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Hurt v. Hurt : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FOR THE STATE OF UTAH

CINDY A. HURT, Plaintiff/Respondent, vs. FRANCIS O. HURT, JR., Defendant/Appellant.	)	BRIEF OF RESPONDENT CASE NO: 890142-CA PRIORITY: 14b

An Appeal from a Judgment of the First
Judicial District Court of
Box Elder County, State of Utah
Honorable Gordon J. Low, Presiding

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LIST OF PARTIES

Cindy A. Hurt, Plaintiff and Respondent.

Francis O. Hurt, Jr., Defendant and Appellant.

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IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal by virtue of the Constitution of the State of Utah, Article VIII, Section 1, et. seq., and the Judicial Code of Utah Code Annotated, in particular § 78-2a-3 entitled "Court of Appeals Jurisdiction", which states as follows:

> (2) The Court of Appeals has appellant jurisdiction, including jurisdiction of interlocutory appeals, over:
>
> (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;...

This appeal is from the District Court of Box Elder County and involves a domestic relations case concerning paternity, divorce and other issues delineated in the Utah Code Annotated § 78-2a-3(2)(h), therefore, this Court has appellant jurisdiction.

STATEMENT OF THE NATURE OF PROCEEDINGS

This is an action wherein the Plaintiff/Respondent, who is the wife, brought an action for divorce against the husband, who is the Defendant/Appellant, in the First Judicial District Court of Box Elder County, wherein ultimately a Decree of Divorce was granted to the parties with a division of the marital property, a determination as to paternity and an award of child support. The issues essentially evolve around a denial of an equity award in the marital home, an alleged excessive award of child support and a finding of paternity in the Defendant/Appellant.

STATEMENT OF THE ISSUES

The issues presented by this appeal as presented by the Appellant in his brief are as follows:

1. Did the Trial Court err in admitting blood tests into evidence on the issue of paternity where other blood tests had come to a different conclusion?

2. Did the Trial Court err in determining that the Appellant was the father of the child despite conflicting evidence?

3. Did the Trial Court err in awarding back child support at a time when it was without jurisdiction to do so under Utah law?

4. Did the Trial Court err in failing to make proper findings of fact established under Utah case law before it awarded child support?

5. Did the Trial Court abuse its discretion and award excessive child support under circumstances where the Appellant's income was not properly calculated?

6. Did the Trial Court abuse its discretion in making a property distribution that failed to take into account the fact that the Appellant had $5,000.00 worth of equity in the family home?

STATEMENT OF THE CASE

The Appellant and the Respondent were married on the 15th day of October, 1983, in Willard, Utah. (See Transcript p. 34 hereinafter referred to as Trans.)

Prior to their marriage, the Appellant and Respondent had lived together and had sexual relationships resulting in the birth of a minor child by the name of Kathy Jo Heyden which child was never adopted by the Appellant nor given the

Appellant's last name and who was born February 12, 1976. (See Trans. p. 35)

An action was originally commenced in the Salt Lake County District Court by the Utah State Attorney General's Office in regards to establishing paternity in the Appellant on behalf of the Respondent which was ultimately dismissed without prejudice on the 22nd day of August, 1980, without a determination as to paternity. (See Trans. p. 36, 37, and Plaintiff's Exhibit #4).

That the parties acquired certain real property and a home during their marriage for a purchase price of $59,500.00 which the Respondent lived in for approximately two to three weeks after the parties separation of August 4, 1987. (See Trans. p. 62 & 67). The home was foreclosed for failure to make payments with the Appellant receiving a Notice of Foreclosure sometime in January, 1988. (See Trans. p. 63). The Respondent moved out of the marital home on October 15, 1987, informing the Appellant that the Respondent could no longer make the house payments and he could move back into the home and that the home was to be listed for sale, which was done. (See Trans. p. 85 & 92-94).

The equity of the home at the time of the divorce trial on September 26, 1988, was zero because of the foreclosure,

regardless of a realtor's statement to the Respondent as admitted in her testimony that the fair market value would be $65,000.00 and that the Respondent would be lucky if she could get that amount out of the home. (See Trans. p. 92). The Appellant testified at the time of the trial in September. 1988, in response to a question as to whether the home was gone at that time "it's history", and that there may or may not be a deficiency. (See Trans. p. 108, 109). The Respondent was informed by the Appellant that he felt there was no equity in the home upon her demand for $2,000.00 and the Appellant refused to take any action in regards to listing the home for sale with Brigham Realty or in moving back into the home to try to reserve any possible equity. (See Trans. p. 92 & 93).

Charles De Witt, a medical doctor and professor in the Department of Pathology at the University of Utah Medical Center and Director of the HLA Typing Laboratory for the University Medical Center, who was qualified as an expert, found that the Appellant from a 1988 test which included a total of six separate tests being run showed that the probability of paternity for the Appellant for the child, Kathy Heyden, with the mother, the Respondent, with a probability of paternity at 99%, which is reasonably high. (See Trans. p. 16 & Plaintiff's Exhibit #1).

