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IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY, STATE OF UTAH

DANIEL T. BOWLIN **Petitioner,** **v.** **NANCY ANN BOWLIN,** **Respondent.**	**CLOSING ARGUMENT** **Case No.: 064900814** **Judge: DECARIA** **Commissioner: CONKLIN**

COMES NOW, Nancy Bowlin (hereinafter "Respondent") by and through her counsel Brian E. Arnold of Arnold & Wadsworth PLLC and submits the following Closing Argument;

CLOSING ARGUMENT

This case was about the Petitioner and his utter dislike for paying alimony to his ex-wife of 20 plus years. This case was a hunting expedition for information that would allow the Petitioner to gain hope of possibly getting rid of his alimony obligation that he was sick and tired of paying. Unfortunately for him the hunting expedition did not succeed. The Petitioner did not prove

cohabitation and nor did he prove that he has had a substantial change in income that was permanent.

A. COHABITATION

The Myers case has finally been released and decided, and has provided the Courts with "hallmarks" of when cohabitation is likely. Their hallmarks include "a shared residence, an intimate relationship, and a common household involving shared expenses and shared decisions." Myers v. Myers, 2011 65, ¶24 (2011).[1]

1. Shared Residence

Probably the most important factor[2] when deciding cohabitation would be whether the Respondent shared a common residence with anybody.[3] Myers stated "as we indicated in *Haddow*, two individuals can be deemed to be cohabitating **only** if they establish a 'common abode that both parties consider their principal domicile for more than a temporary or brief period of time.'" Id. at ¶ 16 (emphasis added).[4] Black's Law Dictionary notes that cohabitation is "[t]o live together as husband and wife." No evidence of a shared residence was ever presented and hardly even mentioned. In fact, the Petitioner believes cohabitation to be "they [Dennis and Respondent] go to soccer games, vacations" and "holidays birthdays, [and] church" activities together.[5] This self definition falls completely short of the true definition of cohabitation.

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[1] "Cohabitation exists when a 'former spouse is residing with a person of the opposite sex and engaging in sexual contact with that person.' Sigg v. Sigg, 905 P.2d 908, 917 (Utah Ct.App.1995). Jensen v. Jensen, 2007 UT App 377, 173 P.3d 223, 225.

[2] "As we indicated in *Haddow*, two individuals can be deemed to be cohabiting only if they establish a 'common abode that both parties consider their principal domicile for more than a temporary or brief period of time.'" Myers v. Myers, 2011 UT 65 ¶ 16 (2011).

[3] "The appellate courts have set out specific factors to ascertain whether there is cohabitation, or residency under the old statute. Utah case law sets forth two prongs to the cohabitation analysis: (1) common residency and (2) sexual conduct." Lisa Jones, Cohabitation: An Easy Out? The Utah Journal of Family Law, Vol. 1 Num. 1 (2010).

[4] "a resident will come and go as he pleases in his own home, while a visitor, however regular and frequent will schedule his visits to coincide with the presence of the person he is visiting." Haddow v. Haddow, 707 P.2d 669 (Utah 1985). Dennis never went to the Respondent's home when she was not there, and vice versa. There was communication about when to visit and when would be good time to spend time together.

[5] Daniel Bowlin Deposition – Page 26, lines 12-21. July 13, 2011.

The Petitioner testified that he had no evidence that the Respondent was sharing a residence with anyone, let alone considering another home to be her primary residence. Petitioner even admitted that he had no evidence of a common residence between the Respondent and Dennis. The Petitioner felt that the Respondent was cohabitating because he saw Dennis Elenbaas walking the Respondent's dog. This does not even come close to the standard needed to prove a common domicile.

