow her adult daughter to drive the Hyundai.

Similarly, the defendant admitted at trial that her monthly "household" expenses of \$486.48 consisted primarily of food and sundries for her and the adult children. (R. 416.) The defendant also admitted at trial that her "charge accounts" expense of \$468.97 per month consisted primarily of clothing for herself and the adult children. (R. 356; 424.) These expenses simply cannot be considered as fixed. They vary in direct proportion to the number of people that the defendant chooses to support. In reality, the adult children likely consume even more than two-thirds of household and charge account amounts because the defendant also lists another \$380 per month for unspecified

personal expenses. The defendant would have no need for such large personal expenditures if her support of the two adult children did not consume the vast majority of her household and clothing expenses.

Even assuming, arguendo, that the defendant needed a food and household budget of \$200 per month, an ample clothing budget of \$150 per month, and an unspecified personal expense budget of \$150 per month to support only herself, over \$830 per month would be cut from the list of defendant's necessary expenses contained in Finding of Fact No. 8. If the defendant also chose to drive the Hyundai she now provides for her daughter, an additional \$300 would be trimmed from the defendant's list of expenses. These savings alone total in excess of \$1,130 per month.

Without an alimony award the defendant still has sufficient income to meet her needs. She still has sufficient income to pay for her condominium mortgage payment and condominium fees. These payments total \$237 more per month than the mortgage payment on the parties' marital home (which defendant was awarded at the time of divorce). She still has sufficient income to pay \$187 per month in utilities. She still has sufficient income to pay nearly \$200 per month in uninsured medical bills. She still has \$100 per month to pay her gas and automobile maintenance. She still has sufficient income to meet her insurance needs. In short, the defendant earns sufficient income to meet all her financial needs if her support of the parties' capable adult children is not included in her list of necessary expenses.

POINT III.

THE PARTIES DID NOT SUPPORT ABLE-BODIED ADULT CHILDREN DURING THE MARRIAGE.

Defendant argues that because the parties provided benefits to their children while they were married, "the plaintiff may not argue that it is inappropriate to do the same, aside from child support, after the Divorce." (Defendant's Reply Brief at 15). This argument fails in two important areas. First, the parties' children were not adults during the marriage. The parties' oldest child, Jeffrey B. Moore, was just 16 at the time of the divorce. The parties had a legal obligation to support their minor children. The parties did not support any individuals during the marriage that they did not have an obligation to support.

The defendant, accordingly, cannot assert that the parties were voluntarily supporting other adults as part of their standard of living during their marriage. When the parties' children reached the age of majority, the parties no longer had any obligation to support them. The defendant cannot unilaterally foist this obligation on the plaintiff by including the support for the adult children as part of her necessary expenses.

Second, Utah law is very clear that the purpose of alimony is to provide support for the receiving spouse based on the receiving spouse's needs and financial condition, the receiving spouse's ability to provide sufficient income for him- or herself, and the ability of the providing spouse to provide support. Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1979). Plaintiff is unaware of a single case or statutory authority that would allow the indirect

imposition of child-support of capable adult children through disguised alimony. Nor has defendant cited any such authority.

Indeed, defendant totally ignores the authorities cited in plaintiff's prior brief that clearly hold that the only needs to be considered in determining alimony are the needs of the receiving spouse. Defendant also ignores the cases which hold that parents' child support obligations cease when their capable children reach the age of 18, Ferguson v. Ferguson, 578 P.2d 1274 (Utah 1978); Carlson v. Carlson, 584 P.2d 864 (Utah 1978), and that child support cannot be indirectly ordered through the payment of alimony. Grapin v. Grapin, 450 So.2d 853 (Fla. 1984).

Moreover, the defendant could not make a claim for alimony based on the support of her children even if they were still minors. Alimony is spousal support. It is not intended for the support of children. Child support is a completely separate obligation and defendant could not include her support of minor children as part of her necessary expenses for purposes of alimony.

Absolutely no legal basis exists for continuing an award of disguised child-support for capable adult children through alimony. Therefore, no basis exists in either fact or law for awarding alimony to defendant to enable her to support the parties' adult children.

#### POINT IV.

THE SUPPORT OF THE PARTIES' ADULT CHILDREN IS NOT A DISCRETIONARY ACT THAT WARRANTS AN AWARD OF ALIMONY.

Defendant asserts that she has the discretion to use alimony in any way she chooses and that "no one can argue that alimony is

justified if it benefits the family dog" or the parties' able bodied adult children. (Defendant's Reply Brief at 16). Plaintiff does not dispute the defendant's right to spend her own funds as she sees fit, but plaintiff strongly opposes the defendant's claimed right to increase the amount of her alimony award by including in her expenses the support of adult children.

