

1987

Asper v. Asper : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870076-CA

IN THE COURT OF APPEALS

STATE OF UTAH

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ALFRED N. ASPER,	:	
	:	
Plaintiff, Appellant	:	
and Cross-Respondent,	:	
	:	
vs.	:	Case No 870076-CA
	:	
LANE A. ASPER,	:	District Court No. D85-2070
	:	
Defendant, Respondent	:	Category No.: 13b
and Cross-Appellant.	:	

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

APPEAL FROM DECREE AND JUDGMENT OF
THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE DAVID B. DEE, PRESIDING

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COURT OF APPEALS

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Plaintiff, Appellant	:	
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JURISDICTION

This is the response to an appeal and a cross-appeal from the Decree of Divorce entered in the Third Judicial District Court, Salt Lake County, State of Utah, on January 26, 1987. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Rules 3 and 4, Rules of the Utah Court of Appeals and Utah Code Ann. § 78-2a-3(2)(g), (1987).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. through IV.

The Statement of the Issues as presented by Plaintiff/Appellant is accurate so far as stated, but it fails to point out the main issue of the case. This issue is whether the trial court erroneously avoided the rightful award of alimony to Defendant/Respondent after the termination of twenty-seven years of marriage.

STATUTORY AUTHORITY

30-3-5 Disposition of property--Maintenance and health care of parties and children--Court to have continuing jurisdiction--Custody and visitation--Termination of alimony--Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties.

. . . .

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the

parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

Uniform Civil Liability for Support Act.

78-45-3 Duty of Man.

Every man shall support his child; and he shall support his wife when she is in need.

78-45-2(4) Definitions.

"Child" means the son or daughter under the age of eighteen years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.

STATEMENT OF THE CASE

This is a divorce case wherein the trial court ordered the husband to pay \$650.00 per month in child support until the parties' minor child reaches the age of twenty-five and awarded the wife \$1.00 per year alimony. Both awards are to be reviewed when the minor child reaches twenty-five. The husband is appealing the amount and duration of the child support awards as well as the award of attorney's fees. In addition, he is appealing the inclusion of amounts representing the estimated real estate commission and closing costs in determining his interest in the marital home's equity. The wife is cross-appealing the alimony provisions.

This was a twenty-seven year marriage, (Record p.25.) in which Mrs. Asper worked during the first couple of years to

assist her husband in earning his masters degree in engineering. (Id.) While Mrs. Asper has worked throughout her marriage, she has never received any formal education and is not qualified for anything but unskilled employment. (Id.) She is currently working for her brother, and her net income is approximately \$1,100.00 per month. (Record p.66.) Her expenses are \$2,095.00 per month. (Record p. 22, ll. 11 through 14.) On the other hand, Mr. Asper earns a gross monthly salary of \$3,326.27. (Record p. 66.) His net income is \$2,400.00 per month, (Record p. 144, ll. 2-7), with the inclusion of the amounts Mr. Asper has voluntarily authorized be directed to a savings account. (Record p. 141, l. 20 through p. 142, l. 5.)

In addition to her lack of training and formal education, Ane Asper is only able to work part time due to the special needs of her minor daughter, Connie. (Record p. 25, ll. 22-24.) Connie Asper, a seventeen year old child of the parties, is inflicted with juvenile rheumatoid arthritis resulting in significant deformity and limited mobility. She is incapable of gainful employment without further education in specialized job skills. (Record p. 8, ll. 15 through 23.)

During the pendency of the divorce proceedings, the parties stipulated through counsel (Mr. Asper's first attorney) to temporary support and therefore no order was issued. Mr. Asper agreed to pay \$250.00 per month temporary child support and also to make the \$330.00 per month mortgage payment on the parties' home. (Record p. 143, ll. 10-13.) Later, Mr. Asper unilaterally

decided to discontinue making these payments, and as a result, Mrs. Asper's counsel requested and received an order that any alimony and child support be retroactive to September 16.

(Record p. 143, ll. 10-20.)