In 1979, less extensive paternity tests were run through Dr. De Witt which showed an inconclusive, at least for evidentiary trial purposes, figure of 89%. (See Trans. p. 25 & Plaintiff's Exhibit #3).

The Appellant's year-to-date earnings to the time of trial on September 26, 1988, consisted of $30,925.00, and for the pay period ending September 4, 1988, it consisted of $1,358.00 over a two-week period, or 84 hours. Two weeks later the year-to-date earnings for the Appellant consisted of $32,209.86 with a gross for that two-week period of $1,283.00 for a total of $2,900.00 gross per month. (See Trans. p. 123 & 124 and Defendant's Exhibit #11).

The Respondent's gross monthly income at $11.40 an hour was $1,976.00 with a net take home pay of $1,473.64. (See Trans. p. 57 and Plaintiff's Exhibit #2, p. 6).

The Trial Court entered its Memorandum Decision subsequent to the September 26, 1988, trial of the parties on the 13th day of October, 1988. (See Trial Record p. 108-112 hereinafter referred to as TR). The Findings of Fact and Conclusions of Law and Decree of Divorce were entered on the 18th day of January, 1989. (See TR p. 117 through 126 and p. 129-133).

A Notice of Appeal on the Decree of Divorce was filed by the Appellant on the 15th day of February, 1989.

The Memorandum Decision in regards to Respondent's Order to Show Cause in Re Contempt for an award of back child support was entered on the 3rd day of April, 1989. (See TR p. 204), and a Notice of Appeal was taken from that order on the 14th day of April, 1989. (See TR p. 206).

These two appeals were consolidated under an Order of Consolidation from this Court on the 14th day of August, 1989, consolidating Case Number 890142-CA and Case Number 890224-CA for consolidation purposes to Case Number 890142-CA.

SUMMARY OF ARGUMENTS

1. This Court will not disturb the findings of the Trial Court unless there is a clear abuse of discretion in a domestic relations case.

2. The Trial Court did not abuse its discretion in admitting the blood tests and the testimony of Dr. De Witt in light of earlier tests, in determining paternity in the Appellant.

3.The Trial Court did not abuse its discretion in finding that there was no equity in the family home.

4. The Trial Court did not commit reversible error in awarding $387.00 per month in child support under the law then in effect.

5. The Trial Court did have jurisdiction to award child support prior to January 18, 1989.

6. If the Appellant's appeal is frivolous or for delay, Respondent is entitled to damages including reasonable attorney's fees, and if the judgment is affirmed, Respondent is entitled to costs against the Appellant.

ARGUMENT

POINT I.

> THIS COURT WILL NOT DISTURB THE FINDINGS OF THE TRIAL COURT UNLESS THERE IS A CLEAR ABUSE OF DISCRETION IN A DOMESTIC RELATIONS CASE.

The standard for reviewing matters in equity was recently considered the the Utah Supreme Court in J & M Const., Inc., v. Southam, 722 P.2d 779 (Utah 1986), wherein the Court held as follows:

> In reviewing matters in equity, this Court will reverse the Trial Court only [emphasis added] when the evidence clearly preponderates against the findings below. Although we may review that evidence, we are particularly mindful of the advantage position of the Trial Court to hear, weigh, and evaluate the testimony of the parties. (Cites omitted) Where the evidence may be in conflict, this Court will not upset the findings below unless the evidence so clearly preponderates against them that this Court is convinced that a manifest injustice has been done...

The Court of Appeals of Utah in the recent decision of Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987), held as follows:

> This Court will refrain from disturbing findings of the Trial Court in a divorce action unless a clear abuse of discretion is shown. (Cites omitted) The Trial Court is clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions...

A review of the facts in this case from the trial record and the Memorandum Decision clearly indicate that there has been no abuse of discretion nor a manifest injustice and this Court should refrain from disturbing the findings of the Trial Court as in this case it was clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions, which it did.

POINT II.

> THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE BLOOD TESTS AND THE TESTIMONY OF DR. DE WITT IN LIGHT OF EARLIER TESTS.

The recent Utah Supreme Court case of Kofford v. Flora, 744 P.2d 1343 (Utah 1987), as cited by the Appellant is the authority in the State of Utah in regards to a determination of paternity by the admission of HLA blood tests. Kofford requires as follows:

> ...Based on the foregoing and other authorities, we hold that only probabilities of paternity of 95% or greater should be admitted. Furthermore, a percentage figure in the range above 95% may be translated for the fact finder into language that is more meaningful to the task at hand, such as "paternity is very likely". (Cites omitted)
>
> When probabilities of paternity in a particular case are based, for example, on the assumption that the mother had more than one consort, in addition to the putative father, the probability should not be admitted to prove paternity unless the statistics have similar significance in proving paternity.

