1997

Collins v. Collins : Brief of Appellant

Utah Court of Appeals

Jerome H. Mooney; Wendy J. Lems; Larsen & Mooney Law; Attorneys for Petitioner.
D. Bruce Oliver; D. Bruce Oliver, P.C.; Attorney for Respondent.

IN THE UTAH COURT OF APPEALS 970707-CA

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ROBERT D. COLLINS,	)	Case Nos. 970707-CA
	(	964300201
Petitioner and Appellant,	)	
	(	
vs.	)	
	(	
PATRICIA M. COLLINS,	)	Priority No. 15
	(	
Respondent and Cross-Appellant.	)	
	)	

BRIEF OF CROSS-APPELLANT

Appeal from the Final Judgment and Decree of Divorce
of the Honorable John A. Rokich
of the Third Judicial District Court,
in and for Tooele County, State of Utah

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Attorneys for Petitioner and Cross-Appellee

** ORAL ARGUMENTS REQUESTED*
** PUBLISHED OPINION REQUESTED*

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TABLE OF AUTHORITIES

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IN THE UTAH COURT OF APPEALS

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ROBERT D. COLLINS,	Case Nos. 970707-CA 964300201
Petitioner and Appellant,	
vs.	
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Respondent and Cross-Appellant.	

A husband and wife prepare for a divorce trial and appear to Court. The Court advises them that they can either save money by stipulating to issues or fight them out in trial, suggesting that the attorneys may receive all of the portions of the couple's estate. He states, "My hands are pretty well tied." Thus, the parties agree to attempt a stipulation and adjourn in chambers. While in chambers, the Court is apprised that the wife is disabled and receives social security. The husband still earned a living as a postal employee. The Court declines that the wife is entitled to an award of child support based upon her receipt of social security. The Court is plainly in error

on the law regarding this issue. The wife would not be entitled to an award of child support if the husband, or obligor, was on SSI, not when the custodial parent, or in this case, the wife receives social security from her past social security contribution.

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by *Utah Code Ann.* § 78-2a-3 (1997) (2)(h) (appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity). The appellant (hereinafter "the Husband") appealed, but later withdrew his appeal pursuant to Rule 37, *Utah Rules of Appellate Procedure*. Also, the Cross-Appellant (hereinafter "the Wife") appealed because the Court has erroneously deprived the Wife of child support contrary to Utah Law, Uniform Civil Liability for Support Act, *Utah Code Ann.* § 78-45-1, *et seq.*[1]

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

(1) Whether the Wife, as the custodial parent is entitled to an award of child support as the custodial parent, and that the Court committed plain error by interpreting Section 78-45-7.5(8)(a) against her amounting to an abuse of discretion?

> In divorce proceedings, including initial custody awards, we give trial courts broad discretion. *E.g.*, Moody v. Moody, 715 P.2d 507, 510 (Utah 1985). So long as that discretion is exercised within the confines of the legal standards we have set, Jones v. Jones, 700 P.2d 1072, 1074, (Utah 1985), and the facts and reasons for the decision are set forth fully in appropriate findings and conclusions, Smith v. Smith, 726 P.2d 423, 426 (Utah 1986), we will not disturb

[1] Specifically Section 78-45-7.5(8)(b) (1997).

the resulting award. We review the findings made by a judge sitting without a jury under the "clearly erroneous" standard of Utah Rule of Civil Procedure 52(a). Ashton v. Ashton, 733 P.2d 147, 149-50 n.1 (Utah 1987); *see Utah R. Civ. P. 52(a).*

Davis v. Davis, 749 P.2d 647 (Utah 1988).

(2) Whether the Court erred by awarding attorney's fees to the Husband when she successfully objected to form and content of the proposed *Decree of Divorce*, contrary to the Bell Test?

Section 30-3-3 of the Utah Code "grants trial courts the power to award attorney fees in divorce cases" but the award "must be based on evidence of the reasonableness of the requested fees, as well as the financial need of the receiving spouse." Crouse v. Crouse, 817 P.2d 836, 840 (Utah Ct. App. 1991). Still, the decision whether or not to award attorney fees is within the sound discretion of the trial court, *see id.*, and we review a trial court's denial of fees under an abuse of discretion standard; *see* Peterson v. Peterson, 818 P.2d 1305, 1310 (Utah Ct. App. 1991).