It is admitted by the Respondent that her and Dennis Elenbaas are neighbors.[6] It was also admitted that she may have had a few small personal items that she sold at a garage sale that were stored at Dennis' home for brief amount of time. Even admitting this does not change the glaring facts that are apparent in this case, namely that Respondent has her own home, pays her own mortgage without help from a third party (Dennis), pays her taxes on her home, her own furniture, pays her own bills, pays her own utility bills, maintains her home, does not have any of Dennis' clothes at her home, does not have any of her clothes at Dennis' home, does not have any shared financial obligations with Dennis, and operates under total financial independence.[7]

In Dennis Elenbaas' deposition he does admit that the Respondent has cleaned his residence, but that he did pay her for cleaning services.[8] Dennis also stated that the Respondent may still know the code to his garage that would give her access. This would make sense because she had been hired by Dennis to clean his home.[9] It is never common for a couple that in theory are sharing a residence that they both consider to be their primary domicile to pay one party to clean the home. It would be common that if both people considered the home to be their primary domicile that they would each clean the home without pay from the other party, share in the mortgage

[6] Respondent's Testimony
[7] Myers v. Myers, 2011, UT 65 (Utah 2011). Myers uses the word financial independence as a key phrase is showing that someone is not codependent as part of the analysis of cohabitation.
[8] Dennis Elenbaas Deposition – Page 44, lines 17-25, June 13, 2011.
[9] Respondent recognizes that access to another person's home is a factor in determining cohabitation but argues that his situation is different in that the access was for work related functions and not for leisure or residency reasons.

payment, share in the utility bills, and share in the maintenance of the home, none of which occurred in this situation. No evidence was ever presented that Dennis and the Respondent were sharing in these functions for either Dennis' home or for the Respondent's home.

During Dennis' deposition he even testified that he travels a lot for his work.[10] When he came back from traveling he would not return to the Respondent's home, he returned to his residence. Respondent actually pays her own mortgage, and lives and maintains her own home, separate from Dennis, and his residence.

There is not enough evidence to fulfill the first prong of deciding whether the Respondent was sharing a primary residence, therefore the Court cannot and should not deicide that the Respondent was living in a common domicile with Dennis Elenbaas.

2. Shared Financial Obligations

In *Myers* when considering whether a relationship has reached that of a common household the Court may look to "shared expenses, shared decision making, shared space, or shared meals." *Myers*, at ¶ 23. The Respondent's bank accounts were subpoenaed and presented at trial.[11] Dennis Elenbaas' bank records were also subpoenaed and presented to the Court.[12] There was no evidence of shared financial obligations. There was no evidence of Dennis paying for anything related to the Respondent, and vice versa. In fact both individuals have separate accounts, separate bills that neither of them depends on the other to provide for such for the other.[13] There also was no evidence put on the record that either supports each other in any financial way, in fact Dennis and the Respondent exercise financial independence.

[10] Dennis Elenbaas Deposition – Page 53, lines 7-8, June 13, 2011.
[11] Exhibits 9, 10, 13, and 14.
[12] Exhibit 15.
[13] In fact if you look at Exhibit 11, there is a check ledger showing the payment of bills that only came from Respondents sole account for which no other person is listed with her on the account.

The Respondent pays all her own bills. She pays her mortgage, utilities, credit cards, and all other financial obligations with the money she makes through employment and receiving alimony from Petitioner. In fact she has had a hard time paying all her financial obligations because of the Petitioner ceasing to pay alimony. The Respondent testified that she had to borrow money from her father (not Dennis Elenbaas) to be able to meet her financial obligations since the Petitioner ceased paying alimony in violation of the Court order.

3. Comingling of Money

Another hallmark of a marriage as set out by Myers could be that the alleged cohabitants have comingled money. There was never any evidence presented of that in this case. The only evidence of money exchanging hands is when Dennis would pay the Respondent to clean his home while he was out of town working for several months. These actions hardly resemble that of a marriage. Usually wives do not get paid to clean their homes or vice versa. The reason the Respondent was paid is because it was not her home, she was providing a service, and Dennis felt like she should be compensated. Other than this instance there is no money comingled, and even this example falls short of the definition of comingling.

