

1986

Katherine I. Strieby v. Chris J. Strieby : Brief of Appellant

Utah Supreme Court

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Barrie A. Vernon; Attorney for Respondent.

J. Franklin Allred; Margo L. James; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

UTAH
DOCKET

K F U

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DOCKET NO. 860209 STATE OF UTAH

KATHERINE I. STRIEBY,)	
)	
Plaintiff-Respondent,)	BRIEF OF APPELLANT
)	
-vs-)	
)	Docket No. 860300
CHRIS J. STRIEBY,)	
)	Priority No. 13B
Defendant-Appellant.)	

APPEAL FROM AN ORDER MODIFYING DECREE OF DIVORCE

THIRD JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY,

HONORABLE JOHN A. ROKICH, JUDGE

Barrie A. Vernon, #3329
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Tooele, UT 84074

J. Franklin Allred, #0058
Margo L. James, #4463
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Salt Lake City, UT 84102

Attorney for Respondent

Attorneys for Appellant

FILED

AUG 20 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE
STATE OF UTAH

KATHERINE I. STRIEBY,)	
)	
Plaintiff-Respondent,)	BRIEF OF APPELLANT
)	
-vs-)	
)	
CHRIS J. STRIEBY,)	Docket No. 860300
)	
Defendant-Appellant.)	Priority No. 13B

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
Point I - BOTH PARENTS HAVE A DUTY TO SUPPORT THEIR MINOR CHILDREN.	5
Point II - DEFENDANT IS ENTITLED TO CLAIM A DEPENDENCY TAX EXEMPTION FOR THE CHILD NOT IN HIS CUSTODY.	6
Point III - DEFENDANT IS ENTITLED TO REFUND OR FUTURE CREDIT FOR CHILD SUPPORT ERRONEOUSLY PAID TO PLAINTIFF.	10
CONCLUSION	13
ADDENDUM	14
CERTIFICATE OF SERVICE	30

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Ditmar v. Ditmar</u> , 293 P.2d 759 (Wash. 1956)	12
<u>Hills v. Hills</u> , 638 P.2d 516 (Utah 1981)	5,6,12
<u>In Re C.J.U.</u> , 660 P.2d 237 (Utah 1983)	5,6
<u>In Re Marriage of Hauger</u> , 679 P.2d 604 (Colo. App. 1984)	8
<u>Lord v. Shaw</u> , 682 P.2d 853 (Utah 1984), <u>rev'd on other grounds</u> 694 P.2d 1043 (Utah 1984)	12
<u>M. v. M.</u> , 313 S.W.2d 209 (Mo. App. 1958)	11
<u>McNeal v. Robinson</u> , 628 P.2d 358 (Okla. 1981)	11
<u>Montoya v. Montoya</u> , 696 P.2d 1193 (Utah 1985)	10
<u>Nabors v. Nabors</u> , 354 So.2d 277 (Ala. Civ. App. 1978)	12
<u>Rasch v. Rasch</u> , 168 So.2d 738 (Miss. 1964)	12
<u>Stoddard v. Stoddard</u> , 642 P.2d 743 (Utah 1982)	7,9,10,12,13
<u>Wiese v. Wiese</u> , 699 P.2d 700 (Utah 1985)	9
<u>Wilson v. Wilson</u> , 5 Utah 2d 79, 296 P.2d 977 (1956)	8
<u>Woodward v. Woodward</u> , 709 P.2d 393 (Utah 1985)	5
 <u>Statutes</u>	
§78-45-4, U.C.A. 1953, as amended	5
26 U.S.C. §152(e), as amended 1976	8,9
26 U.S.C. §152(e), as amended 1984	8,9
 <u>Other Authorities</u>	
Rule 52, Utah Rules of Civil Procedure	9, 13
H.R. Conf. Rep. No. 432, Part II, 98th Cong., 2d Sess. 1498-1500, <u>reprinted in</u> 1984 U.S. Code Cong. & Adm. News 697, 1139-41	8

IN THE SUPREME COURT OF THE
STATE OF UTAH

KATHERINE I. STRIEBY,)	
)	
Plaintiff-Respondent,)	BRIEF OF APPELLANT
)	
-vs-)	Docket No. 860300
)	
CHRIS J. STRIEBY,)	(Priority No. 13B)
)	
Defendant-Appellant.)	

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Trial Court err when it found that Plaintiff has no duty to support the minor child now in Defendant's custody?

2. Did the Trial Court err in denying Defendant two tax exemptions for both minor children born of the marriage, since Plaintiff presented no evidence that she was providing over one-half of the support for the minor child in her custody and the Court made no findings?

3. Did the Trial Court err in denying Defendant's request for a refund or future credit of child support money paid to Plaintiff for a child who was actually living with and completely supported by Defendant and in making no finding on this issue?

