

## 2018 CASE LAW UPDATE

### **Bart J. Johnsen**

#### ***Sauer v. Sauer, 2017 UT App 114.***

The Court of Appeals affirmed the trial court's order awarding wife alimony based upon the trial court's determination that wife had reasonable ongoing needs greater than her needs during the period of separation. The Court of Appeals found it reasonable that the trial court determined that wife's claimed actual expenses were insufficient due to her living with a friend during the separation. The trial court imputed income to wife and imputed expenses to determine alimony. The Court of Appeals noted that it is appropriate that the trial court consider expenses at the time of separation rather than during the pendency of the matter. In affirming the trial court's determination that wife did not dispose of husband's property, the Court of Appeals articulated that the standard of proof in that regard is preponderance of the evidence, but the trial court is not bound to believe a party or his evidence just because the evidence was uncontested.

#### ***Christensen v. Christensen, 2017 UT App 120.***

The Court of Appeals remanded the issue of whether former wife's alimony would terminate based upon cohabitation because the trial court relied on the legally irrelevant factor of whether former wife and her boyfriend met the statutory definition of a common law marriage. Wife and boyfriend testified that they shared a residence and had a sexual relationship but the trial court refused to terminate because they had not held themselves out as married or acquired a general reputation as being married and did not share expenses. The Court of Appeals affirmed the trial court's determination to modify the alimony award based upon a change in circumstances and affirmed the trial court's determination that former husband does not have a "constitutional right to retire" and thus imputed income to him consistent with his historical earnings. The trial court reduced former wife's alimony by the amount she was receiving from former husband's pension but made the effective date the date of trial. The Court of Appeals rejected former husband's argument that if a spousal support order is modified it must be effective the month after service by stating that the statute allows the trial court discretion as to the effective date of modification.

#### ***Chesley v. Chesley, 2017 UT 127.***

The Court of Appeals vacated the trial court's alimony award and remanded for adequate findings on all the required factors. Although the trial court made findings on many of the required factors the findings were insufficient to support the alimony award. The findings must be specific and address each factor to allow adequate review. The findings are inadequate if they fail to include subsidiary facts and disclose the steps taken.

#### ***Rule v. Rule, 2017 UT App 137.***

The Court of Appeals reversed and remanded on the trial court's alimony award for its failure to make findings as to the needs of the parties based upon the marital standard of living. Although each party presented evidence of their needs based upon the marital standard of living, the trial court failed to make findings as to those needs, instead relying on the needs at the time of trial because the trial court found there was insufficient income to meet the needs based upon the marital standard of living. As such, the trial court eliminated all voluntary and discretionary expenses and awarded alimony to wife. Along with her imputed income and child support, the alimony award left wife with a monthly shortfall whereas husband had exactly enough to meet his expenses. The Court of Appeals held that the trial court abused its discretion by failing to determine the marital standard of living and evaluating alimony in light of that standard and by failing to equalize the parties' post-divorce standards of living. Alimony is not limited to providing basic needs but should be fashioned to consider the parties' customary and proper status or circumstances. The trial court must fashion alimony in light of those factors and not based upon the actual expenses that might be lower during the period of separation. The Court of Appeals notes that in the future, the recipient spouse is not able to attempt to modify alimony upward if the trial court fails to determine what alimony would be if there were sufficient funds to allow each party that standard of living. After determining the marital standard of living, if there are insufficient resources, the trial court may then "equalize the poverty." Failure to engage in that analysis is reversible error and in this case the Court of Appeals reversed and remanded.

***White v. White, 2017 UT App 140.***

The Court of Appeals affirmed the trial court's determination that former husband was not entitled to a homestead exemption in a home owned by an LLC that he was awarded in the divorce. Former husband failed to pay his divorce obligations and former wife obtained a judgment. She executed the judgment on real property that was owned by an LLC owned by husband. Husband claimed a homestead exemption and the trial court denied his claim. A homestead exemption is a statutory right which sets forth that an individual may claim an exemption if the property is the personal residence of the individual. The Court of Appeals noted that although the exemption may attach to either title or possession, mere possession, without ownership, confers no exemption. An LLC is not an individual and as such cannot assert an exemption.

