

2009

Jeffery G. Fuell v. Lorencita J. Diel (Fuell) : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

JEFFERY G. FUELL,

Petitioner/Appellant,

vs.

LORENCITA J. DIEL (FUELL),

Respondent/Appellee.

}
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}
}
}
}
} Appellate Case No. ~~20080135~~ ^{20090382-CA}

} [District Court Case No. 034300398 DA]
} [Trial Judge: STEPHEN L. HENRIOD]
}

Appeal from the Judgment and Order
to Modify Divorce Decree entered March 30, 2009
by the Honorable Stephen L. Henriod

APPELLANT'S OPENING BRIEF

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UTAH APPELLATE COURTS

OCT 02 2009

LIST OF PARTIES

1. Jeffery G. Fuell, Petitioner/Appellant.
2. Lorencita J. Fuell, Respondent/Appellee.

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1. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to *Utah Code Ann.* 78A-4-103(2)(h) in that this appeal arises from the final judgment of the District Court, the Honorable Stephen L. Henriod presiding, which involved a domestic relations matter modifying a previously entered Divorce Decree.

2. STATEMENT OF ISSUES AND STANDARD OF REVIEW

ISSUE # 1: Did the District Court err in imputing income to Petitioner?

Sub-Issues:

1.1 Did the District Court err in imputing income when there was no claim for imputation of income in the Petition to Modify? [Issue preserved: Vol. II, 39/3 - 41/20; 75/13-18¹; 98/4-22; 104/22 - 106/6; see, also, Petition to Modify]

1.2 Did the District Court err in imputing income when the issue of imputation of income was presented and referred to by Respondent for the first time during trial? [Issue preserved: Vol. II, 39/3 - 41/20]

1.3 Did the District Court allow Respondent to engage in “trial by ambush?” [Issue preserved: Vol. II, 39/3 - 4041/20]

1.4 Did the District Court err in imputing income when it refused to allow Petitioner to present rebuttal and/or impeachment evidence to the claim for imputation of income when the first time that imputation was raised was at trial? [Issue preserved: Vol. II, 39/3 - 41/20]

1.5 Did the District Court err in holding that the rule of law is that Petitioner “can choose to change his employment and his income, but he can’t do that to the detriment of his children?” [Issued preserved: holding by court not consistent with law]

¹ ### refers to page/line numbers from the Transcript of Bench Trial. Trial occurred on February 4, 2009, which is Vol. I and February 11, 2009, which is Vol. II

ISSUE # 1 DETERMINATIVE LAW: *Utah Code Ann. 78B-12-203. Hall v. Hall*, 858 P.2d 1018 (Utah App. 1993).

ISSUE # 1 STANDARD OF REVIEW: “In order to evaluate the merit of appellant's first imputation argument, we must determine whether the trial court's decision to impute income was **supported by adequate findings** in light of Utah Code Ann. § 78-45-7.5(7)(a) (1992), which reads: ‘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.’ (fn6) While we agree with appellee that section (7)(a) does not specifically require a trial court, in making a “finding” of underemployment, to parrot the exact language of the statute, it is well established that where a statute expressly requires a trial court to make a threshold finding before taking specified judicial action, **the trial court abuses its discretion if it proceeds without first making the legislatively mandated finding.**” [Emphasis added] *Hall v. Hall*, 858 P.2d 1018, 1024 (Utah App. 1993).

“Trial courts have considerable discretion in determining a spouse's income, and determinations of income will be upheld on appeal absent an **abuse of discretion.**” *Leppert v. Leppert*, 2009 UT App 10, p. 3 (Ct. App. Utah, January 15, 2009).

ISSUE # 2: Was the District Court’s decision to impute income supported by sufficient evidence and adequate findings? [Issue preserved: Vol. II, 39/3 - 41/20; 75/13-18²; 98/4-22; 104/22 - 106/6]

ISSUE # 2 DETERMINATIVE LAW: *Utah Code Ann. 78B-12-203. Hall v. Hall*, 858 P.2d 1018 (Utah App. 1993).

ISSUE # 2 STANDARD OF REVIEW: “When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court's judgment unless it is against the

² #### refers to page/line numbers from the Transcript of Bench Trial. Trial occurred on February 4, 2009, which is Vol. I and February 11, 2009, which is Vol. II

clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.’ *State v. Larsen*, 2000 UT App 106, ¶ 10, 999 P.2d 1252 (quotations and citation omitted).” *State v. Nichols*, 76 P.3d 1174, 1178 (Utah App. 2003). [Emphasis added]

3. STATUTORY PROVISIONS

Utah Code Ann. 78B-12-203. Determination of gross income -- Imputed income.

(1) As used in the guidelines, "gross income" includes prospective income from any source, including earned and nonearned income sources which may include 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, income replacement 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. If and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at the parent's job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Notwithstanding Subsection (1), 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, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.**

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history,

occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or a parent's occupation is unknown, 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 and the condition is not of a temporary nature:

(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 unable to 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 minor child who is the subject of a child support award nor benefits to a minor 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 that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

Renumbered and Amended by Chapter 3, 2008 General Session [Emphasis added]

4. STATEMENT OF CASE

Petitioner and Respondent were divorced and a Decree of Divorce was entered on or about September 22, 2003. The Decree awarded both parties the Joint Legal and Physical Custody of their three children. On August 6, 2007, Respondent filed her Verified Petition to Modify Divorce Decree [Addendum 1], wherein she essentially sought to have the custody Order changed and also prayed for “15. Once the custody award is modified, the child support award should also be modified to comport with the custody situation.”

Petitioner Answered and the case ultimately proceeded to Trial on February 4 and 11, 2009, before the Honorable Stephen L. Henriod. Judgment was entered on the Petition to Modify wherein the court modified custody from Joint Physical and Joint Legal and awarded Respondent, Lorencita J. Diel (Fuell), Sole Physical and Sole Legal Custody. Notwithstanding that Respondent had only prayed in her Petition to Modify that child support payment be “modified to comport with the custody situation,” the trial court disregarded Petitioner’s current income that he was earning and imputed Petitioner’s substantially higher income that he was earning at his former job that he quit approximately 2 years earlier.

In its Memorandum Decision [Addendum 2] and in justification of its decision to impute income, the trial court stated: “Mr. Fuell can choose to change his employment and his income, but he can’t do that to the detriment of his children, which is what he has done.” [Addendum 2, p. 6]. In doing so, the trial court erred in not following the dictates of the law and those requirements set forth in *Utah Code Ann.* 78B-12-203. Further, other than the evidence offered by Petitioner, there was not one iota of evidence offered by Respondent that Petitioner was voluntarily underemployed or that he quit his job to cause a detriment to his children.

Petitioner/Appellant contends that the trial court erred in imputing income at his former job's earnings and his appeal is limited to whether the trial court appropriately imputed income.

5. STATEMENT OF FACTS

During trial and for the first time, Respondent made allegations that income should be imputed to Petitioner for purposes of re-calculating child support. [Vol. I, Respondent's Opening Statement: 11/6-10]. The claim that income should be imputed or that Petitioner was wilfully under-employed was never contended by Respondent or raised by Respondent during the pendency of the action and was raised for the first time during trial. Even though Petitioner vehemently objected, the claim was allowed. Although Petitioner attempted to produce contradicting evidence and impeachment evidence, the trial court disallowed the evidence to be admitted. Petitioner claimed "trial by ambush," but the trial court allowed Respondent's attorney to proceed *to argue* that income should be imputed. As will be more fully discussed below, Respondent's attorney presented absolutely no evidence that Petitioner was voluntarily underemployed, but only argued this in his Opening and Closing Statements and argued with Petitioner in an attempt to impeach Petitioner. Respondent herself didn't even testify or allude to this contention that Petitioner was voluntarily underemployed.