The parties came before the Honorable David B. Dee on two separate occasions--September 16, 1986 and November 20, 1986. At these hearings, the court only received evidence proffered by way of stipulation of the parties, and as a result, there was no testimony taken other than to establish grounds for the divorce. Mrs. Asper contended that she needed \$700.00 per month from Mr. Asper in order to maintain a decent standard of living for herself and her daughter. (Record p. 144, l. 25 through p. 145, l. 5.) She requested \$350.00 per month in alimony and \$350.00 per month child support. (Record p. 128, l. 2.) Although recognizing the financial needs of Mrs. Asper, the court expressed concern that if alimony were awarded, it would go on forever. For example, the court stated:

The Court: You're talking--you're talking
 me to a position where you're
 talking about alimony. And
 that's why I said because of
 this position your client is
 taking, alimony goes on
 forever.

. . . .

The Court: The Supreme Court doesn't let
 us do what we used to do.
 Unless we can find some way to
 go around what they ruled,
 alimony is given to somebody
 for five years, say until this
 child is 18 or 21, five years

would be 22, and then ceases,
because the situation has been
adjusted so the child is now
an adult. It goes on forever--

. . . .

The Court: --unless she gets remarried.
And that's because Justice
Durham thinks women have had
the short end of this so many
years it's time to get even.
So when you start tampering
with alimony, you're talking
about a forever proposition.
It never ends. When your
client is 99, your client will
still be paying alimony. If
you get into that box, you're
still in it. That's what I
said to you when we were
talking informally, out of the
presence of your clients,
otherwise you'll have a
problem that will last forever.
And she doesn't mind.

(Record p. 132, l. 14 through p. 133, l. 11.) At the conclusion
of the two days of hearings, the court took the matter under
advisement. (Record p. 149, l. 22 through p. 150, l. 12.)
Thereafter, Mr. Asper was ordered to pay \$650.00 per month child
support and \$1.00 per year alimony. (Record p. 79.)

In addition, the court awarded Mrs. Asper the parties' home
subject to the mortgage which she must assume and pay. (Record
p. 82.) Mr. Asper was awarded a lien on the property for one-half
of the equity in the home as of the date of the divorce after
allowance was made for payment of estimated real estate commis-
sions and closing costs. (Id.) This equity is due upon the first
to occur of the following: sale of the home, Mrs. Asper's

remarriage, or when the parties' minor child reaches the age of twenty-five years. (Id.)

In addition, the court awarded Mrs. Asper \$6,000.00 in attorney's fees. (Record p. 83.) This sum was the result of the time and effort required by Mrs. Asper's counsel due to Mr. Asper's employment of three separate attorneys prior to trial. (Record p. 138, ll. 16-23.) Evidence was presented by affidavit as to the reasonableness of the amounts charged as well as the amount of time required. (Record p. 140, ll. 12-19.) At no time did Mr. Asper's attorney object to either.

SUMMARY OF ARGUMENTS

I.

The trial court did consider sufficient evidence and did make detailed findings of facts as to the parties' minor child's physical disabilities and inability to support herself after the age of majority.

II.

At all times material herein, the parties agreed to equally divide the equity in the marital home at the time of the divorce, and Mr. Asper agreed to accept a lien for this amount. The inclusion of the real estate commission and closing costs in determining the value of the lien was within the sound discretion of the trial court. Mr. Asper cannot now request the parties' marital home be appraised at the time of sale to determine his one-half interest.

III.

The award of attorney's fees to Mrs. Asper was correctly based on her financial need in defending this action, and they are reasonable under the circumstances surrounding this case.

IV.

With regard to the cross-appeal, this was a twenty-seven year marriage wherein Mrs. Asper worked to help her husband obtain his master's degree in engineering. She, however, has no formal training and is only qualified for unskilled employment. In awarding \$650.00 per month child support, the trial court showed it recognized the overall financial needs of Mrs. Asper (her proffer was \$700.00 per month), but the classification of the entire sum as child support was a result of the court's efforts to protect Mr. Asper from what the court erroneously perceived was the permanence of alimony. Mr. Asper should be required to pay \$350.00 per month child support to be reviewed when the parties' minor child reaches a specified age, and \$350.00 per month alimony.