Taylor v. Hansen, 342 Utah Adv. Rpt. 41 (Supreme Court, May 7, 1998).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 30-3-3 (1997). *Utah Code Ann.* § 78-45-7.5 (1997).

STATEMENT OF THE CASE

I. Nature of the Case:

This case arises from the mutual divorce awarded to the Wife and Husband by way of stipulation. The stipulation is contrary to Utah Law as it deprived the disabled wife and custodial parent of child support from the employed husband and obligor. Trial was discouraged by the Court and the Court was clear that child support

would not be awarded.

II. Course of the Proceedings:

This case went through several pre-trial motions where at one point Judge L.A. Dever set temporary child support at "$364.50 pursuant to the child support guidelines." (R. at 70). The temporary order was "calculated based upon [the Husband]'s income $3,212 and [the Wife]'s income of $1,046[2] . . . ." Subsequently at trial, Judge John A. Rokich declined to award any child support. This failure was plainly in error. But when faced with the alternative of going to trial that she may owe more to her attorney, she was compelled to proceed forward with the settlement process. That day the parties entered into an oral stipulation, then both parties appealed for various reasons arguably because neither were happy with the stipulation they felt was forced upon them.

III. Disposition in Trial Court:

Judge John A. Rokich accepted on the record the oral stipulation and awarded both parties a mutual divorce from the other.

IV. Statement of Facts:

On or about August 12, 1996, the Husband filed for divorce from the Wife, (r. at 7), and the Wife counterclaimed. (R. at 19). In these pleadings, both parties asked for child support to be assessed. Contemporaneously, on Augst 30, 1996,

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[2] This amount represents the SSI the Wife receives from social security benefits due to her earnings alone.

the Wife filed Impecuniously due to her disability and limited income. With the *Affidavit of Impecunious*, the Wife also filed for temporary support, including a request for child support, and filed her *Financial Declaration* reporting and combined social security and disability income of $683. (R. at 26).

On or about October 28, 1996, at the temporary hearing, Judge L.A. Dever appropriately awarded child support to the Wife. (R. at 56). Said child support was established at "$364.50 pursuant to the child support guidelines." (R. at 70). The temporary order was "calculated based upon [the Husband]'s income $3,212 and [the Wife]'s income of $1,046[3] . . . ."

Going into trial on the other hand, Judge Rokich incorrectly entered findings that no child support would be awarded. The Court was advised that the Wife was disabled and receiving SSI, (TT. at 8), and the Court responded with, "I know that." Immediately after a couple more exchanges, the Court stated, "I probably should have had you come into chambers and we could discuss this and see if I can't get these issues resolved." (TT. at 8-9). Thus they re-adjourned in chambers.

The parties then commenced talking about property distribution, which included a marital home and three rental properties. The Husband's counsel proposed a mere $300 a month in alimony. (TT. at 10). The Wife objected, restating that when you take into consideration her SSI and so forth. Counsel added, "But she has had to

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[3] This amount represents the S.S.I. the Wife receives from social security benefits due to her earnings alone.

borrow a substantial amount of money during the pendency of this action." (TT. at 10-11). The Court responded, "I don't doubt that. What about the child, though?" Counsel advised him that the Wife believes that ultimately the Court would find that the Husband actually earns "$3,016 as his final income." (TT. at 11).

The parties went on to discuss loans the Wife received from her father and the Court stated, "I don't believe that" apparently believing that the money from her father may not necesssarily be gifted her her. The Court went on, "I think the alimony, well, the alimony award, I don;t see any way out of it. Divide the property and alimony at $300 a month may not be enough, What about the child? If is because of her she is getting the --" (TT. at 12). The Court was cut off by the Wife's attorney who attempted to clarify, "That's correct. Stuff he has to sign." Substantially confused, the Court stated, "So he is alleviated that obligation evidently by getting the social security and paying for the child. So he has got to pay more than (inaudible). I will equalize it out. Her total income would be about equal to what he has got. And they both share the debts equally and divode the property up equally."