STATEMENT OF FACTS

A decree of divorce was entered in this case on February 22, 1982. Addendum 1. In the decree, Plaintiff, Katherine I. Strieby, was awarded custody of the couple's two minor daughters, Kristen Carol Strieby (born July 10, 1970) and Heidi Leann Strieby (born January 14, 1977). Defendant, Chris Strieby, was ordered to pay \$400 per month per child as support and \$100 per month for alimony. Plaintiff was not then working. (TR 12) At the time this decree was entered, Defendant was not represented by counsel. (TR 28)

In August 1984, the oldest child, Kristen, came to live with Defendant. (TR 20) Defendant has completely supported Kristen from August 1984 to the present time. The move was agreed to by Plaintiff but at the time neither parent sought to modify the decree concerning child support and custody. (TR 20-1) Despite the fact that Kristen had moved in with Defendant and he was totally supporting her, Defendant continued to pay Plaintiff \$600.00 in child support and \$100.00 a month in alimony through September 1985. Defendant testified that Plaintiff told him that her lawyer had told her that he had to pay her \$200.00 a month for Kristen, even though she was no longer living with Plaintiff, because it was temporary custody. (TR 20) This discussion was confirmed in Plaintiff's January 1986 affidavit. Addendum 2. Defendant never discussed this matter directly with Plaintiff's attorney. (TR 28)

In October 1985, Defendant lost his steady employment (TR 22) and began having trouble meeting his child support and alimony obligations. In January 1986, Defendant filed a Verified Petition for Order Modifying Decree of Divorce (Addendum 3) asking the Court to (1) order Plaintiff to refund the \$3000 paid to her for the support of Kristen from August 1984 to October 1985; (2) modify the divorce decree by awarding custody of Kristen to Defendant; (3) order Plaintiff to pay child support for Kristen in an amount co-equal to the support paid by Defendant for Heidi or alternatively, that neither party receive child support; and (4) allocate the right to claim a tax exemption for the children in accordance with the order fixing economic responsibility. In response to Defendant's Verified Petition, Plaintiff filed an Affidavit (Addendum 2) which revealed a monthly net income of \$513.00 and monthly expenses of \$1097.50.

A hearing was held on this matter on February 10, 1986 before the Honorable John A. Rokich. (TR 3) Defendant testified that he had only had part-time work for the last one and one-half years and his last steady employment terminated in October 1985. (TR 22) He has continued to look for employment and estimated that if he obtained employment he would earn approximately \$300.00 per week for the duration of the employment. (TR 22-3) As a result of the evidence presented, the Court signed an order on March 10 1986, which (1) awarded custody of Kristen to Defendant; (2) awarded no support for Kristen from Plaintiff and specifically found

that Plaintiff "owed no duty of support to that child"; (3) denied Defendant's request for refund of sums mistakenly paid to Plaintiff while Kristen was in Defendant's custody; (4) reduced the monthly child support payment for Heidi to \$200.00; and (5) granted Defendant one tax exemption. (Order Modifying Decree; Addendum 4. The Order did not alter Defendant's obligation to pay \$100.00 per month in alimony to Plaintiff. (TR 29)

SUMMARY OF ARGUMENT

I. Minor children have a right of support from both parents. While one parent may not be in a position to pay support at a particular point in time, this affects neither the child's right to support nor the parent's legal duty to provide such support when able. The Trial Court's finding that Plaintiff owes no duty to support the child in Defendant's custody is clearly erroneous and should be reversed.

II. The Trial Court abused its discretion in refusing to allocate both tax exemptions to Defendant for the two minor children since Defendant is providing over half the support for the child in Plaintiff's custody. The Trial Court also erred in not making findings of fact on this issue.

III. The Defendant is entitled to a refund from

Plaintiff for sums he erroneously paid to her as child support. The Trial Court also erred in not making findings of fact on this issue.

ARGUMENT

I. BOTH PARENTS HAVE A DUTY TO SUPPORT THEIR MINOR CHILDREN.

"[P]arents are permanently 'duty bound' to support their children under U.C.A., 1953, §§78-45-3 and -4." In Re C.J.U., 660 P.2d 237, 239 (Utah 1983). Regarding the mother's duty to support, §78-45-4 states: "Duty of woman. Every woman shall support her child;...." §78-45-4, U.C.A. 1953 (as amended 1957); Addendum 5.

The fact that one parent is not currently required to pay support to the other neither terminates the child's right [to support] nor obviates that parent's responsibility for such support as may be determined at some future time.

Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985) (citation omitted).

The right to support from the parents belongs to the minor children and is not subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents.... [T]he drastic remedy of termination of parental duties cannot be validly decreed without a hearing devoted to this question and including the submission of evidence and careful judicial consideration of all of the interests involved, including the child's.