V.

As Mr. Asper's arguments on appeal are without merit, and his position has required Mrs. Asper to cross-appeal the division of the total award between child support and alimony, Mrs. Asper is entitled to an award of her attorney's fees and costs associated with this appeal.

ARGUMENTS

POINT I

THE EVIDENCE AND FINDINGS OF FACTS SUPPORT THE TRIAL COURT'S AWARD OF CHILD SUPPORT AND INSURANCE PROGRAMS TO AGE TWENTY-FIVE.

A trial court has broad equitable authority to order support for a child over eighteen years of age who cannot earn a living and is without sufficient means of self support. The Uniform Civil Liability for Support Act requires every man to support his child in Utah Code Ann. § 78-45-3 (1987), and defines "child" as "a son or daughter under the age of eighteen years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means." Utah Code Ann. § 78-45-2(4). As summarized by the Utah Supreme Court in Garrand v. Garrand, 615 P.2d 422 (Utah 1980), this code section:

[E]xpressly fixes responsibility for support of a child (of whatever age who is incapacitated from earning a living and without sufficient means) upon his parents. . . . [T]his court has recognized that when a child is so limited, either physically or mentally, that he is unable to support himself when he reaches his age of majority, his parents may be required to provide support beyond that time. Id. at 423 (footnotes omitted).

In addition, pursuant to Utah Code Ann. § 30-3-5 (1953), the court has broad equitable powers in "safeguarding the interest and welfare of children." Dehm v. Dehm, 545 P.2d 525, 528 (Utah 1976). In the case presently before this court, Appellee, Ann Asper, concurs with Alfred Asper in that, because the court's authority is discretionary, there must be specific findings of

special or unusual circumstances justifying such an award beyond the age of majority. Indeed, support awarded beyond the age of twenty-one has been reversed for failure of the trial court to make such specified findings. See, Harris v. Harris, 585 P.2d 435 (Utah 1978); and Carlson v. Carlson, 584 P.2d 864 (Utah 1978).

However, contrary to Alfred Asper's contentions, Judge David B. Dee did make the requisite findings of special or unusual circumstances, and these were based upon adequate evidence before the court. The trial court accepted into evidence a letter outlining Dr. John Ward's professional opinion of Connie Asper's physical ability to support herself, and Mr. Asper did not object to the admission of this letter in lieu of Dr. Ward's testimony at the hearing. (Record p. 127, ll. 15 thru 18.). Dr. Ward is a professor of medicine at the University of Utah and is Chief of the Division of Rheumatology. He has been involved in the treatment of Connie's condition since 1974. This letter is a detailed outline of Connie's condition. In pertinent part it reads:

Connie Lynne Asper is a 16 year-old student who I have followed since 1974 for juvenile rheumatoid arthritis. Connie continues to have evidence of chronic active arthritis with significant deformity, she has involvement of hands with incomplete fist formation, wrists with limited mobility, reduction of shoulder motion, very limited cervical spine [neck] motion with essentially no ability to extend the neck and rotation limited to 30 degrees, limited extension of the hips, limited mobility of knees, swelling and

tenderness of the ankles, and forefoot deformity.

While Connie is capable of self-care and usual activities, it is unlikely that she can be competitively employed in the current job market. Her physical disabilities would limit her to a very sedentary position and stamina and dexterity would be sincerely limited. Therefore, it is my opinion that Connie should be considered permanently disabled pending such time that she is able to gain specific job skills through an educational process which will prepare her for competition in the job market.

Based upon this expert opinion by a doctor personally involved in treating Connie for over twelve years, Judge David B. Dee made the following statements in the Findings of Fact and Conclusions of Law:

3. The parties to this action are the parents of three (3) children, one of whom is under the age of majority, Connie Lynne Asper, a female, age 17, born September 19, 1969, and who currently resides with Defendant. Since 1974, Connie has been and is now afflicted with juvenile rheumatoid arthritis, with significant deformity of hands, fists, wrists and feet, and with limited mobility of shoulder, neck, hips and knees and, as such, the Court finds that she is permanently disabled and is not able to be competitively employed in the current job market, and Connie should be considered permanently disabled pending such time that she is able to gain specific job skills.

