

FILED
DEC 21 2011
SECOND
DISTRICT COURT

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

	/	RECOMMENDATION
Petitioner,	/	
vs.	/	
	/	Civil No. 064900814
	/	Judge Mark R. Decaria
Respondent.	/	Commissioner Catherine S. Conklin
	/	

DEC 21 2011

This matter came before the Court for an evidentiary hearing on September 21, 22, and October 6, 2011. Petitioner was present and represented by attorney, Respondent was present and represented by attorney Brian E. Arnold. The following issues were presented to the Court for consideration:

1. Should Husband's alimony obligation be terminated on the basis of cohabitation?
2. Should Husband's alimony obligation be terminated or reduced based on a substantial change of circumstances affecting his ability to pay?
3. Has there been a substantial change of circumstances affecting Wife's need for alimony such that Husband's obligation should be modified or terminated?
4. If Husband's alimony is to be terminated or modified, when should the termination or modification be effective?

5. Should a judgment be entered against Husband for failure to pay alimony?
6. Should Husband be held in contempt and sanctioned for failure to pay alimony?
7. Should either party be awarded attorney fees?

This case presents a unique circumstance in this Court's experience in that, in the interest of judicial economy, the parties have asked the Court to issue a recommendation as to the permanent resolution of Husband's Petition to Modify as well as the order to show cause. The parties agreed that the evidence required for the order to show cause would largely be the same as the evidence that would be presented at trial on the petition to modify. The parties were given the option of merely having all of the issues certified to the assigned judge for an evidentiary hearing, but instead elected to have the evidence heard by the undersigned commissioner. The parties agreed that if an objection is filed following this Recommendation, there will not be another evidentiary hearing, and objection to a factual finding will require a marshaling of the evidence in support of that finding and demonstration that the finding is clearly erroneous.

With this frame of reference, and having considered the evidence and argument presented, the Court makes and enters the following recommendations.

PROCEDURAL HISTORY AND PRIOR ORDERS

The parties were divorced on June 15, 2007. The decree contained the following relevant provisions:

13. The parties shall share equally _____ soccer expenses for major tournaments, ODP and club fees. The parties shall also share equally the expenses and basic maintenance of Taylor's vehicle, excluding the purchase price.¹

32. Petitioner shall pay alimony to the Respondent in the amount of \$1,650 per month. Said alimony shall be paid by the Petitioner to the Respondent via direct deposit to an account designated by the Respondent. Alimony shall be paid one half (1/2) on the fifth (5th) of each month and one half (1/2) on or before the twentieth (20th) of each month.

33. The alimony payments set forth in the Decree shall commence on April 24, 2007.

34. Respondent is awarded alimony for the term of the marriage, less the time the Petitioner paid alimony under a Temporary Order in this matter. Alimony will terminate and cease upon the death of either party, or upon the re-marriage or co-habitation of the Respondent.

35. On or around the one year anniversary of the entry of this Decree of Divorce, should the Respondent be regularly working at least thirty-two (32) hours or more per week, the parties shall engage in mandatory mediation to review the issue of alimony. If the Respondent is not regularly working thirty-two (32) hours a week, there will be no review. To this end, on the eleventh (11th) anniversary of this Decree, the Respondent shall provide to the Petitioner her hours worked at that point. After the one year anniversary of the entry of the Decree, at any time the Respondent regularly works thirty-two (32) hours or more per week, the issue of alimony may be revisited, initially through mandatory mediation. At the initial review, and any subsequent review, the sole issue for review will be the Respondent's work hours. No other issues may be addressed.

_____ was the only child of the parties who was a minor at the time of the divorce. _____ turned 18 on January 18, 2009, and he graduated from high school in May of that year.

On March 18, 2011, Husband filed a Pétition to Modify the Decree. Husband alleged that his alimony obligation should be terminated based on either Wife's cohabitation or a substantial change of circumstances. On April 8, 2011, Wife filed a motion for an order to show cause, requesting that Husband be held in contempt for failure to pay alimony. Wife's motion came on for hearing on June 9, 2011, at which time the parties agreed to submit the entire matter for an evidentiary hearing. This Recommendation ensued.

COHABITATION

The relevant statute 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 cohabitating with another person." UCA § 30-5-5(10). Review of the case law suggests several elements that the Court should consider in determining whether cohabitation is occurring:

1. Common residency;²
2. Sexual contact (meaning a relatively permanent sexual relationship);³
3. A key or similar method of accessing the home, such that a cohabitant will be present when the other party is not;⁴
4. Sharing meals;⁵
5. Storing personal items;⁶
6. Joint decision-making;⁷ and
7. Shared space.⁸

² Haddow v. Haddow, 707 P.2d 669, 672 (Utah 1985).

³ Id.

⁴ Pendleton v. Pendleton, 918 P.2d 159, 161 (Utah App. 1996)

⁵ Id.