Hills v. Hills, 638 P.2d 516, 517 (Utah 1981) (emphasis in original) (citations omitted).

The evidence before the Trial Court as to Plaintiff's present ability to support herself and the two minor children may properly have led the Court to conclude that Plaintiff was currently unable to pay child support to Defendant for Kristen. However, the Court did not so indicate. Instead, the Court concluded that "2. The Court awards no support for Kristen, finding that the Plaintiff owes no duty of support to that child." Order Modifying Decree; Addendum 4 (emphasis supplied). This finding was made without any of the safeguards discussed in Hills, supra, including a hearing "devoted to this question". Hills, supra, 638 P.2d at 517.

This finding is clearly erroneous, based on the principles of law discussed above. This court need not defer to the Trial Court's findings on this issue, since

The question of whether a "duty" exists is a question of law and "this Court is [as] capable of determining the question as was the Trial Court and we are not bound by its conclusions."

In Re C.J.U, supra, 660 P.2d at 238 (citations omitted).

The Court should therefore reverse the Trial Court's finding that "Plaintiff owes no duty of support" to Kristen as being clearly erroneous and contrary to Utah law.

II. DEFENDANT IS ENTITLED TO CLAIM A DEPENDENCY
TAX EXEMPTION FOR THE CHILD NOT IN HIS
CUSTODY.

Under the Trial Court's Order Modifying Decree, Defendant was granted custody of the older daughter, Kristen, and required to support her entirely by himself, with no support from Plaintiff. In addition, he is required to pay \$200.00 per month as child support to Plaintiff for the younger daughter, Heidi, who is living with her. Without making any findings as to whether Defendant or Plaintiff was actually paying over half the support for Heidi and with no indication as to the basis for his conclusion, the Trial Judge ruled that one dependency tax exemption be allocated to each party. (TR 8)

While the Trial Court's failure to state its findings of fact on this issue is reversible error, Stoddard v. Stoddard, 642 P.2d 743 (Utah 1982), this Court has the power in equity cases, "to review the evidence and to substitute its judgment for that of the Trial Court...." Wilson v. Wilson, 5 Utah 2d 79, 84, 296 P.2d 977, 981 (1956). The Court may, thus, in examining the record, make its own determination as to entitlement for the tax exemption for Heidi.

The evidence presented at the hearing revealed that Plaintiff's net monthly earned income was \$513.00. Addendum 2. She also receives \$100.00 per month alimony. Decree of Divorce; Addendum 1. The Trial Court ordered Defendant to pay \$200.00 per month child support for Heidi, for a total of \$2400.00 per year.

Plaintiff's Affidavit (Addendum 2) contained an

itemization of monthly expenses to maintain her household. The statement did not, however, demonstrate how much of the monthly expenses were spent for Heidi's support, with the exception of a \$12.00 per month dance class expense. Plaintiff's testimony on this subject (TR 17-9) added no further elucidation on this subject.

Prior to its amendment in 1984, 26 U.S.C. §152(e) (Addendum 6) allowed a noncustodial parent to take the dependency exemption for a child if the noncustodial parent provided at least \$1200.00 per year to support the child and the custodial parent does not clearly establish that he or she provided more support for the child than did the noncustodial parent. The 1984 amendment did away with this test to prevent Internal Revenue Service involvement in disputes between parents both claiming the exemption. H.R. Rep. No. 432, Part II, 98th Cong., 2d Sess. 1498-1500 reprinted in 1984 U.S. Code Cong. & Adm. News 697, 1139-41. This does not, however, prevent a court from ordering the custodial parent to relinquish the exemption to the noncustodial parent. Id. See also 26 U.S.C. §152(e) (as amended 1984); Addendum 6.

Given Plaintiff's income versus expenses, it is apparent that she could not be providing support to Heidi in an amount equivalent to that provided by the Defendant. Since Defendant is providing more than half of his noncustodial daughter's support, he should be entitled to claim a dependency exemption for her as well as for the child in his custody. In Re Marriage of Hauger, 679 P.2d 604, 607

(Colo. App. 1984).

Defendant thus asks this Court to find that he is entitled to claim a dependency exemption for the child in Plaintiff's custody since he provides over half of her support and the evidence clearly preponderates contrary to the Trial Court's action. Wiese v. Wiese, 699 P.2d 700, 701 (Utah 1985). This also continues the status quo for Defendant since he was entitled to both exemptions prior to the 1984 amendment to 26 U.S.C. §152(e). See Addendum 6.