***DeAvila v. DeAvila, 2017 UT App 146.***

The Court of Appeals affirmed the trial court's ruling that a vehicle purchased during the marriage was a marital asset and that the trial court did not err in determining that stock acquired during the marriage was without value based upon husband's testimony. During the marriage the parties acquired a vehicle which wife claimed was a gift to her. The trial court determined that husband's evidence showing that the vehicle had been acquired during the marriage and had been originally titled in joint names weighed heavily against wife's claim that because it was titled in her name at the time of trial that it was conclusively a gift to her. At some point the vehicle was destroyed and the insurance proceeds were received by wife. Wife claimed that even if the court did not determine the vehicle was her separate property she should still be awarded the proceeds because she alleged that husband destroyed the vehicle and as such his claim to the proceeds was

barred by the collateral source rule. The collateral source rule stands for the proposition that a wrongdoer's obligation to pay to the victim should not be reduced by the victim's compensation from another source. The Court of Appeals indicated that wife had failed to explain how that rule would apply in a divorce action when the alleged tortfeasor has an ownership in the damaged property. As for the valuation of the stock, wife claimed that the stock had value and asserted that the trial court was required to value the stock at what she claimed and award the stock to husband and make him pay her money. The Court of Appeals rejected her claim by noting that husband's testimony that the only asset of the company was a lawsuit wherein the attorneys had withdrawn and that it had no other value was based upon his personal knowledge. The Court of Appeals noted that wife firmly argued that she should not be awarded any stock but that husband should pay her cash.

***MacDonald v. MacDonald*, 2017 UT App 136.**

The Court of Appeals affirmed the trial court's determination that former husband failed to demonstrate a material and substantial change in circumstances that was not foreseeable at the time of the entry of the decree and denied his petition to modify alimony. In the divorce decree, wife was awarded certain vacant lots as part of the property division. Subsequently, wife sold the lots and invested the proceeds in an account that generate income that she did not have at the time of the decree. Husband sought to modify alimony based upon wife's receipt of income that she did not have when the alimony was ordered. Husband argued that *Bolliger* stood for the proposition that there must be evidence that the change was actually foreseen at the time of the order. The Court of Appeals determined that the plain language of the statute says that the "change in circumstances [was] not foreseeable at the time of the divorce." Construing the plain language, the Court of Appeals rejected the interpretation that the change must be actually foreseen rather than merely foreseeable. The Court of Appeals noted that the statute was amended in 1995 and the *Bolliger* court did not address whether that amendment altered the standard and as such, because the standard was altered, *Bolliger* is not controlling for the current statute. Applying this standard, the Court of Appeals held it was hardly a stretch to foresee that wife would sell the real property and invest the proceeds and that investment would provide income to her. As such, because it was foreseeable at the time of the decree, wife's income is not a material change in circumstances sufficient to support a modification of the decree of divorce.

***Nicholson v. Nicholson*, 2017 UT App 155.**

The Court of Appeals affirmed the trial court's termination of former wife's alimony obligation to former husband based upon her retirement. The parties decree of divorce that required wife to pay alimony to husband contained a specific provision that wife's future retirement would be a basis for modification or termination of her alimony obligation. The trial court determined that based upon husband's current expenses and current income he had no unmet needs and terminated alimony. The Court of Appeals held that once the court has determined that modification is appropriate, *i.e.*, that there has been a material change in circumstances not

foreseeable at the time of the decree (or here where it was contemplated that retirement would be a change) then the trial court must evaluate the alimony factors at that time. Husband argued that the trial court erred by analyzing his needs at the time of trial rather than using his unmet needs from the decree. Husband argued that his unmet needs was *res judicata*, but the Court of Appeals rejected that argument noting that divorce decrees are subject to modification if there is a substantial change in circumstances. The trial court determined that husband had no unmet needs and as such terminated alimony without determining wife's ability to pay. The Court of Appeals reiterated that if there are not unmet needs then the payor spouse's ability to pay is irrelevant. The Court of Appeals also rejected husband's argument that the trial court was required to award him alimony based upon the marital standard of living at the time of the divorce decree not based upon his standard of living at the time of the modification. The Court of Appeals noted that the statute specifically states "as a general rule the court should look to the standard of living existing at the time of separation," but that it further states that as an exception to the general rule the court "may, in its discretion, base alimony on the standard of living that existed at the time of trial." The Court of Appeals held that it was within the trial court's discretion to base alimony on the standard at the time of modification.