⁶ Id.

⁷ Myers v. Myers, 2010 UT App 74, ¶ 18, 231 P.3d 815, 819

Ultimately, the decision turns on whether the parties “lived in a shared residence in a relationship akin to that of husband and wife.” Myers v. Myers, 2011 UT 65, at ¶21 (quoting Haddow, 707 P.2d at 672. The long-awaited decision of the Supreme Court in Myers approved the appellate court’s 2010 opinion and espoused its approach, which evaluated the nature and extent of the parties’ common residence, relationship, and interactions.

In the case at bar, there is no dispute that Wife and her paramour, [REDACTED] had a sexual relationship. However, the Court finds that the remainder of the circumstances of Wife’s relationship with [REDACTED] do not rise anywhere near the level of cohabitants. Specifically:

1. The Wife did not share a common residence with [REDACTED]. Wife and [REDACTED] are neighbors and have resided across the street from each other for several years. [REDACTED] has never spent the night at Wife’s home. Although Wife has spent the night at [REDACTED]’s home, she did so at the most 18-20 times per year based on the testimony. The Court cannot find that the parties spent enough time in each others’ homes to be deemed a common residence.
2. Although Wife and [REDACTED] had access to each others’ homes, it was for purposes such as a neighbor might fulfill, such as walking the other’s dog or caring for the home while the other was out of town. Wife also accessed [REDACTED] home to clean it, for which she was paid⁹. There was no evidence that either Wife or [REDACTED] used the other’s home for living purposes while the other was not present.

⁸ Id.

⁹ This particular fact was telling for the Court. Spouses do not generally pay one another for household chores as one would pay a maid.

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3. Wife and [redacted] periodically shared meals together, but the Court finds that the frequency of the dining together resembled that of any dating couple. The evidence did not establish that they ate together every evening or even on a regular basis as one would anticipate with a married couple.
 4. Wife testified that she stored a box or two at [redacted] home, but the Court does not find that this behavior is the "storage of personal items" contemplated by the appellate courts. The use of the word "personal" implies to this Court that the cohabitant must keep items such as clothing and toiletries (demonstrative of spending a significant amount of time in the other's residence). Merely using a friend's home, or even that of a boyfriend, to store extra pictures or old dishes, does not constitute "storage of personal items."
 5. There is no evidence that Wife and [redacted] engaged in any kind of joint decision-making.

Husband's attorney adduced a great deal of evidence to the effect that [redacted] attended a large percentage of the sporting events in which one of the parties' children participated. It was also well established that Wife vacationed with [redacted] on an almost annual basis, spending time with [redacted] family in Florida, and that [redacted] attended family functions such as a wedding. While this evidence shows that Wife clearly had a close personal relationship with [redacted] and that each was supportive of the other's family relationships, the Court cannot find that the evidence as a whole is sufficient to meet Husband's burden to show that the relationship was akin to that between husband and wife. Many people involved in a romantic relationship travel together and attend each other's family functions.

There is simply no evidence that this particular couple lived together, shared financial obligations, or engaged in joint activities to the extent that they should be deemed cohabitants.

SUBSTANTIAL CHANGE OF CIRCUMSTANCES

Having determined that alimony should not terminate on the basis of cohabitation, the Court now turns to the question of whether there has been a substantial change of circumstances such that alimony should be modified or terminated. The Court finds that at the time of the divorce, Husband worked for both Smith's and Rite-Aid as a pharmacist. Husband does not work at either position anymore, having lost one because he was told he could not moonlight for a competitor and quit the other because of issues with his supervisor. After five months of unemployment, Husband became a contract employee of CBS/Care Mart, where he worked until the end of his contract in July of 2011. At the time that this matter was heard, Husband was unemployed.

Wife argued that because Husband is still capable of being employed in the same capacity as he was at the entry of the Decree, there has been no substantial change of circumstances. The Court finds that while Husband has no physical disability, the facts do not support the contention that Husband will be able to find two jobs that permit him to earn at the same level he did when the parties divorced. It took Husband five months to find new employment when he left his position with Rite-Aid, and he is facing competition from numerous new graduates. The Court finds that the best measure of Husband's income is the full-time wage he earned as a contract employee from December of 2010 to July, 2011, which was \$9,186 per month. Because this is a significant reduction from Husband's previous income, the

Court finds that there has been a substantial change of circumstances such that the alimony award should be re-evaluated.