4. Plaintiff earns a gross monthly salary of \$3,326.27, and should pay \$650.00 per month child support to Defendant for the benefit of Connie, who has special needs, until she reaches the age of twenty-five (25), with the first payment to be made on September 16, 1986, and like payments on the 15th day of each month thereafter.

Therefore, evidence was considered by the trial court and findings of special circumstances duly noted. In addition, while the Findings of Fact and Conclusions of Law expressly provide for review of this award when Connie reaches age twenty-five, Utah Code Ann. § 30-3-5(3) (1953), provides for the court's continuing jurisdiction to modify child support awards at any time. Therefore, should Connie become self-sufficient and able to earn a living prior to her twenty-fifth birthday, the support award can be modified at that time. As a result, the award of child support to Connie Asper until she reaches the age of twenty-five was not an abuse of discretion and should be upheld on appeal.

POINT II

THE COURT DID NOT ERR IN CALCULATING THE EQUITY IN THE MARITAL HOME.

Mr. Asper's argument in appealing the award of equity in the marital home is confusing. He begins by claiming as error the inclusion of one-half of the estimated real estate commissions and closing costs in the determination of his interest in the equity. Mr. Asper then concludes with a request that the Decree be amended to award him one-half of the actual sale price of the home. However, the inclusion of the commissions and closing costs is within the discretion of the trial court, and the court did not abuse its discretion in this case. In addition, at no time prior to this appeal has Mr. Asper requested one-half of the sale price of the home. Because claims not raised at trial cannot be considered on appeal, Mr. Asper cannot now raise this issue.

At all times material herein, the parties agreed to divide equally at the time of trial the equity in their home. The parties also agreed that Mr. Asper would receive an equitable lien representing his one-half share. First, the complaint filed by Mr. Asper only requested the following:

10. The parties acquired a home and lot located [at] 1332 Colonial Drive, Salt Lake City, Utah. Defendant should be awarded the use and possession of said home subject to an equitable lien in Plaintiff to be paid upon the happening of the following triggering events: Defendant's remarriage or cohabitation with a man not her spouse; upon the youngest child reaching the age of 18; Defendant's ceasing to use the property as her primary residence; sale of the property. In the event of Defendant's death, said home should be awarded to Plaintiff. Defendant should also hold Plaintiff harmless from any and all indebtedness owing on said property.

(Record p. 3-4 (emphasis added).) Then, at trial, Mr. Asper repeated his offer and a request for a present valuation of the equity in the home. His counsel stated:

MR. GUYON: . . . Essentially Mr. Asper's interest in the home would be determined right at the present time in the form of a lien which would be payable upon any contingencies of course the Court wants to impose.

(Record p. 131, ll. 4-8 (emphasis added).) The final division of the possession and equity of the marital home reflected Mr. Asper's requests and position at trial.

Defendant should be awarded the home, subject to the mortgage which Defendant should pay as the same becomes due, and Plaintiff should have a lien against the property for one-half

of the equity, after allowance for payment of real estate commissions and closing costs calculated at 8 % of the present value of the home, or a lien in the amount of \$35,214.50 for his share of the equity. Plaintiff's equity shall be due upon whichever of the following events first occurs: sale of the home, Defendant's remarriage, or when Connie reaches the age of twenty-five years. Plaintiff's lien shall not bear interest.

(Record p. 70 (emphasis added).) This final disposition of the equity is consistent with Mr. Asper's position throughout the proceedings. At no time did he request the house be valued at the time of sale, and he cannot now raise this issue on appeal. As reiterated by the Utah Supreme Court in Bangerter v. Poulton, 653 P.2d 100 (Utah 1983), "It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal." Id. at 102.

Therefore, Mr. Asper cannot request one-half of the sale price of the parties' marital home. In addition, the trial court did not err in calculating the amount of Mr. Asper's lien. As the parties agreed to evenly divide the equity subject to mortgage payments made by Mrs. Asper, fairness requires that the parties both assume one-half of the financial obligations upon sale of the home. Therefore, the trial court did not err in calculating the parties' respective interests in the marital home, and its decision should be upheld on appeal.