Counsel for the Husband then asked, "So what is the Court's suggestion if we do divide it equally, how much are we looking at?" The Court answered, "Well, it depends on--if he has got--if she has got a $1073 now and what's his net after taxes, what is his taxes.[4]

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[4] Apparently the court was confused as he was taking the Wife's SSI and disability into account as an income and child support obligation. The Wife believes that the court

The parties went on discussing various matters but all concerning alimony, which included the reciting of the figures from the Husband's *Financial Declaration*. Said figure argued by the Wife's attorney was "$3,212" when considering the Husband's extra income of $200. (TT. at 15). Thus the court found that the Husband was taking home $2,804. (TT. at 16). And ultimately the court calculated a finding of $2,600 of an income for the Husband and $1,073 for the Wife. (TT. at 17). He thus concluded an award of alimony at $600 to the Wife.

Upon this conclusion, Ms. Lems, counsel for the Husband asked, "Is that in addition to the child support?" The court, still apparently confused responded, "She's not paying any child support because--she only gave me--how much are you getting in child support, $1,073; right?" The Wife exclaimed, "That's my social security money. That's not child support." The court then asked, I thought I saw in here that you were getting so much per month for a child?" And the Wife replied, "$386 because I am disabled." "So you are getting this $386 for child for--said the court and the Wife finished with, "I get $1,073 total." So with that, the court reiterated, "That's what I said, $1,073. So, if he pays about $600 that makes you about equal, the two of you. And so, how do you want to break it down as to that child support or alimony, I don't know. (Inaudible) the child is getting that income. (TT. at 17).

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was apparently replacing the disability payment to the child that the Wife had paid into thus relieving the Husband of any child support obligation.

Ms. Lems apparently knew as well that the court was mistaken as she asked again, "So, are you suggesting, Your Honor, just to make sure that I am clear, that we would divide the properties in half and that he would pay $600 a month then in alimony . . . . and there would be no additional sums owing on child support . . . since she does get dependent disability income for the child." The court agreed. (TT. at 18). Then the Wife's attorney attempted to elaborate that this still would not equalize the disparity in the couple's incomes as there would be a difference of approximately $300.[5] The court responded to arguments, "Just divide everything equally. The only thing I can do is divide it all equally. She pays - - well, get to that now. She'l pay her fees and he'll pay his fees and if we are going to divide it up equal, they are going to pay all the debts, split the debts, each pay their own fees and costs."[6] At any rate, the mediation continued.

Then while the parties later addressed other child maintenance issues, particularly the health insurance premium through the Husband's employment. The Husband objected to having to pay the full $18 monthly payment. So the court wanted to split it. The Wife's attorney responded, " But he's not paying any child support." And the court agreed. Counsel went on, "So, I think that that should just be awash at

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[5]$300 is nearly the same amount of the prior Judge Dever temporary child support award of $364.50. (TT. at 70).

[6] This response appears to be equally confused as it does not actually apply to the arguments.

minimum. I mean, he is not paying anything in child support. He is getting benefits." The court ignored the attempt keeping the amount split and asked them to get out their calculators. (TT. at 22).

> The parties continued to show dissatisfaction, thus the court declared, Let me tell you what I think. One thing. Now, you can be hear and you can go to trial, you will spend more money on attorney's fees than what you are fighting about. So be reasonable. In order to get these things resolved, you have to be reasonable. It's not a life and death matter. You know, I don't know why people -- what price you put on peace of mind. Is it wourth fighting one another over a piece of furniture or over a $500 camper? Is it worth it?
>
> Like I have seen here, I just had a case here not too long ago, the people wound up owing the attorneys more than their estate was worth. So, if you want to do that, fine. I can take the bench and (inaudible). My hands are pretty well tied. I have some discretion, but I am going to divide everting equally, but, gees, if you are going to be fighting about a camper or some furniture, then (inaudible) pretty well assured of getting your alimony regularly, unless they fire him, that's highly unlikely as a postal worker, so look at the pluses. I have so many come in that are awarded alimony that never get paid. So, just have a little give and take and I think you can get this worked out.[7]

(TT. at 26). With that counsel for the Husband concurred and the court recessed while the Wife and her counsel discussed their options. It was clear though no matter what, the court would not entertain the child support issue.