MR. JOLLEY: Exhibit 8, I have next.

MR. BUHLER: I'd object to this whole thing, Your Honor. It's not been produced to me before this moment. It's not in keeping with the motion in limine. It's not in keeping with the order of the first day of this trial.

MR. JOLLEY: This is true, Your Honor. It's offered – number one, to support his testimony; number two, as a rebuttal by the contention that they've made here by offering a child support obligation worksheet based on an old job rather than his

current job. And so I believe they're making the contention that he's willfully underemployed and this rebuts that. **That contention was not made at any time during the litigation except during trial.**

THE COURT: I don't believe it's absolutely implicit in the petition to modify. The objection is sustained based on the order on the motion in limine.

MR. JOLLEY: If I could just have a clarification, Your Honor: **You're saying it's to be implied from the –**

THE COURT: **From the petition to modify –**

MR. JOLLEY: Petition to modify. I was just going to check it. I don't think – **I don't know if I could be wrong about allegation of being underemployed.**

THE COURT: Let's see it.

MR. JOLLEY: I need to look right here.

THE COURT: **Well, I think you're right. There isn't anything about his income.** There's an allegation that he's had increases since the time of the divorce. That's all.

MR. BUHLER: Well, I renew my objection on the basis of the motion in limine.

THE COURT: **Oh, the exhibit is out.**

MR. BUHLER: Okay. I don't know what we're talking about then.

THE COURT: The exhibit's out because Mr. Fuell didn't produce anything significant pursuant to the discovery requests and there was a motion and I made an order and nothing's coming in that controverts that order.

MR. JOLLEY: **But I'm controverting evidence that he's produced here at trial that wasn't produced to us prior. It's like Mr. Buhler said last time, "It's trial by ambush."** There's – we had – we weren't requested to produce medical records. **We had no – or anything dealing with a contention that he was willfully underemployed and then they come into trial and make that allegation. We had no knowledge of anything until the allegation was made here at trial.** And all I'm doing is rebutting the allegation that comes in at the last minute that's not contained in the petition and it wasn't part of this case.

THE COURT: The interrogatory request for production of documents requested everything that he had to support his financial situation.

MR. JOLLEY: Well, this –

THE COURT: Job change; this is certainly part of that package.

MR. JOLLEY: **I don't know how anybody, especially – except in retrospect – you could understand that medical**

records had to do with financial records because at some time in the future they would make an allegation of underemployment. That's all I'm saying is that we didn't find this out until then and this supports his testimony.

MR. BUHLER: But, foundationally, I want to talk to this doctor. I want to know what those said. And I want to know how things happened. I have not been given that opportunity. So as a matter of foundation – even without the motion in limine.

THE COURT: They are also excluded as hearsay. [Emphasis added]

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Petitioner explained that due to the fact that his current job would end in 2011, that he was advised to seek different employment by his doctors due to stress and that he completed an educational program to become a HVAC technician at his own expense.

Q. Okay. What was the reason for changing jobs?

A. Several reasons. One, the place was going to be closing, I think. When I was there it was like August of 2011, I think, is when they planned on a closure date and when the chemical weapons would be burned. And the other thing is I got tired of not sleeping. I'd like sleep four hours in a week when I had to go to work and the job was just too stressful. So, I'd went to school and finished school in 2005, graduated and got a diploma in 2005, and I thought that it would be a good time to change fields instead of looking for work with 1,200 other

people when it comes time for everybody to be laid off out there.

Q. Okay. And what kind of job did you do for that company?

A. I worked in between the engineers and maintenance planners and just helped them find –

Q. Okay. And you say they provided services of disposing of chemical weapons?

A. Yeah.

Q. Okay. And were you experiencing – were any – you indicated you couldn't sleep or you were losing sleep because of the job. What did you say about that?

A. Well, I just – I knew it was coming to an end. I started to hate going to the job. I just didn't even want to be there. So I'd went to the doctor to find out if it was just something with me, why I wasn't sleeping and stuff, and they tried to give me – they wanted to give me sleeping pills and stuff, and I don't take any sort of medication at all. And they suggested a life change. So that's what I did; changed.

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Q. So am I correct that you also changed jobs because it was recommended by your doctor?

A. They just recommended a lifestyle change.

Q. And what were your work hours at your former job?

A. I worked shift work, day shifts, and night shifts and weekends.

Q. Okay. Were they regular shifts?

A. What do you mean by –

Q. Did you have the same shift, year-in, year-out?

A. No, I changed shifts a few times.

Q. How did that effect you?

A. It's just – well, it's just hard to go from days to nights, nights to days, 12-hour shifts.

THE COURT: Well, what your attorney asked is what it was like. Tell us. How long were you on the day shift? Then when did you switch? How long did you stay on night shifts?

THE WITNESS: I never was –

THE COURT: How many hours did you work on a day when you're on a certain shift? Answer his question.

THE WITNESS: I worked 12-hour days and 12-hour nights. It went back and forth –

THE COURT: If you work days shifts, how many weeks were you on the day shift?

THE WITNESS: Well, I wasn't. It was like four days, and then I'd get like two days off.

THE COURT: Like that, or was it that?

THE WITNESS: It was that.

THE COURT: Four days on, two days off, and then you'd change shifts?

THE WITNESS: To three nights.

THE COURT: I don't know what your situation was. And based on your answers, I still don't have a clue. That's why he's asking you the questions and I'm not really satisfied with your answers.

Please go ahead.

MR. JOLLEY: Tell me what your shifts were, to the best of your recollection.

A. I worked 14 days a month. I would work four days shifts, and then – or I'd work four night shifts; Friday, Saturday, Sunday, and a Monday, and then I'd be off Tuesday morning, Wednesday and Thursday, and then go back to work Friday day shift, Saturday day shift, Sunday day shift, and then I'd have Monday off and then I would work Tuesday night, Wednesday night and Thursday night and get off Friday morning and have Saturday off, Sunday off. And then I would work Monday day shift, Tuesday day shift, Wednesday day shift and Thursday day shift, and then we'd have a seven day break before I went back to my four night shifts.

MR. JOLLEY: Okay.

THE COURT: Okay, thank you. That's what I wanted to hear.

Vol. II, 42/5 - 44/12

MR. BUHLER: So, you're certain that EG&G will close in the year 2011?

A. That was their scheduled closure date when I used to work out there. And sometimes it would come a little bit – it was never the same. Sometimes it was earlier and sometimes it was later. They always – they have a graph of when they start burning the chemical weapons. If they have a slowdown, then they extend their closure. And if they burn a little faster, then the closure date comes earlier.

Vol. II, 79/3-12

MR. JOLLEY: Did you change jobs for the purpose of avoiding any obligation to your children?

A. No, I did it for me. For my health.

Q. Okay. And did you take a pay decrease or increase when you changed jobs?

A. Decrease.

Q. Okay. And what were you making per hour at your old job?

A. \$20.80.

Q. Was there any overtime involved or extra pay because of the way you explained this shift?

A. Every time we got – yeah, we got paid a night shift differential, Sunday premiums, and eight hours of overtime every two weeks, so we got 16 hours of overtime a month.

Q. Now, in your new job, what other than the health concerns that you had – were there any other concerns – I'm sorry, the health and the fact that your job with that company would come to an end in 2011, were there any other considerations that you thought of in changing to your other job?