In the alternative, Defendant is entitled to a reversal and remand on this issue, since the Trial Court failed to comply with Rule 52(a), Utah Rules of Civil Procedure. "In all actions tried upon the facts without a jury..., the court shall find the facts specially and state separately its conclusions of law thereon...." Rule 52(a), Utah Rules of Civil Procedure (emphasis supplied); Addendum 5. This failure is particularly significant here since the Court did not orally discuss the reason for its ruling on this issue at the hearing (TR 8) and the minute entry does not even refer to this issue. Addendum 7.

"[A] contested petition for modification of a divorce decree is an action tried upon the facts and requires findings of fact and conclusions of law." Stoddard v. Stoddard, 642 P.2d 743, 744 (Utah 1982) (citations omitted). The Stoddard Court went on to hold that "the District Court's failure to enter findings and conclusions in this case was reversible error", explaining that

[w]ritten findings and conclusions are just

as necessary for the modification of child support as for the alteration or nonalteration of property settlement arrangements. The Trial Court's decision to grant or deny a modification in child support may significantly affect the economic welfare and standard of living of the parties and their children for many years.

Stoddard, supra, 642 P.2d at 745 (fn. omitted). See also Montoya v. Montoya, 696 P.2d 1193, 1194-5 (Utah 1985).

Thus, if the Court does not reverse the Trial Court on this issue and grant Defendant the requested dependency exemption, at a minimum Defendant requests that the matter be remanded to the Trial Court so that a hearing may be held and findings of fact made on this issue.

III. DEFENDANT IS ENTITLED TO REFUND OR FUTURE
CREDIT FOR CHILD SUPPORT ERRONEOUSLY PAID
TO PLAINTIFF.

From August 1984 to October 1985, Defendant paid \$200.00 per month to Plaintiff as child support for Kristen. (TR 20) During this period, Kristen was living with Defendant and was completely supported by him, with Plaintiff's knowledge and consent. (TR 20-1) Plaintiff, in her Affidavit (Addendum 2), admits that she told the Defendant her attorney had advised her to ask for a 50% reduction in child support payments (from \$400.00 to \$200.00 per month) for Kristen, even though Kristen was living with, and completely supported by, Defendant.

Plaintiff also claimed she has "spent all the

monies given to me by Defendant since our divorce up to and including January 1986, on food, clothing for the children, heat, lights, water and mortgage payments on [her] home. I no longer have the money available to give back to the Defendant." Affidavit ¶2. Plaintiff made no effort to show that she used the sums given to her for Kristen's support during this period to pay expenses incurred in anticipation of Kristen's possible return or to actually purchase items for Kristen's use and benefit. See McNeal v. Robinson, 628 P.2d 358, 360 (Okla. 1981). To allow Plaintiff to keep funds paid to her for her daughter's benefit and not so used results in the Plaintiff's unjust enrichment.

The purpose of a judgment having the characteristics of the one under consideration [child support paid by noncustodial parent] is to provide support and maintenance for the children named in the decree, the real beneficiaries of the judgment,.... - - it is not for the personal benefit of the person in whose name the judgment stands.

M. v. M., 313 S.W. 2d 209, 214 (Mo. App. 1958) (citations omitted) (emphasis added).

The Plaintiff's allegation that she has spent all the money Defendant has given her thus has no bearing on whether she was entitled to do so or whether she can be required to reimburse Defendant for the funds in dispute. As noted in Argument I, supra,

The right to support from the parents belongs to the minor children and is not subject to being bartered away, extinguished,

estopped or in any way defeated by the agreement or conduct of the parents.

Hills v. Hills, 638 P.2d 516, 517 (Utah 1981). "A mother has no personal interest in child support money and holds it only as a trustee." Ditmar v. Ditmar, 293 P.2d 759, 760 (Wash. 1956).

This Court has upheld a trial court's finding that the noncustodial parent (as established by a divorce decree) did not owe child support to the other parent for a child actually living with and supported by the noncustodial parent. Lord v. Shaw, 682 P.2d 853, 855-6 (Utah 1984), rev'd on other grounds 694 P.2d 1043 (Utah 1984). This ruling follows the reasoning of courts in other jurisdictions which have examined this issue. See Nabors v. Nabors, 354 So. 2d 277 (Ala. Civ. App. 1978); Rasch v. Rasch, 168 So. 2d 738 (Miss. 1964). The advice Plaintiff gave to Defendant was thus mistaken.

In Nabors, the Alabama Civil Appeals Court noted,

When an order requires divorced husband to make periodic payments for the support of children and he has supported the children while they lived with him, the wife cannot recover payments for support during that period, The husband, however, is given credit for those periods in which he.... supports the child....

Nabors, supra, 354 So. 2d at 279.

These payments cannot be considered voluntary overpayments because both parties characterized them as support for Kristen. Thus, since Plaintiff was unable to

show that she actually used the monies for that purpose, Defendant should be entitled to a refund for the sums erroneously paid to Plaintiff or to a credit on future child support for Heidi. The Trial Court's Order should thus be reversed with instructions to grant Defendant the relief requested.