4. Permanent Sexual Relationship

Having a permanent sexual relationship can be considered a hallmark of a marriage. Id. Even if a sexual relationship is found it is not determinative that the couple is cohabitating. *Myers*, at ¶ 39 (2011) ("Even if Ms. Myers and M.H. had a sexual relationship and lived together under the same roof, their relationship had almost none of the other hallmarks of a marriage.") The Respondent and Dennis admit to having a sexual relationship, however both admit that it was on and off, and was not permanent. A married couple can plan to a certain extent that there will be a sexual relationship that is continual. Here the testimony was that the sexual contact was on and off because the

Respondent and Dennis would "break up"[14] and then get back together and then break up again. Because of the testimony there is not sufficient evidence to prove that there was a permanent sexual relationship.

5. Other Hallmarks of a Marriage

a. **Vacations**

Myers (in a footnote)[15] refers to vacations as a possible factor in deciding cohabitation. *Myers*, ¶ 24 (2011). There was testimony provided by both the Petitioner and Respondent that Respondent and Dennis had gone on a few vacations together. Usually these vacations occurred the week after Christmas and were to Florida. Vacations occurred at most once a year. While this may show some type of relationship, it is does not by itself prove cohabitation. The vacations to Florida were trips that a dating couple may go on to have fun and take a break, but as testimony was given there were meals that the Respondent paid for and there were meals that Dennis paid for. If the Respondent and Dennis truly had a relationship that was "akin to a marriage"[16] the meals would have been paid for out of one account that would have been shared by the Respondent and Dennis.

b. **Holidays**

There was testimony that the Respondent and Dennis had spent some holidays together. Again, this does not prove that cohabitation existed but is simply one factor.[17] Most people that date see each other on the holidays. This is a time to exchange gifts and enjoy each other's company. There was never testimony or evidence given that showed that the Respondent and Dennis spent the night together on the holidays. There was only testimony that Dennis would come over and exchange gifts.

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[14] Nancy Bowlin's Testimony
[15] "Courts in other jurisdictions have identified other factors that may also be relevant...whether the couple spends vacations and holidays together."
[16] Myers v. Myers, 2011, UT 65 (Utah 2011).
[17] Myers v. Myers, 2011, UT 65 (Utah 2011).

It was pointed out by the Petitioner that Dennis gave gifts to Nancy's adult children on Christmas. This would be indicative of a relationship where you would want to impress the other person by giving gifts to their children, and does not prove that you are an exclusive couple. If this was true it would seem to presume that the dating rules for people after a divorce would change in fear that one could be found to be cohabitating if gifts are given to their children at Christmas time.

Respondent recognizes that by Petitioner giving testimony that her and Dennis spent time on Christmas that Petitioner is trying to paint the picture of a cohabitating couple. However, these examples fail. These examples fail for the first reason that it was never presented that Respondent and Dennis lived under one roof, and lastly holidays is only a factor that paints a "broader picture" and is not "prerequisite or [a] requirement." Id.

c. **Other Activities Together – Soccer Games & Wedding**

There was a lot of testimony concerning Dennis attending soccer games for Respondent's child Taylor. Petitioner testified that Dennis came to over 90% of the soccer games. However, Respondent finds this hard to believe because there is no possible way that Petitioner attended over 90% of the games while working 60 to 80 hours a week when the games were during the week at 3:00 pm in the afternoon. Respondent did testify that Dennis would occasionally come to soccer games. If this proves anything it proves that on occasion the Respondent would like Dennis to come to a soccer game with her. This does not prove cohabitation; it only shows that Respondent and Dennis would attend some soccer games together.

Testimony was also given that Dennis attended Respondent's adult son's wedding. Again, when this occurred Dennis was dating the Respondent. This was the Respondent's "plus one" for the wedding. This does not prove that Respondent and Dennis were cohabitating. At most this would prove that Dennis and Respondent were in a dating relationship.