A. I changed jobs – I didn't want to wait five years after I graduated to look for the employment that I took my school for and it had already been three years since I graduated.

THE COURT: High school graduation (Inaudible) graduation? What?

THE WITNESS: HBAC (sic) technician.

THE COURT: Where did you go to school?

THE WITNESS: RSI Phoenix.

MR. JOLLEY: And are you now working in that field?

A. Yes.

Q. And do you intend to stay in that field?

A. Yes, I intend to stay in that field and open my own business.

Vol. II, 44/13 - 45/23

Petitioner paid for his education without any assistance from his current employer or others, which supports his claims that he undertook this action for the reasons stated by him in his testimony, which remained uncontroverted by any evidence presented by Respondent.

Finally, on the issue of changed jobs: Sir, you said you went to school?

A. Uh-huh.

Q. Who paid for that?

A. I did.

Q. You're sure your company didn't pay for it?

A. Yep.

Q. Didn't pay you a nickel?

A. Not one red cent.

Q. What?

A. Not one red cent. It had nothing to do with my field of work, and they would not pay for it.

Q. So, it's just a coincidence that you took it three years ago right after you were ordered to start paying child support and we filed this petition, it just suddenly occurred to you that at that time you needed to go ahead and change and beat the crowd. Is that your testimony?

. . . . Vol. II, 74/7-25

Q. Okay, let me put it a different way: Isn't the truth of the matter that when you got served with this petition to modify, that you quit your job so you wouldn't have to pay the bigger child support amount that we were asking for?

A. No, I quit my job to better myself and for my health.

Q. It's coincidental that you did it right after, shortly – after we filed the petition?

A. It was probably 9, 10 months after we did the petition.

Vol. II, 81/1-11

The only witnesses at Trial were Respondent and Petitioner and even after Petitioner explained what is set forth above, Respondent was not re-called and was not asked to comment on or discredit anything that Petitioner had testified about concerning Respondent's attorney's contention of voluntary underemployment.

6. SUMMARY OF ARGUMENT

The trial court erred by not only allowing Respondent's attorney to argue a theory of underemployment when it was not alleged in the Petition to Modify and was never referenced prior to trial, but also erred when it accepted a contention/argument as true when such contention was completely unsupported by any evidence. Because the trial court felt that Petitioner was not as credible as Respondent, the trial court erred when it shifted the burden of proof by requiring Petitioner to essentially disprove Respondent's allegation/contention

at trial concerning voluntary underemployment, rather than require Petitioner to meet her burden of proof on the issue of voluntary underemployment with competent evidence.

The trial court also erred when it did not enter findings of fact as to the **evidentiary basis for the imputation** as required by *Utah Code Ann.* 78B-12-203(7)(a).

The trial court's imputation of income because of voluntary underemployment was not supported by sufficient evidence and its ruling was clearly erroneous and is against the clear weight of the evidence because the only evidence was presented by Petitioner, and nothing by Respondent, who only argued voluntary underemployment. Furthermore, none of the testimony of Petitioner about why he changed jobs was ever discredited or controverted by Respondent.

7. ARGUMENT

The only evidentiary basis provided by the trial court in imputing income based on voluntary underemployment was that Petitioner changed jobs. [See Memorandum Decision (Addendum 2) and Findings of Fact (Addendum 3)]. Because of this overly broad interpretation by the trial court of the law, the question arises: When is someone "voluntarily underemployed?" The trial court's interpretation that you can change a job but not to the detriment of the children seems to imply that taking a job that pays less is always to the detriment of the children. This interpretation of the law creates illogical results in endless factual scenarios and implies further that the highest amount of income one has been able to achieve at any given time in one's life shall establish a threshold income level which will be used to determine "underemployment." Taken to illogical extremes, an ex-spouse with high income who takes maternity leave should be imputed income at her previous earning capacity

even though she may not be able to find equal income after her maternity leave has expired, because she “voluntarily” left her job. A person who quits a job in the mines because of health or other risk factors must always be imputed with the same level of income. And, changing jobs when one knows that his employer will be closing its doors at some point in the future will also result in “voluntary underemployment.” Even though the trial court apparently did not believe Petitioner when he testified that his job at the chemical weapons disposal site would be ending in the near future, a cursory search on the internet reveals that there just happens to exist a Chemical Weapons’ Convention Deadline of 2012 for destruction of remaining chemical weapons stockpiles.

The evidence presented at trial clearly supported that the job change was for the benefit of Petitioner’s children, to provide for the health of their father and to provide for stability in future income production because of job stability. There was no evidence to the contrary. Respondent did not testify that she even believed that Petitioner quit his job so he could be underemployed and, in fact, she offered absolutely no evidence to support her attorney’s contention or to discredit or contradict Petitioner’s testimony. The only argument to support the contention of underemployment was that Petitioner changed jobs during the time that the Petition to Modify was pending.

“Because we are asked to review the results of a bench trial for sufficiency of evidence, we will only reverse if the trial court's findings were clearly erroneous. ‘When reviewing a bench trial for sufficiency of the evidence, we must sustain the trial court's judgment unless it is “against the clear weight of the evidence, or if [we] otherwise reach[] a definite and firm conviction that

a mistake has been made.”” State v. Gordon, 2004 UT 2, ¶ 5, 84 P.3d 1167 (quoting State v. Goodman, 763 P.2d 786, 786-87 (Utah 1988) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987))).

¶ 11 Additionally, ‘in those instances in which the trial court's findings include inferences drawn from the evidence, we will not take issue with those inferences unless the logic upon which their extrapolation from the evidence is based is so flawed as to render the inference clearly erroneous.’ Glew v. Ohio Sav. Bank, 2007 UT 56, ¶ 18, 181 P.3d 791 (citing State v. Walker, 743 P.2d at 193).”

State v. Briggs, 197 P.3d 628, 631 (S. Ct. Utah 2008)

Regarding the sufficiency and “logic upon which their extrapolation from the evidence” would be “so flawed as to render the inference” of voluntary underemployment “clearly erroneous,” Petitioner’s counsel argued in closing:

He did not – there were no lapse in employment, there was no failure to have a job. This was a change of job and I think his testimony was credible by going to the doctor, to finding out why he couldn’t sleep, by having these horrendous shifts, that he did this for a good reason, not for the bad reasons that they are saying, that is to avoid his obligations to his children.

I guess if he were informed as a loving dad that they say he is and that he really is, that someday if you change this job, it will be held against you and the allegation will be made that you are going to pay less in child support to hurt your children, I believe Mr. Fuell would have remained at the job saying, "No, I don't – I'm not going to do something to hurt my children." This is something that we as attorneys do in reparation (sic) for trial as we look for what we can do. And I think that's all this is is they're bootstrapping their way into saying, "Well, we want this historic income" when, in fact, he's not making that money. He doesn't have a lot of reserves. He's doing what he can. And the child support award should be based on his current income, which he's been at that job now for some time, since July of '08.

He has benefits at that job. Now he has insurance for his kids, and there was no reason – the reason was never contemplated by him that "I'm going to change so that I can adjust not only my income down by 29 to 39 to almost 49, I'm going to take \$2,000 less a month in my pocket so I can avoid paying \$300 to her." That type – just doesn't make a lot of sense. And that's the math if you the two calculators in what he's making less by his new job. So it was done for appropriate reasons.