Thereafter, the parties entered into an oral stipulation which was read into the record. (TT. at 27). In the record, the provision regarding child support read, "The amount that the defendant is receiving for the minor child on the disability income

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[7] The court's admonishment was inaccurate as the judge is a divorce proceeding has broad discression and his hands really are not so tied up. Nonetheless, the admonishment was clear to the Wife that she would have to appeal to get anywhere with the child support issue.

will substitute as any type of child support. Therefore, there will be no order of child support that [the Husband] has to pay [the Wife]. (TT. at 28).

Thereafter, the counsel for the Wife, added, "If I can have one moment? There is a couple of clarifications, Your Honor, for me. First off, in regards to the child support, the order should read something to the effect that so long as - -" The court cut him off stating, "As the government is paying for it, social security?" Mr. Oliver agreed and attempted to explain just to be cut-off again, "Otherwise - -" , by the court, "Well, I don't want to get in trouble. I was going to call that to your attention anyhow." (TT. at 33). Thereafter, once the stipulation was completed, both parties answered "Yes" when asked if they agreed to the stipulation. (TT. at 34). However, both parties immediately appealed once, the decree was entered.

Meanwhile, the Husband's counsel agreed to prepare the proposed final pleadings. (TT. at 38). But the initial set was not acceptable and the Wife objected. (R. at 211-215). The court approved sustained some of the objections, but overturned others. Nonetheless, and in spite of the Wife disability and indigency, the court awarded the Husband attorney's fees of $400. (R. at 261).

SUMMARY OF THE ARGUMENT

The court's refusal to award the Wife child support is contrary to Section 78-45-7.5 (1997) and based upon his clearly erroneous understanding of the social security and disability benefit received by the Wife. Section 78-45-7.5 substitutes the

social security benefit in lieu of child support when the obligor is the party receiving the social security benefit not the custodial parent.

Moreover, it was well established that the Wife is disabled and on a fixed income. The Wife filed as an indigent litigant while the Husband received incme which clearly exceeded the Wife. Nevertheless, the court awarded the Husband attorney's fees of $400 for having to defend the Wife's objections which some were meritorious, but all were brought or asserted in good faith. The award was unreasonable as it was contrary to the Bell Test and Section 30-3-3.

ARGUMENT

POINT I.

THE DENIAL OF CHILD SUPPORT WAS CLEARLY ERRONEOUS.

The Wife urges this court to rule that the judge's findings of her social security and disability income $1,073 does not preclude the Husband from a child support obligation. The relevant statutory provision at issue is Section 78-45-7.5.

Subsection 78-45-7.5(8)(b) reads, inter alia:

> Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of the parent.

Utah Code Ann. § 78-45-7.5 (1997).

The appellate courts have outlined the criteria upon which a party may successful rely on the plain error doctrine. To establish plain error, the party must show that: "(i) An error exists; (ii) the error should have been obvious to the trial

court; and (iii) the error is harmful." State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993). An error is harmful if, "absent the error, there is a reasonable likelihood of a more favorable outcome" for the defendant, or "our confidence in the verdict is undermined." Id. at 1208-09.

In this matter, the issue of child support meets the test outlined in Dunn. First, the failure to set child support is clear error as child support is mandated for all persons who are noncustodial parents as proscribed by the Uniform Civil Liability for Support Act. Second, this error should have been obvious to the trial judge. As a matter of fact, both attorneys kept asking for clarification about the child support issue. It was clear in the record as identified above, that once the alimony issue had been discussed and the court ordered that $600 would be appropriate, thereafter the Husband's attorney asked if that would be in addition to child support, and again. (TT. at 17-18). Finally, it is equally clear that the Wife has been, is, and shall continue to be harmed by this decision. The intent of child support is to assist her in maintaining a roof over the child's head. This obligation is both parents to maintain. In reading Subsection 78-45-7.5(8)(b), no where does it alleviate the Husband from his child support obligation. That subsection provides that the Wife is receiving Social Security benefits is credited towards her income as her income. No part of the benefits received by the Wife is attributed to the Husband's income to alleviate or obviate his child support obligation. In this matter, there remains an addition $300 between the parties'

incomes that remain disparate between the Husband's income and the Wife's benefits and alimony that can be applied in this matter towards the child support obligation. The $600 alimony without child support is insufficient for the Wife and the parties' daughter. Child support should awarded in addition to alimony.