POINT III

IT WAS NOT AN ABUSE OF DISCRETION TO AWARD
MRS. ASPER \$6,000.00 IN ATTORNEY'S FEES.

Courts have the authority, pursuant to Utah Code Ann. § 30-3-3 (1953) to award sums so as "to enable such party to prosecute or defend the action." There are threshold requirements for such an award, and these were outlined by the Utah Supreme Court in Beals v. Beals, 682 P.2d 862 (Utah 1984). There the court stated:

In divorce cases, awards of attorney's fees must be supported by evidence which shows that the requested award is reasonable. Relevant factors of reasonableness include 'the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates commonly charged for divorce actions in the community.' Also, the party requesting the award must show financial need. Where reasonableness of the award or financial need have not been shown, we have reversed awards of attorney's fees.

Id. at 864 (citation omitted). Therefore, there are two basic requirements necessary for an award of attorney's fees: (1) Reasonableness, and (2) financial need. Both of these factors have been met in the present case. Mrs. Asper's counsel, Frank J. Gustin, submitted an affidavit as to the activities undertaken on behalf of Mrs. Asper. These included document preparation, client conferences and hearings. The rates charged were equal to those commonly charged for divorce cases in Salt Lake City, Utah, by attorneys with equal experience and expertise. Extra hours were required in this case due to Mr. Asper's need to employ

three different attorneys prior to trial. Mrs. Asper was in no way responsible for these circumstances but has incurred detriment as a direct result thereof. To compensate for this unusual factor, Mrs. Asper's counsel suggested that the amount of attorney's fees be paid out at the time the house is sold and the equity divided. (Record p. 145, ll. 6 thru 21.)

Finally, evidence was presented that Mrs. Asper's monthly net income, at \$1,100.00, (Record p. 144, l. 25) was insufficient to meet her monthly expenses of \$2,095.00. (Record p. 141, ll. 11 thru 14.) On the other hand, Mr. Asper earns a gross monthly salary of \$3,326.27. While his statement of expenses was challenged as inflated by Mrs. Asper at the hearing, (Record p. 142, l. 11 through p. 25, l. 11), he is at least comfortably able to meet his expenses. As a result, Mrs. Asper did establish the requirements of reasonableness and financial need, and, therefore, it was not an abuse of discretion to award her attorney's fees to assist her in defending the action brought by Mr. Asper.

CROSS-APPEAL

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD ALIMONY TO MRS. ASPER.

Alimony is awarded in an effort to, as nearly as possible, maintain the standard of living enjoyed by the parties during the marriage. The court must consider all relevant factors affecting one spouse's ability to provide for herself and the other's ability to pay support. As summarized by the Utah Supreme Court

in Olson v. Olson, 704 P.2d 564 (Utah 1985):

An alimony award should, as far as possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage. In determining the amount of alimony to be awarded, it was necessary for the trial court to consider the financial condition and needs of the plaintiff, her ability to produce a sufficient income for herself, and the ability of the defendant to provide support.

Id. at 566 (footnotes omitted). Pursuant to this standard, the lower court abused its discretion in failing to award alimony to Mrs. Asper.

Evidence was provided through documentation and at the hearing to show Mrs. Asper's need for additional support and Mr. Asper's ability to so provide. Mrs. Asper currently works thirty hours per week and makes \$1,100.00 per month. Her expenses total \$2,095.00 per month. She is unable to work full time due to the care required by her daughter Connie who has juvenile rheumatoid arthritis. (Record p. 25, ll. 22-24.) Mr. Asper earns a gross monthly salary of \$3,326.00, and his net income is \$2,400.00 (Record p. 138, ll. 10-12) with the inclusion of amounts Mr. Asper has chosen to divert to savings for his pension fund. (Record p. 141, ll. 20-23.) His claimed expenses were disputed as inflated by Mrs. Asper. (Record p. 142, l. 11 through p. 144, l. 1.)