At a minimum, the Trial Court's Order on this issue should be reversed and remanded for the entry findings of fact since none were made on this issue either. (For a complete discussion of this point, see Argument II, supra, p.9-10). The Trial Court did not rule on this issue at the hearing (TR 30-31) and the only indication as to the Trial Court's decision was in the minute entry. Addendum 7. The Trial Court thus failed to comply with Rule 52(a), Utah Rules of Civil Procedure, and thereby committed reversible error. Stoddard v. Stoddard, 642 P.2d 743, 745 (Utah 1982).

CONCLUSION

Defendant respectfully asks the Court to grant him the relief requested in this brief, namely that

1. Plaintiff does have a duty to support a child not in her custody;
2. Defendant is entitled to claim both dependency tax exemptions for the two children; and
3. Defendant is entitled to reimbursement or future credit for child support erroneously paid to Plaintiff.

Respectfully submitted this 20th day of August,
1986.

J. Franklin Allred

Margo L. James

Attorneys for Defendant-Appellant

ADDENDUM

1. Decree of Divorce, February 22, 1982
2. Affidavit of Katherine I. Strieby, January 1986
3. Defendant's Verified Petition for Order Modifying
Decree of Divorce and Notice of Hearing
4. Order Modifying Decree
5. §78-45-4, U.C.A. 1953 as amended
Rule 52, Utah Rules of Civil Procedure
6. 26 U.S.C. 152(e), as amended 1976
26 U.S.C. 152(e), as amended 1984
7. Minute Entry

Addendum 1

FILED
TOOELE COUNTY, UTAH

'82 FEB 23 PM 2:10

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3rd FLOOR

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR TOOELE COUNTY, STATE OF UTAH

---ooOoo---

KATHERINE I. STRIEBY,	:	
	:	
Plaintiff,	:	DECREE OF DIVORCE
	:	
vs.	:	
	:	
CHRIS J. STRIEBY,	:	Civil No. 82-001
	:	
Defendant.	:	

---ooOoo---

This matter having come on regularly for hearing on the 22nd day of February, 1982, before the Honorable Ernest F. Baldwin, Jr., one of the Judges of the above-entitled Court, the Plaintiff appearing in person and being represented by her counsel, Barrie A. Vernon, and the Plaintiff and the Defendant having duly executed a Stipulation for the purpose of settling differences between the parties and the Defendant having agreed that the Plaintiff may proceed on the Complaint as modified by the Stipulation and the Court having entered the default of the Defendant herein; and the Court having received evidence, including the testimony of the Plaintiff, and the case having been submitted to the Court for its determination and decision and less than 90 days having elapsed since the filing of said Complaint, but good cause having been shown to waive the waiting period, and the Court having inquired into the legal sufficiency of the evidence so adduced, and having heretofore filed its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is hereby awarded a Decree of Divorce dissolving the bonds of matrimony presently existing between the parties, the same to become final three months from the date of

signature and entry.

2. Plaintiff is hereby awarded the care, custody and control of the minor children of the parties, subject to Defendant's right of visitation every other weekend and on Wednesday night.

3. Plaintiff is hereby awarded \$400.00 per month per child as and for the support of said minor children with the further sum of \$100.00 per month as and for alimony.

4. Plaintiff is hereby awarded as her sole and separate property title to the home of the parties located at 217 East 1st South, Tooele, Utah, one half of the equity in the home, ^{as the sole owner} the furniture and furnishings, 1978 Cougar, 1966 Mustang and her personal belongings and effects presently in her possession; and Defendant is hereby awarded as his sole and separate property the 1973 and 1974 Ford truck, one-half of the equity in the home to be paid when Plaintiff remarries, dies, sells the home or when the youngest child turns 18, and his personal belongings and effects presently in his possession.

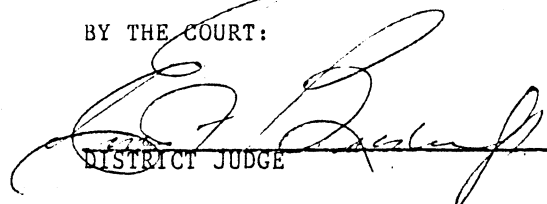
5. Plaintiff is hereby ordered to assume and pay the payments on the mortgage on the home located at 217 East 1st South, Tooele, Utah, and Defendant is hereby ordered to assume and pay all other debts and obligations to the time of separation of the parties and to hold the Plaintiff harmless therefrom.

6. Defendant is hereby ordered to maintain the current medical and life insurance and keep the same current for the benefit of the parties' minor children.

7. Defendant is hereby ordered to contribute the sum of \$350.00 as and for Plaintiff's attorney's fees, together with the costs of court incurred herein.