***Vanderzon v. Vanderzon*, 2017 UT App 150.**

The Court of Appeals affirmed the trial court's order that wife and children would relocate to within 25 miles of husband but if she did not then the children would reside with husband until such time as she relocated. Although prior to trial wife had consistently indicated that she would not relocate to the same state where husband resided, she ultimately agreed to do so at trial. Wife appealed the 25 mile radius arguing that the requirement infringed on her constitutional rights to travel and to parent. She argued that she has a constitutional right to live where she wants and to parent how she sees fit. The Court of Appeals held that the 25 mile requirement did not subject her to a continuing risk of forfeiting primary custody, *i.e.*, wife claimed that husband could move out of the radius and take the children, because the order required her to relocate into that radius but that in the event something changed later, that would be the subject of a petition to modify. The Court of Appeals rejected the constitutional argument by noting that it was not preserved and that it did not constitute plain error. The Court of Appeals reversed the trial court's award of alimony by noting that the trial court used gross income for wife and net income for husband and then equalized the income which left wife with greater unmet needs than husband. It is reversible error to not equalize the shortfall. The Court of Appeals affirmed the trial court's determination to not award attorney fees.

***Scott v. Scott*, 2017 UT 66.**

The Supreme Court reversed the Court of Appeals' determination that a petition to terminate alimony based upon cohabitation was timely when the alleged cohabitation had ceased prior to the petition being filed. Stating that it was required to revisit the question that gripped the nations' attention in 1999, the Supreme Court reiterated that "is" means "is" and not "was" or "has

been.” Ex-husband petitioned for termination of alimony based upon cohabitation approximately six months after ex-wife and her boyfriend had broken off their relationship. The trial court found that the ex-wife had cohabitated and terminated alimony effective the date the trial court determined the cohabitation began (the date of a cruise which the Court of Appeals reversed). On appeal to the Court of Appeals, ex-wife argued that the petition was not timely because it was brought after the alleged cohabitation had ceased. The Court of Appeals determined that although the language of the statute clearly used the word “is” that the legislature could not have intended it to be considered the present tense. The Supreme Court reversed by stating that the best evidence of the legislature’s intent is the plain language and the plain language says “is.” The Supreme Court determined that ex-wife was not entitled to attorney fees in defending the petition to terminate alimony based upon Utah Code section 30-3-3 because the plain language of the statute says it is to establish alimony or enforce an alimony award and does not provide for attorney fees to defend a petition to terminate alimony.

***Shuman v. Shuman, 2017 UT App 192.***

The Court of Appeals affirmed the trial court’s award of primary custody to wife by indicating that a trial court is not required to make findings as to each piece of evidence presented. As long as the trial court makes adequate findings as to the custody factors, along with subsidiary facts, it is not required to address each and every piece of evidence. The appellant has a heavy burden to marshal the evidence to demonstrate that taken as a whole, the trial court’s determination is against the weight of the evidence. Merely pointing out contrary evidence is not persuasive. The trial court’s determination to use the property list and value from one of the party’s was affirmed because the trial court is not required to explain why one party is more credible than the other party. The Court of Appeals reversed on some limited issues of property and debt, including that wife indicated at trial that she listed a heating blanket twice, because the trial court failed to address that issue and failed to make any finding or ruling on the issue of the debt. The Court of Appeals noted that the trial court is required to make findings on all material issues presented.

***O’Hearon v. Hansen, 2017 UT App 214.***

After the mother of three children was killed in a car wreck, her husband (step-father) petitioned for custody and visitation of her children pursuant to section 30-5a-101, *et. seq.* On natural father’s motion, the trial court dismissed the petition by finding that step-father failed to assert sufficient facts to show that he could prove the seventh factor: that father is absent or is found by a court to have abused or neglected the child. The Court of Appeals reversed. Noting that for a 12(b)(6) motion to dismiss the facts must be assumed to be true and all inferences must be made for the non-moving party, the Court of Appeals analyzed this factor. The trial court noted that in the petition step-father averred that father had visited the children only once per month and as such, the trial court found that step-father could not prove father “is absent.” The Court of Appeals cited *Scott v. Scott* for the proposition that “is” means “is” and then analyzed that although parents retain fundamental rights over their children those rights are not absolute. The statute in

question allows the court to determine that children may be placed with non-parents if there are certain factors established. Noting that the first six factors surround the non-parent's relationship with the children, the seventh factor addresses the natural parent. The Court of Appeals found that the plain language of the statute requires a trial court to determine whether the father is absent on the date the petition was filed and it is not a backward-looking inquiry. Determining that absent means not present the statute then requires that on the date of the petition the parent, in this case father, is not present for purposes of parenting the child. The Court of Appeals determined that using the same statutory construction, *i.e.*, is means present tense, the requirement that the parent is found to have neglected or abused must have also occurred as of the date the petition is filed, *i.e.*, that a court has already determined abuse or neglect as of that date.