Defendant apparently confuses the determination of alimony with a custodial parent's discretion to use child-support payments. Child support generally is based solely on parents' income according to the Utah Child Support Guidelines contained in Utah Code Annotated section 78-45-7.14. After the amount of child support is fixed, a custodial parent typically has the discretion to use the child support payment as the custodial parent sees fit.

In contrast, the amount of an alimony award is based on the receiving spouse's needs and ability to support him- or herself. If the receiving spouse were granted discretion to include in his or her needs virtually anything they desired, including the support of their adult children, the receiving spouse would have sole discretion in determining the amount of the alimony award. This obviously could lead to very unjust burdens on the providing spouse. Yet that is exactly the discretion that the defendant claims to have in the present case. Plaintiff is unaware of any case law or statutory authority that would permit the defendant to exercise such broad discretion.

The defendant likens her complete care and support of two adult children to caring for her family pet. As explained above, it appears that the defendant currently pays in excess of \$1,100

per month toward the support of the adult children. This substantial support amount simply is not on the same scale as caring for the family pet. Plaintiff, therefore, requests this Court to reject the defendant's argument that she has the discretion to include in her financial needs the support of her adult children.

POINT V.

THE TRIAL COURT WAS JUSTIFIED IN REDUCING THE AMOUNT OF DEFENDANT'S ALIMONY AWARD IN LIGHT OF THE DEFENDANT'S REFUSAL TO SPECIFY THE AMOUNT OF ONLY HER NEEDS.

The defendant's reply brief essentially follows the same approach taken by the defendant at trial with respect to the inclusion of her support of the two adult children as part of her necessary expenses. The defendant does not deny that she has included the support of the children in her expenses. Nor does the defendant point to any evidence that would indicate what her expenses would be without including the support of the adult children.

At trial, the defendant consciously elected to not even attempt to identify what her expenses would be without including the support of her adult children. She refused to identify her expenses despite substantial questioning from plaintiff's counsel to determine her needs. (R. 357; 369.) In light of the defendant's refusal to identify only her needs without including the support of the adult children, there were ample grounds for the trial court to conclude that the defendant had sufficient resources to provide for herself.



The trial court erred only in permitting the defendant's support of the adult children to be included in her alimony award until November of 1992. (See R. 216). Plaintiff, accordingly, requests this Court to reverse the trial court's grant of alimony to defendant until November of 1992 and order that alimony be reduced to \$1 as of the date plaintiff filed his petition to modify, October 30, 1989.

#### CONCLUSION

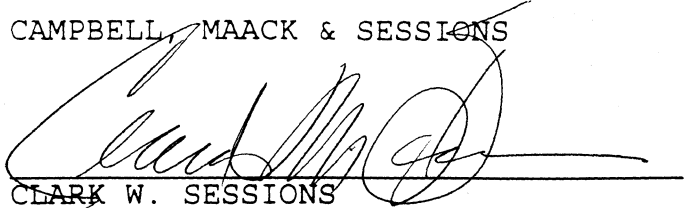
Plaintiff's issue on cross-appeal clearly constitutes a question of law. The defendant does not dispute that she has included the support of the parties' capable adult children as part of her claimed necessary expenses. Nor does she dispute that the trial court included the support of the adult children in the defendant's expenses when it ordered the plaintiff to continue to pay alimony until November of 1992. Rather, defendant asserts that she has the right to include the support of the adult children in her expenses because the parties supported the children while they were minors during the marriage.

Defendant wholly ignores the case law and policy arguments advanced by plaintiff in his prior brief. Utah law is very clear that alimony is based on the receiving spouse's needs and ability to support him- or herself, not the needs of capable adult children. Moreover, allowing support of adult children to be included in the determination of alimony would substantially pervert public policy regarding the independence of adults and confuse existing law on child support and alimony as set forth in plaintiff's prior brief. Defendant has failed to contest these

policy concerns or statements in existing law. Plaintiff, therefore, respectfully requests this Court to reverse the lower court and order that the defendant's alimony award be reduced to \$1 per month as of October 30, 1989 based on the trial court's finding of a substantial change of in the defendant's circumstances.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 1993.

CAMPBELL, MAACK & SESSIONS


A handwritten signature in dark ink, appearing to read "Clark W. Sessions", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'C'.

CLARK W. SESSIONS

**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT ROY B. MOORE** was mailed, postage prepaid, this 1<sup>st</sup> day of June, 1993, to the following:

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