

IN THE UTAH COURT OF APPEALS

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Sherrie C. Eloff,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner and Appellee,)		
)	Case No. 20070904-CA	
v.)		
)	F I L E D	
)	(December 11, 2008)	
Bruce C. Eloff,)		
)		
Respondent and Appellant.)	<table border="1"><tr><td>2008 UT App 444</td></tr></table>	2008 UT App 444
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Third District, Salt Lake Department, 054905322
The Honorable Tyrone E. Medley

Attorneys: J. Bruce Reading, Salt Lake City, for Appellant
 David A. McPhie, Holladay, for Appellee

Before Judges Thorne, Billings, and McHugh.

BILLINGS, Judge:

The trial court determined Wife's monthly income for both child support and alimony purposes to be \$3137, and her reasonable and necessary expenses to be \$3461 per month. The trial court awarded Wife \$818.26 per month in child support but did not include that amount when calculating her income for purposes of determining alimony. The trial court found Wife had a shortfall of \$324 per month (\$3461 minus \$3137) and awarded her \$324 per month in alimony.

During the proceedings in which the trial court made the alimony award, the attorneys and trial court had the following conversation:

Mr. Reading (for Husband): . . . Back to the alimony issue, you mentioned that the Petitioner had \$3137, that included, I guess, the child support?

Mr. McPhie (for Wife): No.

The Court: No. I did not include that child support in the calculation and I cited it as a gross amount of her income.

Mr. Reading: And--and so that was not taken into account to help pay those expenses?

The Court: It was taken into account, but it was not included by me as income for alimony purposes.

The trial court did not explain how the child support was "taken into account" in setting the alimony award. The record is unclear as to how the child support was taken into account because Wife's need (\$3461) is less than the combined amount of her income (\$3137) and the child support payment (\$818.26).

Utah Code section 30-3-5(8)(a) identifies factors the trial court must consider in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

Utah Code Ann. § 30-3-5(8)(a) (2007) (codifying what were formerly known as the Jones factors, Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985)). The trial court abuses its discretion if it fails to adequately consider these factors when determining alimony. See Lee v. Lee, 744 P.2d 1378, 1381-82 (Utah Ct. App. 1987).

In Bingham v. Bingham, 872 P.2d 1065 (Utah Ct. App. 1994), we remanded on the issue of the alimony amount because the trial court awarded the wife more alimony than her need indicated. See id. at 1068. We stated:

Where the trial court has offered no explanation for such a discrepancy, we agree with defendant that the court should not have awarded plaintiff more than her established needs required, regardless of defendant's ability to pay this excess amount. Accordingly, we remand the case for a reassessment of the alimony award in accordance with the precept that the spouses' demonstrated need must, . . . constitute the maximum permissible alimony award.

Id. at 1068.

In Bakanowski v. Bakanowski, 2003 UT App 357, 80 P.3d 153, we emphasized that an alimony award must be supported by adequate factual findings "unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Id. ¶ 9 (internal quotation marks omitted). There, we reversed and remanded a trial court's award of alimony that was higher than the wife's need indicated because the trial court failed to enter specific findings regarding the wife's needs. See id. ¶ 11. We stated that "[t]he absence of findings of fact is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain." Id. ¶ 13 (internal quotation marks omitted).

Wife cites to Rehn v. Rehn, 1999 UT App 41, 974 P.2d 306, in which this court stated that "[w]hile the trial court did not expressly articulate which expenses it used to arrive at the alimony award, there is no requirement that a court make such a finding." Id. ¶ 8. However, in Rehn, "the trial court stated that the calculation of expenses was reasonable and adequately explained how it arrived at the alimony award." Id. Here, we cannot assess whether the trial court abused its discretion in making the alimony award because of an absence of findings of fact to support the award.

We recognize that, based on the facts before us, it appears that Husband can afford the alimony payment, and thus, the award itself may not be an abuse of discretion. However, without findings of fact to support an award seemingly in excess of Wife's needs, there is no way for us to determine the award's validity. We therefore remand for the trial court to articulate

findings of fact to support its alimony award or to modify the award to only cover Wife's reasonable needs.

Judith M. Billings, Judge

WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

Carolyn B. McHugh, Judge