POINT II.
THE $400 AWARD OF ATTORNEY'S FEES IS UNREASONABLE UNDER THE EXISTING CIRCUMSTANCES.

The Bell Court established a procedure and a test for determining the award of attorney's fees by the trial court. The test established consists of a three prong analysis. The first of the three prongs involves an examination of the need of the spouse who is requesting the payment of attorney's fees. The second prong involves an analysis of the spouse who may be required to pay the attorney's fees. The final prong deals with the reasonableness of the amount of the fees (see Bell v. Bell, 810 P.2d 489 (Utah App. 1991).

The Bell Court stated:

> To permit meaningful review of the trial court's discretionary ruling, "we have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award." Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215 (Utah Ct. App. 1989); see also Martindale v. Adams, 777 P.2d 514, 518 (Utah Ct. App. 1989) (for meaningful appellate review trial court must explain factors and basis for sua sponte reduction of attorney fees); Morgan v. Morgan, 795 P.2d 684, 688 (Utah Ct. App. 1990) (award of attorney fees in divorce case remanded for more adequate findings). In Haumont v. Haumont, 793 P.2d 421, 426 (Utah Ct. App. 1990), we held it was an abuse of discretion for the trial court to award less than the claimed amount of attorney fees without any reasonable justification, and that a trial court must explain its sua sponte reduction in order to permit meaningful

> review on appeal. See also Regional Sales Agency, Inc., 784 P.2d at 1215 (findings particularly important when the trial court has reduced the attorney fees from the amount requested, and amount requested was supported by undisputed evidence); Martindale, 777 P.2d at 518.

Id. In this matter the award of attorney's fees did not follow any Bell Test. The court entered the amount of $400--apparently an arbitrary amount. The main point to consider is that the the Bell Test is very similar to the Jones Factors. For all practical purposes, the same factors, or prongs, are considered in assessing attorney's fees as they are in determining alimony. In this matter, alimony was awarded to the Wife. Contrary to that award, the court imposed attorney's fees against the Wife even though she was partially meritorious with her objections toward the proposed final documents. It appeared to the Wife, that perhaps the trial judge became confused as to who objected and who prevailed on the objections. Perhaps the judge figured that the $400 were to be awarded to the Wife and not vice versa.

CONCLUSION

The trial court clearly and prejudicially committed reversible error in declining to award the Wife child support and by assessing attorney's fees against her. Hence, this Honorable Court should vacate the order and reverse the trial court's decision as to these awards and remand them for determination. Moreover, the Wife respectfully requests that this Court mandate that the child support may be applied retroactively to the date of the entry of the *Decree of Divorce*.

RESPECTFULLY SUBMITTED this 5th day of January, 1999.

D. BRUCE OLIVER
Attorney for Respondent and Cross-Appellant

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 12 day of January, 1999, I served a copy of the foregoing **BRIEF OF CROSS-APPELLANT**, postage prepaid, to: Wendy J. Lems, LARSEN & MOONEY LAW, 50 West Broadway, First Floor, Salt Lake City, Utah 84101.

D. BRUCE OLIVER

ADDENDA

30-3-1. Procedure — Residence — Grounds.

(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

(2) The court may decree a dissolution of the marriage contract between the petitioner and respondent on the grounds specified in Subsection (3) in all cases where the petitioner or respondent has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the petitioner has been stationed in this state under military orders, for three months next prior to the commencement of the action.