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As stated above, it would make little sense to orchestrate a scheme to pay less in child support when the overall effect would be to dramatically reduce the earning spouse's disposable income at the same time. Looking at the child support calculators and the incomes testified to², the change of jobs resulted in an decrease in child support to \$481.00, but also a decrease in income of \$2,398. Child support calculated at Petitioner old income of \$4,825 would be \$761.00. So, is it logical that someone would intentionally and for the purpose of avoiding child support change jobs to save \$280 per month in child support payments while he would be losing gross income of \$2,398 and net income (after deducting child support) of \$2,118 per month? "Hey, even though I will be losing \$2,118 of spendable income to myself, I will change jobs so I can deprive my children of \$280 per month." The logic of the court's statement does not follow the logical inferences that one is compelled to draw from the mathematical calculations.

As such, the only logical inference that could have, and should have, been drawn would have been something other than proposed in argument by Respondent's counsel. And, the only other evidence which was un-refuted was the testimony of Petitioner about the reasons why he changed jobs.

The trial court also erred when it did not enter findings of fact as to the **evidentiary basis for the imputation** as required by *Utah Code Ann. 78B-12-203(7)(a)*. The Findings of Fact and Conclusions of Law state the following with regards to the imputation of income, which are also consistent with the Memorandum Decision.

² Petitioner's income: old job: \$4,825 and new job: \$2,427. Respondent's income: \$3,000. [See, Memorandum Decision, p. 5]

13. Beginning in August 2007 when the petition to modify was served upon Mr. Fuell, all of the statutory provisions and guidelines for establishing child support shall apply. Ms. Diel's income is and was \$3,000 per month.

Mr. Fuell was earning \$4,825 per month until mid-2008 when he decided he needed a lifestyle change, quit his job, left the children uninsured for three months, and took a new job earning \$2,427.00 per month, and he claims this figure should be used for his child support. Mr. Fuell claimed there were medical reasons for the job change, but provided no medical evidence, brought no witnesses to testify as to any medical condition, admitted that he refused to take medication for sleep issue he claimed, and as indicated above, was incredible. Mr. Fuell can choose to change his employment and his income, but he can't do that to the detriment of his children, which is what he has done. The income for calculation of child support for Mr. Fuell shall be \$4,825.00 per month.

14. Beginning August 2007, the child support obligation for Ms. Diel under UCA 78B-12-301(1) will be \$466.64 and for Mr. Fuell shall be \$761.36 per month.

15. Because ORS has withheld \$135.00 per month from Mr. Fuell's income during the period between August 2007 and the

end of March 2009, he shall receive credit for these payments
and judgement shall enter for the difference of \$12,527.20.

It appears that another legally insufficient reason for the imputation is that the trial court thought that Petitioner's testimony was "incredible." But, unfortunately, a thorough review of the Trial Transcript clearly illustrates that the trial court did not give any credence to the testimony of Petitioner. This is also borne out by the tone and tenor of the Memorandum Decision. The trial court chose to disbelieve what would otherwise be believable, especially when there was no evidence to the contrary. Rational questions arise and support the veracity of Petitioner, such as why would someone go to school for a different career if he did not intend to change careers in the future and why is it so unbelievable that one would do this when he knew that his job would be terminating in the future due to a nation-wide and world-wide plan to close chemical weapons disposal sites? Why would the court impute income when one is medically advised to change careers?

Notwithstanding that the trial court refused to believe anything that was testified to by Petitioner, what is important is that the trial court failed to comply with its statutory duty under *Utah Code Ann.* 78B-12-203(7)(a) and set forth "the evidentiary basis" for imputing income. All the trial court did was say that Petitioner's testimony was not credible, but there was no evidence presented other than he changed jobs and this is the only evidence relied upon by the trial court, which is insufficient for imputation of income. There was no discussion by the trial court as to what evidence led it to conclude that Petitioner voluntarily changed jobs to hurt his children or to the intentional detriment of Petitioner's children, as implied by the statement that Petitioner "can choose to change his employment and his

income, but he can't do that to the detriment of his children." And, this statement by the trial court is not consistent with the law.

"Accordingly, because the evidence in this case is not 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment,' we cannot affirm on the basis of undisputed evidence in the record. *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)."

Hall v. Hall, 858 P.2d 1018, 1025 (Utah App. 1993)

"Findings may not be implied, however, when the 'ambiguity of the facts' makes such an assumption unreasonable. *Ramirez*, 817 P.2d at 788. This court recently held that we will not imply any missing finding where there is a "matrix of possible factual findings" and we cannot ascertain the trial court's actual findings. *See Adams*, 821 P.2d at 6.

Hall v. Hall, 858 P.2d 1018, 1025-1026 (Utah App. 1993)

Petitioner changed jobs because of medically suggested reasons and because he knew his job would be ending. He planned for the change in his life by attending school to educate and prepare for the change in jobs while continuing to work for his current employer. The job change was necessitated by his health and the ultimate future closure of all chemical weapons disposal sites, especially the one that he worked for because his employer had told him that they would be closing in 2011. Similarly, as in *Endrody v. Endrody*, 914 P.2d 1166,

1170 (Utah App. 1996), when good reasons (medical, age, etc.) exist for changes in employment, income is not properly imputed.

“. . . the goal of imputing income is to prevent parents from reducing their child support or alimony **by purposeful** unemployment or underemployment.” [Emphasis added] *Griffith v. Griffith*, 959 P.2d 1015, 1018 (Utah App. 1998). There was no purpose or intent by Petitioner to become unemployed or underemployed. His goals were long range, appropriately motivated and for the purpose of bettering his and his children’s situation with the goal of having his own business some day. The change was also necessitated by Petitioner’s health as advised by his doctors.

It is curious that the trial court would criticize Petitioner for not bringing to trial supporting evidence or witnesses regarding his medical condition and other factors that necessitated the change in employment when the trial court refused to allow medical documentation that Petitioner tried to admit and when Petitioner never even knew that a claim of underemployment would be made until the day of trial during Respondent’s Opening Statement.

“Who knows what evidence a party might produce if given the opportunity? In the light of the modern practice under the Rules of Civil Procedure, **a trial is not to be by ambush. Instead, the evidence upon which one relies for judgment can be, and should be, known to the opponent**; and when all the evidence is known, if there is no dispute on any material issue of fact, the rules provide that the court may apply the law and thus terminate

the matter, thereby conserving the time of the court and avoiding expense to the state and to the litigants.” [Emphasis added]

Burningham v. Ott, 525 P.2d 620, 621-622 (S. Ct. Utah 1974)


Had Petitioner known of the claim of voluntary underemployment prior to trial, he could have prepared his documentation and witnesses to support his defense to this claim that was not even alluded to in the Petition to Modify, as admitted by the trial court. Petitioner was truly blind sided.

8. CONCLUSION

For the reasons set forth above, it is respectfully submitted that the trial court erred in imputing income to Petitioner in excess of his current earnings and it is requested that this portion of the Judgment be set aside and amended to require computation of child support using Petitioner’s current income. It is further requested that the Judgment also be amended to compute the arrearage consistent with Petitioner’s current income.

DATED: October 2, 2009

Respectfully submitted,

By: 
VERNON C. JOLLEY
Attorney for Petitioner/Appellant,
JEFFERY G. FUELL

ADDENDUM

Tab 1

GARY BUHLER (7039)a
ATTORNEY FOR RESPONDENT
PO BOX 229
GRANTSVILLE, UT 84029-0229
TELEPHONE: (435) 884-0354

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

JEFFERY G. FUELL
Petitioner,
vs.

LORENCITA J. DIEI (FUELL)
Respondent.