Dated this 22 day of February, 1982.

BY THE COURT:


DISTRICT JUDGE

Addendum 2

BARRIE A. VERNON, USB#3329
Attorney for Plaintiff
P.O. Box 531
Tooele, Utah 84074
Telephone: 524-3682

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

---oo0oo---

KATHERINE I. STRIEBY,)	
Plaintiff,)	AFFIDAVIT OF KATHERINE I. STRIEBY
vs.)	Civil No. 82-001
CHRIS J. STRIEBY,)	Assigned to Judge John A. Rokich
Defendant.)	

---oo0oo---

STATE OF UTAH)
) ss.
COUNTY OF TOOELE)

COMES NOW KATHERINE I. STRIEBY, the above-named plaintiff, and,
being first duly sworn upon her oath, states as follows:

1. When Kristen, my oldest daughter, moved out to live with her father in 1984, I asked my attorney Barrie Vernon what I should seek in the way of child support during this period. He advised me, and I advised my ex-husband, that during periods of prolonged visitation (over 30 days) generally the courts grant the father a 50% reduction on the support till drawn up legally since this strikes a rough balance between temporary monthly costs, food, clothes, etc. and ongoing permanent monthly costs, mortgage, lights, heat, etc.

2. I have spent all monies given to me by the defendant since our divorce, up to and including January, 1986, on food, clothing for the children, heat, lights, water and mortgage payments on our home. I no longer have the money available to give back to the defendant.

3. In regard to the custody of Kristen, she has recently indicated to me that she desires to move back with me and I believe the court should talk this matter over with her in private before deciding on a change of permanent custody but I do not believe that a custody evaluation will reveal any more than her talking with the court would reveal.

4. I cannot afford to pay the defendant any child support for my daughter Kristen if he is awarded custody. Attached to this Affidavit is a statement of my average expenses and monthly income. It reveals that I need the \$500.00 per month awarded to me in 1982 to barely meet my monthly costs let alone contribute any amounts to the support of Kristen.

5. I would not object, if I were receiving \$400 per month from the defendant for child support for Heidi, that he claim Kristen and I claim Heidi as dependents for income tax purposes.

DATED this _____ day of January, 1986.

151
KATHERINE I. STRIEBY

On the _____ day of January, 1986, personally appeared before me Katherine I. Strieby who acknowledged to me that she executed the foregoing.

151
Notary Public residing in Tooele, Utah

STATEMENT OF MONTHLY EXPENSES AND INCOME

KATHERINE STRIEBY, January, 1986

INCOME-	Style Shop, Tooele, Utah	Gross - \$123.00	
		Net - \$111.00	
	JP Court, Stansbury Park	Gross - \$432.00	
		Net - \$402.00	
	TOTAL	Gross \$555.00	Net-\$513.00

EXPENSES-	Mortgage	\$292.00	
	Gas	\$ 73.00	
	Lights	\$ 50.00	
	Loans/accounts	\$190.00	
	Water	\$ 35.00	
	Phone	\$ 40.00	
	Gasoline	\$ 55.00	
	Dance class (Heidi)	\$ 12.00	Total Income \$513.00
	Food	\$190.00	Alimony/CS \$500.00
	AT&T	\$ 11.00	
	TelAmerica	\$ 20.00	Total Expenses \$1097.50
	Medical insurance	\$	MONTHLY SHORTFALL \$ 84.50
	Car repairs	\$ 20.00	
	Car insurance	\$ 24.50	
	Medical/dental	\$335.00	
	Entertainment	\$ 10.00	
	Clothing	<u>\$ 40.00</u>	
	Total	\$1097.50	

J. FRANKLIN ALLRED
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102
Phone: (801) 531-1990

IN THE THIRD JUSICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

KATHERINE I. STRIEBY,	:	
	:	VERIFIED PETITION FOR ORDER
Plaintiff,	:	MODIFYING DECREE OF DIVORCE
	:	AND NOTICE OF HEARING
-vs-	:	
CHRIS J. STRIEBY,	:	Civil No. 82-001
Defendant.	:	

State of Utah)
 : ss
County of Tooele)

Chris J. Strieby the defendant above named being duly sworn on his oath petitions the Court for an Order modifying the Decree of Divorce in the above entitled matter and in support of his petition alleges as follows:

1. That he is the defendant above named and as such has knowledge of the matters hereinafter stated.

2. That pursuant to the original decree of divorce the plaintiff above named had custody of the parties two minor children and defendant was required to pay Four Hundred Dollars (\$400.00) per child per month as child support for said children.

3. That in August of 1984, the eldest child, Kristen, came to live with and be dependent fully on the

defendant for her care, custody and support.