Based on these figures, Mrs. Asper requested \$350.00 in child support (Record p. 128, l. 2) and \$350.00 in alimony for a total award of \$700.00. (Record p. 144, ll. 2-4.) Instead, Judge

Dee decided to award \$650.00 in child support for Connie to the age of twenty-five. This award shows that while recognizing Mrs. Asper's overall financial needs, the court was reluctant to award alimony. Statements by the court suggest this decision was the result of the court's effort to avoid what it perceived was the permanency of alimony. At the hearing, the court expressed concern about its erroneous assumption that an alimony award goes on forever:

THE COURT: . . . But I think the law in the State of Utah is if you award alimony, and I'm not talking about special circumstances, and this is a special circumstance with a disabled child, you never get off of it. It doesn't matter what you think about it. That's the position I'm going to take in this case.

. . . .

THE COURT: So if you talk about alimony, you're talking about forever.

(Record p. 133, ll. 17-25.) Mrs. Asper respectfully points out that this is not a correct summary of the law. Instead, under Utah Code Ann. § 30-3-5, an award of alimony for an unspecified period of time continues until automatically terminated by remarriage or co-habitation. In addition, under Utah Code Ann. § 30-3-5(3) (1953), the court retains jurisdiction to modify an alimony award when there has been a material change of circumstances. As a result, a party is never permanently locked into paying alimony. In this case, it appears from the record that the court's misconstruction of alimony law led him to fashion the unique child support and alimony award of \$650.00 per month and

\$1.00 per year respectively. This decision was an abuse of discretion in light of Mrs. Asper's circumstances. Her expenses exceed her income by \$995.00. She cannot work more hours as she must help Connie with the ordinary function of day-to-day living. In addition, this was a twenty-seven year marriage. When the parties were first married, Mrs. Asper worked to help Mr. Asper get his master's degree in engineering. While she continued to work throughout her marriage, she does not have any formal education; and, therefore, she is only qualified for unskilled employment.

The failure to award extended alimony in a similar situation was held to be an abuse of discretion in Olson v. Olson, 704 P.2d 564, (Utah 1985). In Olson, the parties had been married for twenty-three years and had six children, three of whom were minors. Mrs. Olson had no formal education and had no work experience. The court awarded her \$1,600.00 per month alimony for a period of two years. On review, the Utah Supreme Court stated:

We agree, however, with the plaintiff's contention that the court's order that alimony terminate after two years was a clear and prejudicial abuse of discretion. As we stated in Jones v. Jones, '[t]his is simply not the sort of situation in which a decreasing rehabilitative alimony award is appropriate.' Married soon after graduation from high school, the plaintiff's primary occupation during the twenty-odd year marriage, was caring for the parties' home and six children. Having worked only minor clerical jobs for two brief periods over twenty years apart,

she has no reasonable expectation of obtaining employment two years hence that will enable her to support herself at a standard of living even approaching that which she had during the marriage. Continuing spousal maintenance is mandated by these circumstances. Therefore, under our discretionary power to modify the final decree in a divorce action, we hereby modify the decree of divorce in this case to provide for permanent alimony from defendant to plaintiff. Against should the circumstances change in the future, the defendant may petition the court to modify the decree under its continuing jurisdiction.

704 P.2d at 567 (emphasis added). Olson is applicable to the case now before this Court. While Mrs. Asper does have work experience, she does not have a formal education so as to get a job in order to maintain her accustomed standard of living or even to meet her monthly expenses. Further, unlike Mrs. Olson, she has a daughter who needs extra time and attention, thus precluding many job opportunities. Therefore, given all of the circumstances of this case, it was an abuse of discretion to fail to award alimony to Mrs. Asper.

This Court has the authority to determine and award a substitute remedy for that of the trial court's. Pursuant to Rule 30(a) of the Rules of the Utah Court of Appeals this Court is empowered to modify any judgment or order from which a party appeals. In Penrose v. Penrose, 656 P.2d 1017 (Utah 1982) the Utah Supreme Court discussed the nature of their authority to modify judgments:

It is the duty and preogative of this Court in equity matters, where the occasion warrants, and after a review of both the facts and the

law, to fashion its own remedy as a substitute for the judgment of the trial court, but that court's actions should only be disturbed to prevent manifest injustice.