**VERIFIED PETITION TO MODIFY
DIVORCE DECREE**

Case No. 034300398 DA
Commissioner Michelle Tack
Judge Mark S. Kouris

The petitioner Lorencita Diei, by and through her attorney Gary Buhler, hereby petitions the Court to modify the existing decree of divorce as follows:

1. Lorencita, Jeffery, and the parties' children still live in Tooele County, thus this Court has proper jurisdiction over this matter.
2. Paragraph #3 of the decree awards the parties joint legal and joint physical custody of their children Justin, Travis, and Wyatt.
3. For the first year following the divorce Lorencita and Jeff agreed to have the children live with each parent about $\frac{1}{2}$ of the time due to the work schedule Jeff had at his employment.
4. However, Jeff failed to pay any child support or his $\frac{1}{2}$ of the day care as ordered in the decree. He did provide the medical insurance coverage for the children through his employment.

5. Beginning in the summer of 2004 Jeff began trying to convince the oldest child to live with him full time and the child did choose to stay with his father somewhat more than ½ of the time, while the younger two boys stayed almost exclusively with their mother.
6. From September 2005 through March 2006, the older boy lived full time with his father and the middle son stayed with him about four nights per week while the mother, with her new husband, were constructing a new house.
7. Once Lorencita and her husband completed the new home in March 2006, the middle son returned to living full time with the mother and his younger brother, while the oldest continued living with Jeff and visiting Lorencita.
8. During this time, Travis, the middle son, had several social problems at school which resulted in his assignment to the behavior unit of his school. In response to these social problems, Lorencita was forced to quit her management job and take other employment that paid much less but allowed her to attend to the troubled son
9. By the end of the 2005 - 2006 school year, Travis had regained control and was out of the behavior unit. He started the fall session in regular classes but then without any notice or agreement, Jeff removed the child from that school and enrolled him in a different school far removed from his mother's home.
10. Although Travis was then living full time with his father, Jeff failed to control the child or make any effort to cooperate with the school authorities and Travis returned to having severe problems at school. See attached letter from the school.
11. In May, 2007 Travis returned to living fulltime with Lorencita, her husband and his younger brother.

12. In July 2007, Justin turned 18 years old but did not graduate with his normal class.

13. Justin is now living on his own and attending adult education while working for Lorencita's husband.

14. These changes in custody from what was expressed in the decree are a substantial and material change in circumstance that would allow the court to modify the custody award contained within the decree to reflect the conditions actually created by the parties whereby the youngest and middle children are living under their mother's primary physical custody and the oldest child is living on his own.


15. Once the custody award is modified, the child support award should also be modified to comport with the custody situation.

16. Lorencita also believes Jeff has received substantial pay increases since the time of the divorce that would also allow a modification of the existing child support award.

17. Lorencita also asks the Court to grant her judgement against Jeff for the \$2,600.00 in child support he has never paid to her under the terms of the existing decree.

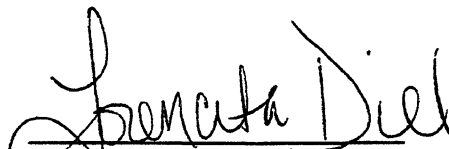
WHEREFORE Lorencita ask the Court to modify the existing decree to reflect the relief requested above.

DATED this 1st day of August, 07.



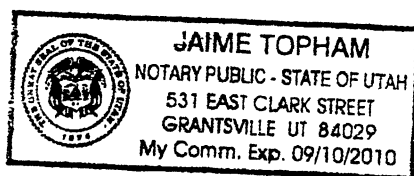
Gary Buhler
Attorney for the Respondent

DATED this 1st day of August, 07.



Lorencita Diel

Lorencita Diel appeared before me at Tooele County, Utah on this 1st day of August, 07 and proved to me her identity through documentary evidence. After being sworn and under oath, signed the preceding document in my presence, and acknowledged and affirmed that the information contained in the document was true of her own personal knowledge and that she has signed the document voluntarily for its stated purpose.



Jaime Topham

NOTARY PUBLIC

Tooele County School District

92 S Lodestone Way, Tooele, Utah 84074 ♦ 435-833-1900 ♦ FAX 435-833-1912

June 18, 2007

Dear Lori

Thank you for calling and asking for a report on Travis for this past school year. I appreciate parents who are actively involved and concerned about their student's progress.

As you know, Travis has presented us with many challenges. We have seen behaviors from Travis this year that we have not seen in the past. There are concerns with Travis' behavior and attendance.

Travis was in our behavior classroom last year (2005-2006), and was a model student. Travis was often the one that would tell other students to stop being disrespectful and disruptive in the classroom and he was a great role model for many of his classmates. At the end of the year we decided that Travis was ready to graduate from our program and return to mainstream classes when school started for the 2006 / 2007 school year. Travis did start the 2006 /2007 school year in regular education and resource classes. However, after approximately one month Travis's behavior had become so disruptive that we felt the best placement for Travis was to place him back into our behavior classroom.

After being placed back into the behavior classroom Travis' disruptive behaviors increased rapidly. Travis became verbally and physically aggressive toward staff and other students. Some of Travis' aggressive behavior included: threatening to kill staff, threatening physical harm to staff, use of offensive language, throwing chair, desks, and other objects. Travis would also threaten other student with physical harm and verbal assaults.

During this time we had a difficult, if not impossible, time reaching Jeff to discuss Travis' behaviors. I made many attempt to reach Jeff, as did our teacher, therapist and Principal. Most of our phone calls and letters went unanswered, and it finally came to the point that we would have to contact you in order to make contact with Jeff. I appreciate that you always responded to our phone calls in a timely manner.

As you are aware, Travis became so disruptive that the decision was made to place him on home bound services. You had many concerns about this decision and we had many of the same concerns. We were concerned that if Travis was placed home bound that he would spend the majority of the day unsupervised, which would afford him the opportunity to get into trouble at home or in the community. After several discussions with you we decided that we would keep him in school, but we would have to isolate him from other students. It was approximately April 17, 2007 that we placed Travis in a classroom by himself and provided one-on-one instruction and supervision.

Tooele County School District

92 S Lodestone Way, Tooele, Utah 84074 ♦ 435-833-1900 ♦ FAX 435-833-1912

During this school year Travis has also began to identify himself with the ICP gang. He would wear the clothing associated with this gang; he would write gang symbols and flash gang signs when in the hall. This had become a great concern of mine since this gang has a growing presence in Tooele and they are eager and willing to welcome anyone into gang. Also, during this time Travis began to verbalize that he had begun smoking and drinking on a regular basis.

Another concern that I have had with Travis this year is his attendance. I looked back to his attendance in the 2005-2006 school year and compared it to his attendance this year. In the 2005-2006 school year Travis had 3 suspensions and 9 absences. This year he had 7 suspensions and 34 absences. This was a significant increase in both suspensions and absences which causes me concern that Travis has missed so much academic and behavior support.

As we have discussed it will be necessary for us to place Travis in our behavior unit at Tooele High School for the coming school year. Travis's behaviors are so disruptive and violent that it is impossible for us to consider putting him in regular classes at this time. I am confident that Travis would be able to work his way out of the behavior unit if Travis would just make up his mind to do so. We have a great teacher in the behavior classroom next year that will be more than willing to help Travis with anything he needs, but it will also be Travis' responsibility to do what is asked of him.

I find Travis an affable and charming young man who has a lot of potential. However, his behavior is hindering his success at this time. I am hopeful that this coming school year we can have better communication and collaboration between parents and school staff as I feel that this is crucial in helping Travis be successful. I hope this information has been helpful. Please feel free to contact me anytime with questions, concerns, or suggestions on strategies concerning Travis. I may be reached at 435-849-1120.