Based on all that is above it is clear that the relationship between the Respondent and Dennis was not "akin to that generally existing between husband and wife"[18] and therefore does not constitute cohabitation for the purpose of eliminating alimony.

B. FINANCIAL ABILITY TO PAY

"For the trial court to terminate an alimony award, there must be an articulated basis for doing so; i.e., the court must be persuaded that the recipient spouse will be able to support himself or herself at a standard of living to which he or she was accustomed during the parties' marriage, or that the payor spouse is no longer able to pay. Utah Code Ann. § 30-3-5(7)(a, g). Williamson v. Williamson, 1999 UT App 219, 983 P.2d 1103 (Utah Ct. App. 1999). At trial the Petitioner argued that because he had now lost his contract only weeks before trial that he could no longer afford to pay alimony as it is currently ordered. First, the lost employment contract was never pled in the original Petition for Modification of Alimony, and was only given as notice a few weeks before trial.

The evidence of the Petitioner's income and earning potential is clear. In 2010, the Petitioner earned $96,504.00.[19] In 2009 the Petitioner earned $158,420.00.[20] In 2008 the Petitioner earned $162,960.00.[21] In 2007 the Petitioner earned $159,628.00.[22] Therefore, his earning capacity is quite high and he even testified that he believed he would get another job or contract soon in this range of salary. Further, this is not the first time that the Petitioner had lost his contract or job. Even in the past when he has lost his job he would find another job, and find a way to catch up on alimony, and this even occurred during the time period that he felt that Respondent was cohabitating.

[18] Myers v. Myers, 231 P.3d 815 (Utah Ct. App. 2010) citing *Haddow*, 707 P.2d at 672.
[19] Exhibit 38
[20] Exhibit 38
[21] Exhibit 38
[22] Exhibit 38

The deposits into Petitioners checking account even paint a picture of higher income. Exhibit 43 that was presented at trial is an accounting of the deposits into his account. Deposits range from $5,256.04 (when he was unemployed) all the way to $38,769.38 (when he was employed). This shows even more income than what was reported on his taxes during the same years. The income is there to pay alimony even though he stated he could not afford to pay alimony making $125,000.00 a year.[23]

Petitioner was not truthful about his expenses and his financial declaration. His financial declaration stated that he only spent $325.00 on meals outside the home.[24] In the Petitioner's deposition he stated he only spent $90.00 on food outside of the home.[25] When examining a month of eating outside the home the record shows that he spent over $800 on eating out and over $100 on liquor from the liquor store.[26] This was also a month in which he had over $22,000.00 in deposits and still was able to state to the court that he could not afford to pay $1,650 in alimony to the Respondent.

Petitioner also includes money given to his adult child that is currently in college as an expense on his financial declaration.[27] The total of these "valid expenses" are $1,135.00 a mere $500 short of what his alimony obligation is to the Respondent.[28] Payments to an adult child are not a valid expense. This is a gift that does not to need to be given. If this "valid expense" was eliminated along with some of his eating out[29] the Petitioner could more than afford the alimony payment to Respondent no matter his circumstances.

Even after Petitioner had lost his contract he continued to go on trips and boating expeditions. He also continued to help his adult son financially. He continued to eat out in excess of

[23] Petitioner's Testimony
[24] Exhibit 19
[25] Daniel Bowlin Deposition – Page 37, lines 14 – 18.
[26] Exhibit 36
[27] Exhibit 19
[28] Exhibit 19
[29] If he eliminated half of his over $800 expense of eating out he could afford alimony.

his financial declaration which he later called a "hopeful budget."[30] It is obvious from his testimony that he only hoped[31] to mislead the court that he was and would continue to be in horrible financial situation where he could not continue to pay Respondent's alimony for which he called "salary."[32] It was clear by his testimony that he was bitter and did not feel that the Respondent had ever helped him in his career even after a 25+ year marriage where she put him through school, and was a stay at home mom that took care of their children and the home. It was disappointing to see a person take no thought or give any credit to a woman who had done so much in their marriage. Petitioner even testified that there are other bills that her felt were more important than a court order for alimony. Petitioner further testified that he would rather give his adult son money than pay alimony. Petitioner's wife testified that she would pay other bills before paying the court ordered alimony. Petitioner and Petitioner's wife paint a picture of bitterness and total disregard for the courts and alimony. It presents an attitude that they can do what they want, and what they feel is best, even in violation of law and court orders.