(3) Grounds for divorce:

(a) impotency of the respondent at the time of marriage;

(b) adultery committed by the respondent subsequent to marriage;

(c) willful desertion of the petitioner by the respondent for more than one year;

(d) willful neglect of the respondent to provide for the *petitioner the common necessaries of life;*

(e) habitual drunkenness of the respondent;

(f) conviction of the respondent for a felony;

(g) cruel treatment of the petitioner by the respondent to the extent of causing bodily injury or great mental distress to the petitioner;

(h) irreconcilable differences of the marriage;

(i) incurable insanity; or

(j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless:

(i) the respondent has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and

(ii) the court finds by the testimony of competent witnesses that the insanity of the respondent is incurable.

(b) The court shall appoint for the respondent a guardian ad litem who shall protect the interests of the respondent. A copy of the summons and complaint shall be served on the respondent in person or by publication, as *provided by the laws of this state in other actions for* divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.

(c) The county attorney shall investigate the merits of the case and if the respondent resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the respondent and the interests of the state.

(d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.

(e) The petitioner or respondent may, if the respondent resides in this state, upon notice, have the respondent brought into the court at trial, or have an examination of the respondent by two or more competent physicians, to determine the mental condition of the respondent. For this purpose either party may have leave from the court to enter any asylum or institution where the respondent may be confined. The costs of court in this action shall be apportioned by the court. 1997

30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may *obtain a divorce from her husband.* 1953

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party

is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment. 1993

30-3-4. Pleadings — Findings — Decree — Use of affidavit — Sealing.

(1) (a) The complaint shall be in writing and signed by the petitioner or petitioner's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon the default of the respondent, evidence to support the decree may be submitted upon the affidavit of the petitioner with the approval of the court.

(c) If the petitioner and the respondent have a child or children, a decree of divorce may not be granted until both parties have attended the mandatory course described in Section 30-3-11.3, and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the respondent, upon the petitioner's affidavit.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1997

30-3-4.1 to 30-3-4.4. Repealed. 1990

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

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7) (a) The court shall consider at least the following factors 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; and

(iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case. 1997

78-45-7.6. Adjusted gross income.

(1) As used in the guidelines, "adjusted gross income" is the amount calculated by subtracting from gross income alimony previously ordered and paid and child support previously ordered.

(2) The guidelines do not reduce the total child support award by adjusting the gross incomes of the parents for alimony ordered in the pending proceeding. In establishing alimony, the court shall consider that in determining the child support, the guidelines do not provide a deduction from gross income for alimony. 1989

78-45-7.7. Calculation of obligations.

(1) The parents' child support obligation shall be divided between them in proportion to their adjusted gross incomes, unless the low income table is applicable.

(2) Except in cases of joint physical custody and split custody as defined in Section 78-45-2 and in cases where the obligor's adjusted gross income is $1,050 or less monthly, the base child support award shall be determined as follows:

(a) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base combined child support obligation table.

(b) Calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income.

(3) In cases where the monthly adjusted gross income of the obligor is between $650 and $1,050, the base child support award shall be the lesser of the amount calculated in accordance with Subsection (2) and the amount calculated using the low income table.

(4) The base combined child support obligation table provides combined child support obligations for up to six children. For more than six children, additional amounts may be added to the base child support obligation shown. Unless rebutted by Subsection 78-45-7.2(3), the amount ordered shall not be less than the amount which would be ordered for up to six children.

(5) If the monthly adjusted gross income of the obligor is $649 or less, the court or administrative agency shall determine the amount of the child support obligation on a case-by-case basis, but the base child support award shall not be less than $20.

(6) The amount shown on the table is the support amount for the total number of children, not an amount per child. 1994

78-45-7.8. Split custody — Obligation calculations.

In cases of split custody, the base child support award shall be determined as follows:

(1) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base combined child support obligation table. Allocate a portion of the calculated amount between the parents in proportion to the number of children for whom each parent has physical custody. The amounts so calculated are a tentative base child support obligation due each parent from the other parent for support of the child or children for whom each parent has physical custody.

(2) Multiply the tentative base child support obligation due each parent by the percentage that the other parent's adjusted gross income bears to the total combined adjusted gross income of both parents.