Sincerely,



Jan Jensen
Behavior Specialist
Tooele County School District

Tab 2

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

JEFFERY G. FUELL,	:	MEMORANDUM DECISION
Petitioner,	:	CASE NO. 034300398
vs.	:	
LORENCITA J. FUELL, nka DIEL,	:	
Respondent.	:	

This matter was tried to the bench on the 4th and 11th days of February, 2009, on the respondent's Petition to Modify Decree of Divorce. Respondent was represented by Gary Buhler and petitioner was represented by Vernon C. Jolley. The Court heard testimony from the petitioner and the respondent, received exhibits and heard arguments from counsel, took the matter under advisement, and now issues this Memorandum Decision.

Credibility of Witnesses

Ms. Diel was well-prepared, knowledgeable, with detail regarding the relevant facts, supported her testimony with credible documents, and evidenced an excellent grasp of the facts and the ability to remember them. Her testimony was reasonable and compelling. The petitioner was almost totally without credibility. He failed to answer questions appropriately on cross-examination and had to be instructed by his counsel as to the correct answers regarding many facts. He specifically testified that he was ignorant of the terms in his Complaint, he refused

to acknowledge that his attorney (who drafted the pleadings in the parties' stipulated divorce), represented only him and not both parties. He testified he was ignorant as to the terms of the Decree of Divorce, specifically including the specific provision that he pay 100% of the health insurance premiums for the children. He testified that he was ignorant of his children's schedules, and that he was ignorant of how his children were doing in school. He was unable to give any intelligible testimony regarding expenses that he has incurred for the benefit of the children, other than admitting that he had failed and refused to pay one-half of expenses properly documented and provided to him by the respondent, and went to great lengths claiming he didn't know why the 16-year-old, Travis, didn't want to spend time at his home, ultimately admitting on cross-examination that Travis hates his girlfriend. The petitioner presented a purported schedule of his time with the children, which was obviously prepared after the fact, and to support his otherwise completely unsupported claims regarding time the children were with him. He only provided a photocopy, didn't have any original documents, provided other documents supposedly to document payments made to the respondent for the benefit of the children, which included purchases for tires for his vehicle, and to the extent respondent was able to pay to obtain photocopies of checks, was discredited almost entirely as to those checks she was able to obtain. He swore he had made payments that he later was proven not to have made. He claimed he had never received

medical bills and evidence of payments for the children's health care, which were later proven to have been provided. In conclusion, the petitioner's testimony proved either that he is truly ignorant of almost every important detail with respect to custody, the children's situation since the divorce, or that he was ignorant in part and lying on the other part.

-- Substantial and Material Change in Circumstances

Respondent has the burden of proving there was a substantial and material change in circumstances before the Court can modify a divorce Decree. This was an unadjudicated divorce. It was obtained by stipulation. Petitioner was represented by counsel, respondent was unrepresented. Therefore, no finding has ever been made as to the best interests of the children.

With respect to modifications of joint custody, § 30-3-10.4, Utah Code Ann., provides:

(1) On the motion of one or both of the parents, or the joint legal custodians if they are not the parents, the court may, after a hearing, modify an order that established custody if:

(a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified; and

(b) a modification of the terms and conditions of the order would be an improvement for and in the best interest of the child.

* * *

(3) The order of joint legal custody may be terminated by order of the court if one or both parents file a motion for termination and the court determines that the joint legal custody order is unworkable or inappropriate under existing

circumstances. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including parent-time and child support, shall also be determined and ordered by the court.

The Court finds that the joint custody status in the parties' divorce is unworkable and the reasons that it is unworkable include, but are not limited to the following:

1 When petitioner unilaterally took Travis without notice to respondent, withdrew him from Clark Junior High and enrolled him in Tooele Junior High and kept him through that school year, Travis missed approximately 40 days of school, was suspended multiple times and ultimately expelled. In April of 2006, after spring break, respondent brought Travis back to respondent's home and he went from all "F's" to all "C's" and by year-end to all "A's". Petitioner didn't even know Travis wasn't doing well in school during that year.

2 Petitioner has failed to exercise a reasonable amount of visitation for an extended period of time, with both minor children residing almost exclusively with the respondent for more than the past year.

3 For petitioner's lack of knowing or understanding the children's situation and what is going on in their lives as referred to above under the heading of "Credibility," cumulatively the total and complete failure of the petitioner as a custodial parent amount to a substantial and material change of circumstances.

Best Interests of the Children

The status quo for more than a year has been that the children reside full-time with their mother and Wyatt spends few overnights with his father and Travis spends no overnights with his father. The performance of the children in school alone shows that it is in their best interest that the respondent be awarded sole custody.

All of the statutory provisions shall apply with respect to the guidelines for establishing child support, the parties will share uninsured health expenses equally. At the current time one parent is providing medical insurance and the other is providing health insurance, and they should share those premiums equally. They should share the cost of work-related child care equally, and the advisory guidelines will be part of the Order.

Incomes to Use

Respondent's income is \$3,000 per month. Petitioner was earning \$4,825 per month until mid-2008 when he decided he needed a lifestyle change, quit his job, left the children uninsured for three months, and took a new job earning \$2,427 per month, and he believes this figure should be used for his child support. Respondent's position is that he is voluntarily underemployed. Petitioner claimed there were medical reasons, but provided no medical evidence, brought no witnesses to testify as to any medical condition, admitted that he refused to take medication for a sleep issue he claimed, and as indicated above, was

incredible. He can choose to change his employment and his income, but he can't do that to the detriment of his children, which is what he has done. The income for calculation of child support for the petitioner shall be \$4,825.

Arrearages

After a great deal of conflicting evidence about payments regarding health care expenses for the children, the parties have agreed that the petitioner should owe \$230 to the respondent for unpaid medical issues. He should also reimburse the respondent for the medical insurance premiums during 2008 before he became eligible for insurance in his new job, and respondent produced persuasive evidence that for a period of 13 months the petitioner failed to pay the \$200 per month in child support awarded in the divorce Decree, and she is awarded Judgment in that sum.

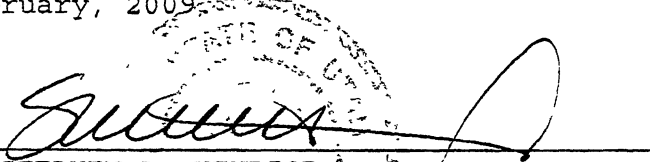
Attorney's Fees

The record, including the Court's file and the testimony at trial, shows that the petitioner has willfully refused to cooperate in the discovery process and this has necessitated respondent's counsel taking many otherwise unnecessary actions, including a Motion to Compel and a Motion in Limine in order to get as much verifiable information from the petitioner for use at trial as possible. The petitioner's failure to respond in this litigation process mirrors his failures as a parent, and he must have been an extremely frustrating client to work with for his counsel who, despite hindrances caused by his passive/aggressive and

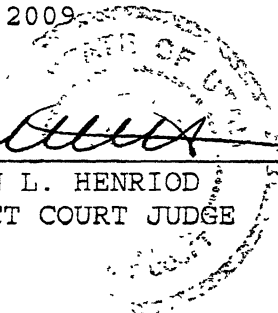
stubborn refusal to participate that made their burden unnecessarily difficult to provide proper representation under the circumstances, he has done a fine job. Respondent is awarded attorney's fees in an amount to cover the additional work that shouldn't have been done because of petitioner's failure to provide information, including such simple things as a current paycheck. The Court finds that the sum of \$1,500 is an appropriate sum to cover that additional work.