The standard of living that the Respondent enjoyed during the marriage was quite high. They had a nice house, nice cars, and extra money to take vacations. Now the Respondent has a smaller house, less money, and is fighting cancer on her lower income. According to the Respondent's financial declaration (before cancer was discovered) her needs were in excess of $5,502.23, and her income with the alimony payments as agreed upon in the divorce decree were $4,244.02.[33] Even without the increased expenses of fighting cancer and continual treatment[34] her needs are in excess of over $1,000.00 from her income. Respondent has not in any way lived a life that is similar to that as when she was married, she has continued to try and live a frugal life within her means while trying

[30] Petitioner's Testimony
[31] Maybe Petitioner is a "hope-aholic" like Madison in Chuch Palahniuk's book "Damned" where a little 13 year old girl continually "hopes" things will happen that everyone else knows cannot and will not occur.
[32] Exhibit 37
[33] Exhibit 44
[34] Respondent testified that she would continue to need medication and receive treatments for the Cancer, and that her expense have increased at least $400.00.

to enjoy some of the activities that she was accustomed to during the marriage because of Petitioner's high income.

The Respondent's need for alimony is clear. Respondent's need for alimony has increased since being diagnosed and fighting cancer. She has been forced to take time off from work to fight cancer and is need of the alimony. This is the reason that alimony was agreed upon in the Divorce Decree. Further, before the divorce decree was entered the Petitioner knew that Respondent had a job and had renewed her license for that job, which is currently her same job. Petitioner knew how much money she would be making and the hours she would work and still agreed to pay her alimony at $1,650.00 a month. There has been no change in her need or financial circumstances since the divorce. Petitioner knew what he was doing when he agreed to pay her alimony and is now only bitter that he has to continue to pay it, and is trying to use a couple week old contract loss to his advantage before he gets another job making a significant amount of money.

Petitioner's testimony is clear; he does not want to pay alimony even though he can afford it. He believes he will get a job soon making the same amount of money that he was before, and that he would rather ignore the court's order and give money to his adult son and eat meals outside of the home instead of paying alimony when he can afford to do so.

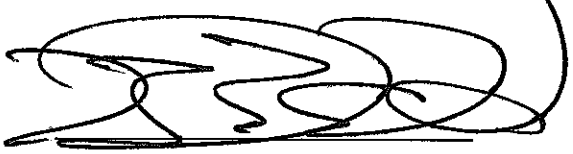
CONCLUSTION

There is absolutely no evidence showing cohabitation. At best, the evidence shows that Respondent and Dennis had an "on and off" dating relationship. The Respondent and Dennis never shared a common residency, mixed financial obligations, comingled money, or shared anything of significance.

The Petitioner can afford to pay alimony. By his own testimony he is going to get another job making just as much money as he always has. He wants the court to believe that he should give

money to his adult son and go out to eat before paying court ordered alimony. Petitioner knew exactly how much money Respondent would make at the time of divorce because she had the exact same job as she now has. It is only now after becoming extremely bitter about paying Respondent her "salary" that he believes the Court should let him off the hook and dismiss his alimony obligation. The problem is he has failed to present a case that would allow the Court to terminate alimony. Because Petitioner has failed, the Respondent asks the Court to order that alimony continue and that past alimony is now due and award Respondent her attorney fees for defending this case.

DATED this 26 day of OCTOBER, 2011



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CERTIFICATE OF MAILING

I hereby certify that I personally cased to be mailed by First-Class Mail, postage prepaid, a true and correct copy of the foregoing to the following, on this 28 day of Oct, 2011:

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