Id. at 1019. In view of the practical implications resulting from the labels given to support awards, and under the facts in this case, Mrs. Asper requests the court to modify the trial court's total financial award and order Mr. Asper to pay \$350.00 per month child support and \$350.00 per month alimony. This division would be consistent with Mrs. Asper's overall financial need as well as the total support award ordered by the trial court.

POINT V

RESPONDENT ANE ASPER IS ENTITLED TO
AN AWARD OF HER ATTORNEY'S FEES AND
COSTS ASSOCIATED WITH THIS APPEAL.

Mr. Asper's appeal of the trial court's decision on the awards of child support to age twenty-five, the equity in the marital home and attorney's fees is without merit. In addition, it was clear that the trial court recognized the overall financial need of Mrs. Asper to be in the range of \$700.00 as requested by her at trial. Therefore, Mr. Asper's appeal of the total financial award is also without merit. To defend against the allegation that the court award of child support was excessive, Mrs. Asper was pressed to cross-appeal the alimony provisions and request this court to modify the division of the total award between child support and alimony. Therefore, Mrs. Asper requests this court to award her attorney's fees associated with this

appeal. As the Utah Supreme Court concluded in Carter v. Carter, 584 P.2d 904 (Utah 1978):

However, the defendant argues that inasmuch as the plaintiff was unwilling to abide by the trial court's judgment, and that she has been put to the necessity of defending this appeal, the plaintiff should have to bear the costs thereof, including reasonable attorney's fees for her counsel. We agree with the reasonableness and propriety of her request.

Id. at 906 (footnote omitted). (See also, Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977).)

In this case, Mrs. Asper has an income of \$1,100.00 per month, \$995.00 less than her monthly expenses. Mr. Asper nets approximately \$2,400.00 per month. The trial court recognized the appropriateness of a total financial award to Mrs. Asper of \$650.00 per month. As a result, fairness requires that Mrs. Asper not be required to deplete her limited assets in demonstrating that this appeal is without merit. Therefore, Mrs. Asper requests this court to remand to the trial court for determination of an award of her attorney's fees and costs associated with this appeal.

CONCLUSION

This started out as a simple divorce case. The parties were married for twenty-seven years and have a minor child who is disabled by arthritis. Mrs. Asper helped her husband obtain his master's degree, and as a result Mr. Asper nets \$2,400.00 per month by way of income as an engineer at Hill Air Force Base. Mrs. Asper has no formal education, and she currently works for

her brother. Her net income is \$1,100.00 per month, and her expenses are \$2,095.00 per month. The court found and concluded that Mrs. Asper needs \$650.00 per month support from her husband.


While the facts are straightforward, the case has not been; and Mrs. Asper requests this Court to put an end to the unwarranted time, money and energy devoted to it as a result of Mr. Asper's efforts to avoid his financial responsibilities. Prior to trial, Mr. Asper employed three separate attorneys in this effort, thus hampering consistency and causing increased legal fees for Mrs. Asper. The trial court's legal misconceptions led to a convoluted division of support award between child support and alimony even though the overall financial award was reasonable in view of the needs of Mrs. Asper and her disabled minor daughter who turned eighteen on September 19, 1987.

This Court should modify the total financial award to provide for \$350.00 per month in child support to be reviewed as provided by the trial court when Connie reaches the age of twenty-five years and to award her \$350.00 per month in alimony. In addition, Mrs. Asper requests that this Court affirm the trial court on all other issues and award her the attorney's fees incurred herewith.

RESPECTFULLY submitted this 15 day of October, 1987.

GUSTIN, GREEN, STEGALL & LIAPIS

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MAILING CERTIFICATE

I hereby certify that on this 15th day of October, 1987, I mailed four true and correct copies of the foregoing Brief of Respondent and Cross-Appellant, by placing such in the United States Mail, at Salt Lake City, Utah, postage prepaid and addressed to:

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