Mr. Buhler is to prepare Findings, Conclusions and a Judgment consistent with this Memorandum Decision.

Dated this 27 day of February, 2009.



STEPHEN L. HENRIOD
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 5 day of ~~February~~ *March*, 2009:

Vernon C. Jolley
Attorney for Petitioner
9710 South 700 East, Suite 205
Sandy, Utah 84070

Gary A. Buhler
Attorney for Respondent
291 N. Race
Grantsville, Utah 84029

Nancy Watkins

Tab 3

GARY BUHLER (7039)
ATTORNEY FOR RESPONDENT
PO BOX 229
GRANTSVILLE, UT 84029-0229
TELEPHONE: (435) 884-0354

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TOOELE

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

JEFFERY G. FUELL
Petitioner,
vs.

LORENCITA J. DIEI (FUELL)
Respondent.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
CONCERNING PETITION TO
MODIFY DIVORCE DECREE**
Case No. 034300398 DA
Commissioner Michelle Tack
Judge Stephen L. Henriod

This matter tried to the bench on the 4th and 11th days of February, 2009, on the respondent's Petition to Modify Decree of Divorce. Lorencita Diei (Fuell) was represented by Gary Buhler and Jeffery Fuell was represented by Vernon C. Jolley. The Court heard testimony from the parties, received exhibits and heard arguments from counsel, took the matter under advisement and issued its Memorandum Decision on February 27, 2009.

FINDINGS OF FACT
Credibility of Witnesses

The Court finds that:

1. Ms. Diei was well-prepared, knowledgeable, and provided detail regarding the relevant facts. She supported her testimony with credible documents, and evidenced an excellent grasp of the facts and the ability to remember them. Her testimony was reasonable and compelling.

2. Mr. Fuell was almost totally without credibility. He failed to answer questions appropriately on cross-examination and had to be instructed by his counsel as to the correct answers regarding many facts. He specifically testified that he was ignorant of the terms in his Complaint and he refused to acknowledge that his attorney who had drafted the pleadings in the parties' stipulated divorce represented only him and not both parties.

He testified he was ignorant as to the terms of the Decree of Divorce, specifically including the specific provision that he pay 100% of the health insurance premiums for the children.

He testified that he was ignorant of his children's schedules, and that he was ignorant of how his children were doing in school.

He was unable to give any intelligible testimony regarding expenses that he has incurred for the benefit of the children, other than admitting that he had failed and refused to pay one-half of expenses properly documented and provided to him by Ms. Diel, and went to great lengths claiming he didn't know why the 16 year-old, Travis, didn't want to spend time at his home, ultimately admitting on cross-examination that Travis hates his girlfriend.

3. Mr. Fuell only provided a photocopy of a purported historical schedule of his time with the children to support his otherwise completely unsupported claims regarding time the children were with him. This document was obviously prepared after the fact, and he didn't have any original documents.

4. Mr. Fuell provided other documents supposedly to document payments he made to Ms. Diel for the benefit of the children, which included purchases for tires for his vehicle, and to the extent she was able to pay to obtain photocopies of checks, his claims were discredited almost entirely as to those checks she was able to obtain. On direct, Mr. Fuell swore he had made payments that on cross examination he was proven not to have made.
5. Mr. Fuell claimed he had never received medical bills and evidence of payments for the children's health care, which were later proven to have been provided.
6. In conclusion, Mr. Fuell's testimony proved either that he is truly ignorant of almost every important detail with respect to the children's situation since the divorce, or that he was ignorant in part and lying on the other part.

Substantial and Material Change in Circumstances

7. This was an unadjudicated divorce obtained by stipulation. Mr. Fuell was represented by counsel. Ms. Diel was unrepresented. Therefore, no finding has ever been made as to the best interests of the children.
8. Ms. Diel has the burden of proving there was a substantial and material change in circumstances before the Court can modify a divorce decree. With respect to modifications of joint custody, §30-3-10.4, Utah Code Ann., provides:
 - (1) On the motion of one or both of the parents, or the joint legal custodians if they are not the parents, the court may, after a hearing, modify an order that established custody if:
 - (a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified; and
 - (b) a modification of the terms and conditions of the order would be an improvement for and in the best interest of the child.

(3) The order of joint legal custody may be terminated by order of the court if one or both parents file a motion for termination and the court determines that the joint legal custody order is unworkable or inappropriate under existing circumstances. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including parent-time and child support, shall also be determined and ordered by the court.

9. The Court finds that the joint custody status in the parties' divorce is unworkable and the reasons that it is unworkable include, but are not limited to the following:
- A. When Mr. Fuell, without notice to Ms. Diel, unilaterally withdrew the parties' son Travis from Clark Junior High and enrolled him in Tooele Junior High and kept him through that school year, Travis missed approximately 40 days of school, was suspended multiple times and ultimately expelled.
- In April of 2006, after spring break, Ms. Diel brought Travis back to her home and he went from all "F's" to all "C's" and by year-end to all "A's". Mr. Fuell didn't even know Travis wasn't doing well in school during that year.
- B. Mr. Fuell has failed to exercise a reasonable amount of visitation for an extended period of time, with both minor children residing almost exclusively with Ms. Diel for more than the past year.
- C. For Mr. Fuell's lack of knowing or understanding the children's situation and what is going on in their lives as referred to above under the heading of "Credibility," cumulatively the total and complete failure of Mr. Fuell as a custodial parent amount to a substantial and material change of circumstances.

Best Interests of the Children

10. The status quo for more than a year has been that the children reside full-time with their mother and Wyatt has spent a few overnights with his father and Travis

has spent no overnights with his father. The performance of the children in school alone shows that it is in their best interest that Ms. Diel be awarded their sole custody.

11. At the current time, each of the parents are providing medical insurance for the children and they should begin to share those premiums and all uninsured health expenses equally.

12. If needed, the parents should share the cost of work-related child care equally, and the advisory guidelines will be part of the Order.

Child Support and Incomes to Use

13. Beginning in August 2007 when the petition to modify was served upon Mr. Fuell, all of the statutory provisions and guidelines for establishing child support shall apply. Ms. Diel's income is and was \$3,000 per month.

Mr. Fuell was earning \$4,825 per month until mid-2008 when he decided he needed a lifestyle change, quit his job, left the children uninsured for three months, and took a new job earning \$2,427.00 per month, and he claims this figure should be used for his child support. Mr. Fuell claimed there were medical reasons for the job change, but provided no medical evidence, brought no witnesses to testify as to any medical condition, admitted that he refused to take medication for a sleep issue he claimed, and as indicated above, was incredible. Mr. Fuell can choose to change his employment and his income, but he can't do that to the detriment of his children, which is what he has done. The income for calculation of child support for Mr. Fuell shall be \$4,825.00 per month.

14. Beginning August 2007, the child support obligation for Ms. Diel under UCA 78B-12-301(1) will be \$466.64 and for Mr. Fuell shall be \$761.36 per month.

15. Because ORS has withheld \$135.00 per month from Mr. Fuell's income during the period between August 2007 and the end of March 2009, he shall receive credit for these payments and judgement shall enter for the difference of \$12,527.20.

Arrearages

16. Ms. Diel produced persuasive evidence that for a period of 13 months prior to August 2007, Mr. Fuell failed to pay the \$200 per month in child support awarded in the divorce Decree and she is awarded Judgment in that sum of \$2,600.00.

17. After a great deal of conflicting evidence about payments made regarding health care expenses for the children, the parties have agreed that Mr. Fuell should pay \$230.00 to Ms. Diel for unpaid medical expenses incurred by the children and she is awarded Judgment in that sum.