4. That from and after the month of August 1984, the defendant had paid to plaintiff the sum of Four Hundred Dollars (\$400.00) as child support for Heidi, and Two Hundred Dollars (\$200.00) per month for child support for Kristen, notwithstanding, Kristen was no longer residing with the plaintiff, but was in fact residing with and being fully supported by the defendant.

5. That the defendant made said payments as child support for Kristen to plaintiff while defendant had the obligation of fully supporting Kristen under a mistaken belief as to his obligation to continue support communicated to him by plaintiff's attorney, Barrie Vernon.

6. That defendant is entitled to a refund of all moneys paid for the support of Kristen from the time Kristen moved into defendant's home to and including the month of October, 1985, when defendant ceased paying any support for Kristen.

7. That the defendant is entitled to an order modifying the decree of divorce to provide the following:

a. For the permanent care, custody and control of the minor child Kristen subject to a right of reasonable visitation by the plaintiff.

b. For an order requiring plaintiff to pay child support in a sum co-equal to the amount paid by the defendant to the plaintiff for the support of Heidi.

c. In the alternative, for an order requiring each of the parties to support that child in their custody with no contribution by the other party.

d. For an order reasonably allocating the right to claim the exemption of the parties minor children, in accordance with the order made fixing economic responsibility.

Wherefore the defendant prays the court issue its order modifying the decree of divorce to give him custody of the minor child Kristen subject to a reasonable visitation, to require plaintiff to contribute to Kristen's support in an amount equal to the amount he pays for Heidi's support or in the alternative requiring each of the parties to support that child in their custody entirely without contribution for the other, for an order allocating the right to claim the children as exemptions and for attorney's fees for the bringing of this motion and for the refund of all sums paid to plaintiff by defendant for the support of Kristen, while Kristen was in fact living with the defendant.

DATED this _____ day of January, 1986.

J. FRANKLIN ALLRED
Attorney for Defendant

CHRIS STRIEBY
Defendant

Subscribed and sworn to before me this _____ day
of _____, 1986.

My Commission Expires

NOTARY PUBLIC

J. FRANKLIN ALLRED #58
Attorney for Defendant
321 South 6th East
Salt Lake City, Utah 84102
Phone: (801) 531-1990

Addendum 4.

FILED MAR 13 PM 12:34
CLERK OF COURT
SALT LAKE CITY, UTAH

IN THE THIRD JUDICIAL DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

Katherine I. Strieby	:	
Plaintiff,	:	ORDER MODIFYING DECREE
-vs-	:	Civil No. 82-001
Chris J. Streiby	:	Judge: John A. Rokich
Defendant.	:	

The petition of the defendant to modify the decree of divorce in the above entitled matter, came on regularly for hearing before the honorable, John A. Rokich, judge of the above entitled court, in his court room in the Tooele County Court House on Monday, the tenth day of February, at the hour of 1:00 p.m. The plaintiff was present in person and represented by her attorney, Barrie A. Vernon, and the defendant was present in person and represented by his attorney, J. Franklin Allred. The parties were sworn and the court heard testimony and having reviewed the pleadings on file, considered the evidence and being fully advised, now, therefore, makes the following order.

1. The decree of divorce is modified to grant the permanent care, custody, and control of the minor child, Kristen, to defendant subject to a right of reasonable visitation on the part of the plaintiff.

2. The court awards no support for Kristen, finding that the plaintiff owes no duty of support to that child.

3. The request for the repayment, by plaintiff to defendant, of those sums mistakenly paid by defendant to plaintiff, for the support of Kristen, while Kristen was in the exclusive custody of defendant is denied.

4. The defendant should be entitled to claim ^{JAN} ~~both~~ ^{one} child ^{SAK} ~~as~~ exemptions on his state and federal income tax forms and ^{each SAR} ~~the plaintiff~~ is ordered to execute the necessary waivers to effectuate this part of the court's order.

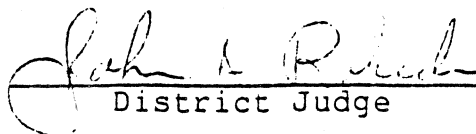
5. Child support for the minor child, Heidi, is reduced to \$200 per month based on defendants representation that he is making less than \$1000 per month.

6. Plaintiff is granted a judgement in the sum of \$1100 representing arrearages for the months of November and December 1985, and January 1986.

7. The payment schedule, herein ordered, shall take effect March 1, 1986.

8. Each party is ordered to bear their own attorney's fees and costs.

Dated this 10 day of March, 1986


District Judge

§78-45-4, U.C.A. 1953, as amended

DUTY OF WOMAN.--Every woman shall support her child; and she shall support her husband when he is in need.