ALIMONY ANALYSIS

A. WIFE'S NEEDS

Although a financial declaration was submitted by Wife, Wife testified that a better statement of her monthly needs was the budget she gave in response to Husband's interrogatories. (Exhibit 6.) Wife's budget included significant sums that were paid monthly for support of the parties' college-aged son [REDACTED]. Both parties agreed that although it is a priority for them to assist Taylor with his education, these sums should not be considered in an alimony analysis. Deducting these sums, Wife's stated needs were \$3,740. Wife also testified that since answering the interrogatories (her answers were submitted in June of 2011), her expenses had increased due to her cancer treatment. Wife stated that the additional expenses would be \$200 - \$300 per month. The Court notes that in Wife's financial declaration, which was filed in July of 2011, Wife estimated her out-of-pocket medical expenses at around \$800. (Exhibit 44.) The Court is inclined to believe that \$300 is the appropriate figure for Wife's medical expenses, which gives Wife a total monthly budget of \$4,040. The Court finds these expenses to be reasonable and necessary to sustain Wife in the lifestyle to which she had become accustomed during the marriage.

B. WIFE'S ABILITY TO MEET HER OWN NEEDS

Since shortly after the divorce, Wife has been employed as a nurse, and her income has fluctuated based on the number of hours and types of shifts she has worked. Wife has never worked more than 32 hours per week. Husband argued that Wife is capable of working 40 hours

per week and that she should be imputed with a full-time wage, but the Court does not find this argument persuasive because of the language of the parties' Decree. The parties clearly contemplated that Wife would work less than 40 hours, and the alimony calculation was based on Wife working part time. The parties agreed that if Wife were to work more than 32 hours per week, the issue of alimony could be revisited, but she has not done so. As the parties themselves set the parameters of the alimony analysis with Wife working part-time, the Court is not inclined to change the paradigm at this juncture.

The Court finds that Wife's average gross monthly income since the divorce is \$3,848. Deducting 20% for taxes leaves Wife with a net monthly income of \$3,079. Therefore, Wife is \$961 short on being able to meet her reasonable monthly needs and is in need of alimony.

C. HUSBAND'S NEEDS

The Court has struggled with an appropriate calculation for Husband's monthly expenses. Husband submitted two different financial declarations, one based on his expenses while he was working and a second based on anticipated expenses during his period of unemployment. (Exhibit 19.) During Husband's cross-examination, it became clear that the figures in the second budget were more idealistic than actual and that Husband is likely still spending at a similar level to his period of contract employment. The Court also considers the fact that Husband is the sole support for his new wife, [REDACTED] No one offered any method to divide Husband's expenses from those of his current spouse or any evidence upon which the Court could base findings that separate the two.

The Court concludes that the best measure of Husband's expenses is the first financial declaration he submitted. Where Husband's ability is measured based on the time when he is

working, the Court finds that it is equitable that his spending be evaluated using the same time period.

The Court does find that some adjustments are appropriate. Specifically, the Court deducts \$100 from the food allocation, as Husband testified that this amount is attributable to the parties' adult son [REDACTED]. The Court is adding \$120 for Husband's MasterCard payment, but is not adding any of the other expenses itemized by Husband on page 4 of his financial declaration. These expenses are attorney fees, which the Court does not feel should be part of an alimony analysis, and expenses for [REDACTED] which the parties agreed should be excluded. Based on the foregoing, the Court finds that Husband's reasonable monthly expenses are \$5,681.

D. HUSBAND'S ABILITY TO PAY ALIMONY

As indicated in the section discussing the substantial change of circumstances, the Court finds that the best measure of Husband's current income capacity is the wage he earned as a contract employee, which is \$9,186. This is the most recent employment Husband had prior to the evidentiary hearing. Further, given that it took Husband five months to find a new job when he was unemployed before, the Court does not find that an unemployment period of three months (July through the hearing in October) is of such extent that the Court should attribute Husband with zero income.

The Court finds it appropriate to deduct 25% for taxes for Husband. Husband's pay stubs indicate that Husband was actually having roughly 30% withheld, but his bank records demonstrated that this level of withholding actually resulted in tax refunds totaling approximately \$13,000 in 2011. (See Exhibit 36). A 25% withholding rate leaves Husband with a net monthly income of \$6,890. Husband can pay his needs of \$5,681, with \$1,209 left over.

Husband has the ability to pay alimony to meet Wife's needs. Rounding Wife's needs, the Court finds it appropriate that Husband pay alimony at the rate of \$1,000 per month. As Husband filed his petition to modify in March, 2011, this new figure will begin April 1, 2011.

ARREARAGE AND CONTEMPT

On the issue of calculating Husband's arrearage, the Court begs the assistance of counsel because there is an inconsistency between the Court's notes from the evidentiary hearing and the Court's memory of the procedural history of the case. At the evidentiary hearing, Wife testified that Husband had not paid alimony since August of 2010. Husband gave no testimony to the contrary. Using this time frame, Husband owes \$1650 per month from September of 2010 through March of 2011, a total of \$8,250. Husband owes \$1,000 per month from April of 2011 through December of 2011, a total of \$9,000, for a grand total of \$17,250.