***Paulsen v. Paulsen, 2018 UT App 22.***

The Court of Appeals affirmed the trial court's denial of ex-husband's motion for summary judgment on his petition to modify alimony but reversed the trial court's determination after trial to reduce ex-wife's alimony award. The decree of divorce awarded wife alimony of \$1,408.00 but offset child support of \$408.00 for total support of \$1,000.00. Years later ex-husband petitioned to modify his alimony obligation claiming that ex-wife had paid off her mortgage and she was earning more than at the time of the decree. Ex-husband moved the court for summary judgment claiming that it was undisputed that ex-wife no longer had need for alimony. The trial court denied the motion for summary judgment and held a trial on the petition where it reduced ex-wife's alimony from \$1,000.00 to \$117.00. Ex-husband appealed claiming that the trial court erred in not granting summary judgment and erred in not terminating his alimony obligation completely. The Court of Appeals reversed finding that the trial court erred in not addressing the foreseeability standard that the payment of the mortgage on the home she was awarded in the decree would occur and that wife would earn some additional income in the future. Further, the Court of Appeals found that the trial court erred by not addressing the needs of the parties in light of the standard of living they enjoyed during the marriage.

***Sandusky v. Sandusky, 2018 UT App 34.***

The Court of Appeals upheld the trial court's enforcement of a separation agreement with modifications and interpretations of ambiguous terms. The parties executed a separation agreement and each agreed to be bound by it in divorce. At the trial, the trial court determined that certain provisions were vague such as checking and savings accounts and thus ordered the parties to split those accounts. Husband argued on appeal that the term was not vague because the parties agreed on the definition and that certain accounts were his separate property. The Court of Appeals rejected husband's argument by determining that the trial court's determination that each party had vastly different interpretations was sufficient to establish that the term was vague. The Court of Appeals rejected husband's claim that the trial court erred in enforcing the term of the separation agreement of husband's obligation to pay \$2,000.00 per month to wife for alimony. Husband argued that it was not alimony but a property settlement so once wife received her share of the

property he no longer owed payments. The Court of Appeals rejected that argument by noting that the plain language of the agreement was contrary to husband's argument. The Court of Appeals upheld the trial court's determination to not award fees to either party by analyzing section 30-3-3(1).

Important footnote: The Court of Appeals states that to adequately preserve an argument as to the adequacy of a trial court's factual finding the party so claiming must show that he alerted the trial court to the claim, *i.e.*, object to the findings.

***Bond v. Bond, 2018 UT App 38.***

The Court of Appeals affirmed the trial court's award of alimony to wife that included imputation of income to her based upon part-time employment. Wife was diagnosed with MS during the marriage and ultimately ceased working at all. At trial husband presented evidence by way of a vocational expert that indicated that wife could earn certain wages on a part-time basis even with her disability. The trial court imputed income to her based upon 15 hours work per week at the lowest range of hourly rates suggested by the vocational expert. Wife appealed claiming that the trial court erred by imputing income to her when the expert was not able to point to a specific job with a specific employer. The Court of Appeals noted that the trial court has broad discretion in imputing income and the statute talks of employment potential and probable earnings. It noted that there is no statute or case law that requires the trial court to identify a specific employer when imputing income.

***Christensen v. Christensen, 2018 UT App 53.***

The Court of Appeals affirmed the trial court's denial of husband's motion to reduce his alimony based upon language in the decree that discussed an adjustment for Social Security. The Court of Appeals noted that the language within the decree was ambiguous and husband's claim that the trial court erred because it did not determine that husband's interpretation was correct was flawed. Although husband's interpretation is plausible so is wife's interpretation. The trial court did not err in determining that the motion was premature because neither party had begun receiving Social Security.

***Gerwe v. Gerwe, 2018 UT App 75.***

The Court of Appeals affirmed the trial court's determination to set aside a post-nuptial agreement based upon fraudulent inducement where husband failed to raise his claims of error to the trial court. The Court of Appeals rejected his argument that it was plain error by finding that husband failed to establish that the trial court committed plain error. The Court of Appeals affirmed the trial court's determination that husband was required to pay to wife for personal property in his possession. Husband argued that the trial court erred by requiring him to pay her for all the personal property without taking into account the personal property in her possession, but the Court of Appeals noted that husband incorrectly construed the trial court's ruling because the trial court

specifically considered the property in wife's possession when determining the value. Husband argued that the trial court erred by basing alimony and child support on his current income rather than on income he would receive when he voluntarily gave up his current job to take a different job with a lower income. The Court of Appeals affirmed the trial court by noting that husband's claim to a reduction in income had not yet occurred and was speculative. The Court of Appeals also noted that husband testified that the reduced income would be only temporary and as such, the trial court was well within its discretion to look at current and historical income when determining child support and alimony.