(3) Subtract the lesser amount in Subsection (2) from the larger amount to determine the base child support award to be paid by the parent with the greater financial obligation. 1994

78-45-7.9. Joint physical custody. Obligation calculations.

In cases of joint physical custody, the base child support award shall be determined as follows:

(1) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base combined child support obligation table.

(2) Calculate each parent's proportionate share of the base combined child support obligation by multiplying the base combined child support obligation by each parent's percentage of combined adjusted gross income. The amounts so calculated are a tentative base child support obligation due from each parent for support of the children.

(3) Multiply each parent's tentative base child support obligation by the percentage of time the children spend with the other parent to determine each parent's tentative obligation to the other parent.

(4) Calculate the base child support award to be paid by the obligor by subtracting the lesser amount calculated in Subsection (3) from the larger amount.

(5) The parent determined to be the obligor in Subsection (4) shall pay the amount calculated in Subsection (4) when the obligee has physical custody. 1994

78-45-7.10. Reduction when child becomes 18.

(1) When a child becomes 18 years of age, or has graduated from high school during the child's normal and expected year of graduation, whichever occurs later, the base child support award is automatically reduced to reflect the lower base combined child support obligation shown in the table for the remaining number of children due child support, unless otherwise provided in the child support order.

(2) The award may not be reduced by a per child amount derived from the base child support award originally ordered. 1994

78-45-7.11. Reduction for extended visitation.

(1) The child support order shall provide that the base child support award be reduced by 50% for each child for time periods during which the child is with the noncustodial parent by order of the court or by written agreement of the parties for at least 25 of any 30 consecutive days. If the dependent child is a client of cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program, any agreement by the parties for reduction of child support during extended visitation shall be approved by the administrative agency. However, normal visitation and holiday visits to the custodial parent shall not be considered an interruption of the consecutive day requirement.

(2) For purposes of this section the per child amount to which the abatement applies shall be calculated by dividing the base child support award by the number of children included in the award. 1997

78-45-7.12. Income in excess of tables.

If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount shall be ordered on a case-by-case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support. 1994

78-45-7.13. Advisory committee — Membership and functions.

(1) On or before March 1, 1995, the governor shall appoint an advisory committee consisting of:

(a) one representative recommended by the Office of Recovery Services;

the court shall adjust the amount of child support ordered to that which is provided for in the guidelines.

(8) Notice of the opportunity to adjust a support order under Subsections (6) and (7) shall be included in each child support order issued or modified after July 1, 1997. 1997

78-45-7.3. Procedure — Documentation — Stipulation.

(1) In a default or uncontested proceeding, the moving party shall submit:

(a) a completed child support worksheet;

(b) the financial verification required by Subsection 78-45-7.5(5); and

(c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.

(2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the defaulting party's income by the moving party, based on the best evidence available, may be submitted.

(b) The evidence shall be in affidavit form and may only be offered after a copy has been provided to the defaulting party in accordance with Utah Rules of Civil Procedure or Title 63, Chapter 46b, Administrative Procedures Act, in an administrative proceeding.

(3) (a) In a stipulated proceeding, one of the moving parties shall submit:

(i) a completed child support worksheet;

(ii) the financial verification required by Subsection 78-45-7.5(5); and

(iii) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.

(b) A hearing is not required, but the guidelines shall be used to review the adequacy of a child support order negotiated by the parents.

(c) A stipulated amount for child support or combined child support and alimony is adequate under the guidelines if the stipulated child support amount or combined amount equals or exceeds the base child support award required by the guidelines. 1994

78-45-7.4. Obligation — Adjusted gross income used.

Adjusted gross income shall be used in calculating each parent's share of the base combined child support obligation. Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines. 1994

78-45-7.5. Determination of gross income — Imputed income.

(1) As used in the guidelines, "gross income" includes:

(a) prospective income from any source, including nonearned sources, except under Subsection (3); and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. However, if and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at his job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Specifically excluded from gross income are:

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance; and

(c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns.

(c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.

(c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a child who is the subject of a child support award nor benefits to a child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of