Rule 52, Utah Rules of Civil Procedure

Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) *Waiver of Findings of Fact and Conclusions of Law.* Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) By default or by failing to appear at the trial;
- (2) By consent in writing, filed in the cause;
- (3) By oral consent in open court, entered in the minutes.

26 U.S.C. §152(e), as amended 1976

26 U.S.C. §152. Dependent defined.

(e) Support test in case of child of divorced parents, etc.—

(1) **General rule.**—If—

(A) a child (as defined in section 151(e)(3)) receives over half of his support during the calendar year from his parents who are divorced or legally separated under a decree of divorce or separate maintenance, or who are separated under a written separation agreement, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year unless he is treated, under the provisions of paragraph (2), as having received over half of his support for such year from the other parent (referred to in this subsection as the parent not having custody).

(2) **Special rule.**—The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if—

(A)(i) the decree of divorce or of separate maintenance, or a written agreement between the parents applicable to the taxable year beginning in such calendar year, provides that the parent not having custody shall be entitled to any deduction allowable under section 151 for such child, and

(ii) such parent not having custody provides at least \$600 for the support of such child during the calendar year, or

(B)(i) the parent not having custody provides \$1,200 or more for the support of such child (or if there is more than one such child, \$1,200 or more for each of such children) for the calendar year, and

(ii) the parent having custody of such child does not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody.

For the purposes of this paragraph, amounts expended for the support of a child or children shall be treated as received from the parent not having custody to the extent that such parent provided amounts for such support.

(3) **Itemized statement required.**—If a taxpayer claims that paragraph (2)(B) applies with respect to a child for a calendar year and the other parent claims that paragraph (2)(B)(i) is not satisfied or claims to have provided more for the support of such child during such calendar year than the taxpayer, each parent shall be entitled to receive, under regulations to be prescribed by the Secretary, an itemized statement of the expenditures upon which the other parent's claim of support is based.

(4) **Exception for multiple-support agreement.**—The provisions of this subsection shall not apply in any case where over half of the support of the child is treated as having been received from a taxpayer under the provisions of subsection (c).

26 U.S.C. §152(e), as amended 1984

26 U.S.C. §152. Dependent defined.

(e) **Support test in case of child of divorced parents, etc.—**

(1) **Custodial parent gets exemption.**—Except as otherwise provided in this subsection, if—

(A) a child (as defined in section 151(e)(3)) receives over half of his support during the calendar year from his parents—

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) **Exception where custodial parent releases claim to exemption for the year.**—A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if—

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

(3) **Exception for multiple-support agreement.**—This subsection shall not apply in any case where over half of the support of the child is treated as having been received from a taxpayer under the provisions of subsection (c).

(4) **Exception for certain pre-1985 instruments.**—

(A) **In general.**—A child of parents described in paragraph (1) shall be treated as having received over half his support during a calendar year from the noncustodial parent if—

(i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, and

(ii) the noncustodial parent provides at least \$600 for the support of such child during such calendar year.

For purposes of this subparagraph, amounts expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

(B) **Qualified pre-1985 instrument.**—For purposes of this paragraph, the term "qualified pre-1985 instrument" means any decree of divorce or separate maintenance or written agreement—

(i) which is executed before January 1, 1985,

(ii) which on such date contains the provision described in subparagraph (A)(i), and

(iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

(5) **Special rule for support received from new spouse of parent.**—For purposes of this subsection, in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

(6) **Cross reference.**—

For provision treating child as dependent of both parents for purposes of medical expense deduction, see section 213(d)(5).

THIRD JUDICIAL DISTRICT
COUNTY OF TOOELE — STATE OF UTAH

FILE NO. 82-001

: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

KATHERINE I. STRIEBY

BARRIE A. VERNON

CHRIS J. STRIEBY

J. FRANKLIN ALLRED

SHARON CALLISTER

CLERK

KATHY SCHULTZ

REPORTER

FAY GILLETTE

BAILIFF

HON. JOHN A. ROKICH

JUDGE

DATE: FEBRUARY 14, 1986

This matter came on for hearing on the 10th day of February, 1986.

Plaintiff was present and represented by John Allred. Defendant was present and represented by Barrie A. Vernon.

The Court hearing testimony of the witnesses, argument and reviewing the file concludes as follows:

1. Plaintiff shall not be entitled to reimbursement for support paid to defendant when Christin, the minor child of the parties hereto resided with Plaintiff.

2. Support payments paid to defendant for Heide shall be reduced to \$200.00 per month beginning March 1, 1986. Said reduction is based upon plaintiff's representation that plaintiff is making less than \$1,000.00 per month.

3. Each party to pay their own costs and attorney fees.

[Handwritten signature]

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Brief of Appellant were mailed this 20th day of August, 1986, to the following:

Barrie A. Vernon, Esq.
Attorney for Appellee
P.O. Box 531
Tooele, Utah 84074.