However, the evidentiary hearing was initially scheduled for July, 2011, but was continued on the condition that Husband would pay alimony until the Court ruled following the evidentiary hearing. In early September, Wife filed a request for an expedited order to show cause on the basis that Husband had not paid any alimony in August. It is the Court's recollection that at this point Husband submitted a copy of a check for August's alimony. There is nothing in the docket to verify this, nor is there any document filed in response to Wife's motion for an order to show cause. Based on the evidence, the Court believes that it is the appropriate amount owed by Husband is \$17,250. If counsels' collective memories or records can establish that there was an additional payment for which the Court has not given Husband credit, that amount should be reflected in the final order. Husband will be given 60 days from

the entry of the order to make arrangements satisfactory to Wife to repay the amount owed or the amount will be entered as a judgment.

The penultimate issue on which the Court must rule is that of contempt, and it is this issue with which the Court has struggled most. There are three elements that must be established in order for contempt to be found for failure to obey a court order: (1) that there was a valid, existing order of which the contemnor was aware; (2) the contemnor had the ability to comply with the order; and (3) the contemnor willfully failed or refused to comply with the order. These elements must be found by clear and convincing evidence. Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988) (citations omitted).

As a general rule, the Court has declined to find an individual in contempt for failing to pay a financial obligation when the individual is unemployed and is making a good faith effort to find work. The difficulty in this case is that Husband regained employment in December of 2010, but he did not re-commence his alimony payments. Husband had the ability to pay at least some support to Wife because he continued to financially support _____ although Husband acknowledged that he was court-ordered to support Wife and had no similar obligation with respect to Taylor.

Husband also testified that it was around the early part of 2011 when he believed that Wife began cohabitating. Even this reasoning, though, cannot justify Husband's failure to pay for two reasons. First, there was no evidence that anything changed in Wife's relationship with _____ such that it suddenly became "cohabitation" in the fall of 2010. It is much more likely that the change was due to Husband's employment status, not Wife's relationship. Second, the law does not permit a payor who suspects cohabitation to simply terminate alimony

payments on that basis. It is the payor's burden to prove cohabitation, and the alimony award remains the order of the court until such time as cohabitation has been established.

The Court is also concerned with Husband's failure to pay alimony in the months immediately prior to the evidentiary hearing, even though he obtained a continuance based on the specific promise that he would comply with the order in the interim. As noted above, it is possible that Husband made one payment for which he has not been given credit, but that does not excuse the other two payments that should have been made. The Court recognizes that Husband was unemployed at this point, but the Court feels that Husband should have made an effort to pay as an act of good faith because of the representations made to obtain the continuance.

Considering all of these facts, the Court is compelled to conclude that the elements of contempt have been established by clear and convincing evidence. For at least the time period of December, 2010, through July, 2011, Husband was working and had the ability to comply with the order. His failure to pay anything to Wife during this time is contemptuous. As a sanction for his contempt, Husband will pay a portion of Wife's attorney fees, as discussed below.

ATTORNEY FEES

Pursuant to UCA § 30-3-3, the Court may award attorney fees to the party who substantially prevails in any action to enforce a court order. In the present case, Wife prevailed on the issues of cohabitation and contempt. While Husband was successful in reducing the alimony award, the Court cannot find that he substantially prevailed on this issue because alimony was not terminated as he had requested. As alimony was reduced, the Court cannot find that Wife substantially prevailed on this issue either.

The Court finds that it is appropriate to award Wife a portion of her attorney fees because she has substantially prevailed on two of the issues and as a sanction for Husband's contempt. Wife's attorney is requested to submit an affidavit of attorney fees by January 10, 2012. The Court will issue a separate recommendation as to attorney fees after reviewing this affidavit.

CONCLUSION

Husband has not met his burden to establish that Wife was cohabitating such that alimony should be terminated, but he has demonstrated that there has been a substantial change of circumstances requiring a modification. Alimony is modified to the sum of \$1,000 per month beginning April, 2011, and absent counsels' agreement that there was a payment in August of 2011, Husband will owe Wife the amount of \$17,250. This amount will be entered as a judgment unless Husband makes satisfactory payment arrangements within 60 days from the entry of the order. Husband is found to be in contempt for failing to pay alimony during the time when he was employed, and he will pay a portion of Wife's attorney fees in a sum to be determined as a sanction for this contempt and because Wife substantially prevailed on two of the issues.

Once the Court has made a recommendation on attorney fees, Wife's attorney will be requested to prepare an order.

DATED this 21 day of December, 2011.



CATHERINE S. CONKLIN
Domestic Relations Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Recommendation was mailed, first-class, postage prepared, on this 21st day of December, 2011, to the following:

Brian E. Arnold
Attorney for Respondent
955 East Chambers Street, Suite 220
South Ogden, UT 84403



Tammy Anderson
Lead Deputy Clerk