18. Mr. Fuell is also obligated to reimburse Ms. Diel for the medical insurance premiums during 2008 before he became eligible for insurance in his new job in the amount of \$1,534.89.

Attorney's Fees

19. The record, including the Court's file and the testimony at trial, shows that Mr. Fuell has willfully refused to cooperate in the discovery process and this has necessitated Ms. Diel's counsel taking many otherwise unnecessary actions, including a Motion to Compel and a Motion in Limine in order to get as much verifiable information from Mr. Fuell for use at trial as possible.

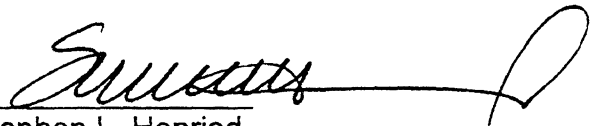
20. Mr. Fuell's failure to respond in this litigation process mirrors his failures as a parent, and he must have been an extremely frustrating client to work with for his counsel who has done a fine job despite hindrances caused by the client's stubborn refusal to participate that made their burden unnecessarily difficult to provide proper representation under the circumstances.
21. Ms. Diel is awarded attorney's fees in an amount to cover the additional work that was required solely because of Mr. Fuell's failure to provide information, including such simple things as a current paycheck. The Court finds that the sum of \$1,500 is an appropriate sum to cover that additional work.
22. Because the child support that has remained unpaid is deemed to be a judgment subject to the statutory rate of interest until paid in full, the support judgment is hereby augmented by the current judgment rate of 2.4% annual interest.
23. The total \$18,392.09 judgment shall be additionally augmented by ongoing interest at the statutory rate until paid in full and by any and all costs of collection to include Ms. Diel's reasonable attorney's fees at the rate normally and reasonably charged by her attorney at the time of the collection expenses.
24. Because this obligation is a family support obligation, it may not be discharged in any bankruptcy action unless so ordered by the appropriate bankruptcy court.

CONCLUSIONS OF LAW

The parties are subject to the jurisdiction of this Court, the divorce decree should be modified as set forth above and a judgment should enter under the terms stated herein.

Dated this 3/30/09.

BY THE COURT:


Stephen L. Henriod
Third District Court Judge


NOTICE OF ORDER

Dated March 10, 2009:

Utah Attorney General Child Support
PO Box 140851
Salt Lake City UT 84114

Vernon Jolly
9710 South 700 East Suite 205
Sandy UT 84070

Pursuant to Rule 7 the UTAH RULES OF CIVIL PROCEDURE, you are hereby notified that the respondent's counsel has forwarded the original hereof to the Court for signature, and you have five (5) days from the date this notice is served upon you to file any written objections to the form of the foregoing order with the Court and mail a copy to respondent's counsel. If no objections are filed within that time, the original hereof will be signed and filed.


Gary Buhler
Attorney for Lorencita Diel

Tab 4

GARY BUHLER (7039)
ATTORNEY FOR RESPONDENT
PO BOX 229
GRANTSVILLE, UT 84029-0229
TELEPHONE: (435) 884-0354

09 MAR 30 PM 2:30
FILED BY *[Signature]*

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

JEFFERY G. FUELL
Petitioner,
vs.

LORENCITA J. DIEL (FUELL)
Respondent.

**JUDGEMENT AND ORDER
TO MODIFY DIVORCE DECREE**

Case No. 034300398 DA
Commissioner Michelle Tack
Judge Stephen L. Henriod

This matter was tried to the bench on the 4th and 11th days of February, 2009, on the respondent's Petition to Modify Decree of Divorce. The Court having entered its findings of fact and conclusions of law, hereby enters the following:

JUDGEMENT AND ORDER

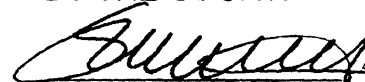
1. Because the Court has found that the joint custody status in the parties' divorce is unworkable and sole custody to the mother is in the best interests of the children, the existing decree is so modified and the advisory guidelines under UCA §30-3-10 shall apply to this Order.
2. Ms. Diel, having met her burden of proving there was a substantial and material change in circumstances pursuant to UCA §30-3-10.4, is hereby awarded the primary physical care custody and control of Travis, and Wyatt Fuell.
3. Mr. Fuell shall have parent time pursuant to UCA 30-3-35.

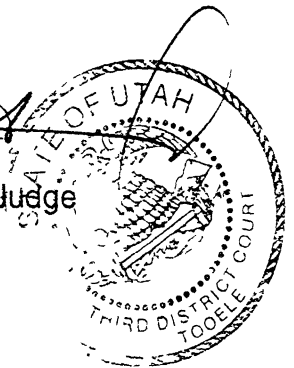
4. Mr. Fuell and Ms. Diel are, at the current time, each providing medical insurance for the children and as of March 1, 2009 they shall begin to share those premiums and all uninsured health expenses equally.
5. If needed, the parents shall share the cost of work-related child care equally.
6. For the purposes of calculating child support, Ms. Diel's income is \$3,000 per month and Mr. Fuell is deemed to be earning \$4,825 per month. Beginning August 2007, the base child support obligation for Ms. Diel under UCA 78B-12-301(1) will be \$466.64 and for Mr. Fuell shall be \$761.36 per month.
7. Beginning in August 2007, and continuing until the children attain the age of 18 or graduate high school in due course, which ever event last occurs, Mr. Fuell shall pay to Ms. Diel \$761.36 per month as and for child support.
8. Because ORS has withheld \$135.00 per month from Mr. Fuell's income during the period between August 2007 and the end of March 2009, he shall receive credit for these payments and judgement shall enter for the difference of \$12,527.20 in adjusted child support owed to Ms. Diel.
9. In addition, Mr. Fuell failed to pay Ms. Diel \$2,600.00 in child support prior to August 2007 and judgement in that amount shall enter for past due child support owed to Ms. Diel.
10. Mr. Fuell shall pay \$230.00 to Ms. Diel for unpaid medical expenses incurred by the children and she is awarded Judgment in that amount.

11. Mr. Fuell is also obligated to reimburse Ms. Diel for the medical insurance premiums she alone paid during 2008 in the amount of \$1,534.89 and she is awarded Judgment in that amount.
12. Ms. Diel is awarded attorney's fees from Mr. Fuell in an amount of \$1,500.00 and she is awarded Judgment in that amount.
13. The total \$18,392.09 judgment shall be augmented by ongoing interest at the statutory rate 2.4% annual interest until paid in full and by any and all costs of collection to include Ms. Diel's reasonable attorney's fees at the rate normally and reasonably charged by her attorney at the time of the collection expenses.
14. Because this obligation is a family support obligation, it may not be discharged in any bankruptcy action unless so ordered by the appropriate bankruptcy court.

Dated this 3/30/09.

BY THE COURT:


Stephen L. Henriod
Third District Court Judge



NOTICE OF ORDER

Dated March 10, 2009:

Utah Attorney General Child Support
PO Box 140851
Salt Lake City UT 84114

Vernon Jolly
9710 South 700 East Suite 205
Sandy UT 84070

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Gary Buhler

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I served a true and accurate copy of the document described as APPELLANT'S OPENING BRIEF on the following named persons by depositing said document in the United States mail, postage prepaid, addressed as follows:

GARY BUHLER
Attorney at Law
P.O. Box 229
Grantsville, Utah 84029

Two (2) Copies

Attorney for Respondent/Appellee

DATED: 10/2/09


VERNON C. JOLLEY