In the immediate case at hand, Dr. De Witt specifically testified as referred to in the Statement of the Case, that the probability of paternity for the Appellant for the child, Kathy Heyden, with the mother, the Respondent, that the probability of paternity is 99% slightly more and that that represents a reasonably high degree of probability. Dr. De Witt further testified under both direct and cross-examination that the 1979 test included the probability of 89% but that that would be inadmissible as evidence under the Kofford case cited above because it did not show a probability of 95% or greater. The specific reason for the difference between the 89% and the 99% was the fact that six separate additional tests were run and that the testing is now more reliable than that previously done in 1979.

In his opening statement, the Appellant's counsel and the Court discussed the issue of res judicata in regards to bringing up new test scores, Exhibit 4 and the evidence submitted from the parties prior Utah case, for which the tests were done show a dismissal without prejudice so that in fact there has been no adjudication as to the paternity of the Appellant for the minor child and a question as to whether or not this matter is an issue subject to res judicata or collateral estoppel is not even raised as it has not been previously litigated.

Dr. De Witt specifically testified that the 89%, 1979 test, could not be admissible as being unreliable under the Kofford decision but that under the testing done more recently in 1988 and the 99% probability factor , Dr. De Witt, after having been qualified as an expert by stipulation, felt there was a 99% probability that the Appellant was the father of Kathy Heyden. The testimony and evidence are in full compliance with the requirements of Kofford, supra, running contrary to Phillips v. Jackson, 615 P.2d 1228 (Utah 1980) which is no longer applicable under the Kofford standards.

While the Respondent concedes that the recent Utah Law Review article cited in the Appellant's Brief is correct, the citation therein does not lend any weight to showing

prejudicial error of the Trial Court. The Appellant failed to object to the admissibility of the expertise of Dr. De Witt, his testimony, and the methodology used in arriving at his decision of the 99% probability.

Additionally, uncontroverted testimony was given by the Respondent that she had not had sexual relationship with any other parties at the time of conception, negating the necessity of other further testimony as to the reliability of the high probability of parentage or paternity in the Appellant, and testing of other parties.

While the Appellant is correct in requesting this Court to enforce rigid standards and requirements as spelled out in Kofford, a thorough review of the record, lack of objection by the Appellant, lack of other sexual activity occurring around the time of conception and the testimony of Dr. De Witt fully complies with the strict requirements as set forth by the Utah Supreme Court in Kofford v. Flora, and this Court should find no abuse of discretion and affirm the finding of paternity by the Trial Court.

POINT III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THERE WAS NO EQUITY IN THE FAMILY HOME.

The parties did purchase a home for $59,900.00 in Brigham City, Utah, which was given a fair market value of approximately $65,000.00 as testified to by the Respondent with the further caviat that the parties would be lucky to derive that amount of money from the sale of the home. Testimony of the Respondent would further substantiate that this fair market value assessment was made around October of 1987, at the time the Respondent moved from the home after a two to three week temporary occupancy of the home which was temporarily awarded to the Respondent after the separation of the parties in August of 1987.

This Court in the recent case of Narangjo v. Narangjo, 751 P.2d 1144 (Utah App. 1988), in regards to a judicial review of a Trial Court's division of properties in a divorce action held as follows:

> There is no fixed formula upon which to determine a division of properties in a divorce action, cites omitted, the Trial Court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity (cites omitted). Changes will only be made if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion. (cites omitted). Additionally, it is commonly recognized by this Court that marital properties are valued at the time of the trial.

In the immediate case at hand, testimony was offered by the Respondent that she moved out of the home in October of 1987, listed the home for sale, and the home ultimately in January or February was foreclosed upon.

The Trial Judge made a specific findings of fact on page 136 of the transcript which can be used to supplement the actual findings of fact prepared by counsel under the Utah Rules of Civil Procedure, Rule 52(a) and Erwin v. Erwin, 108 UAR 55 (May 12, 1989). The transcript in this case reads at page 136 "seems to me the testimony was somewhat of a offhanded appraisal regardless of whether it was $62,000.00 or $65,000.00 if the house was sold in a commercial sale, and there would be at least a 6% or 7% fee against that, would reduce it to $60,000.00. There is approximately $59,000.00 owing against it. I see if there's any equity at all, it's probably $1,000.00 or less. Even if it were valued at $65,000.00. If it were valued at $62,000.00, there would be a negative equity. I can't find any equity in that property at all, and the fact that there was a problem with the Plaintiff in possession and vacating the same, doesn't seem to me that it would have been a particle of difference as to the division of equity had the property still been in the possession of the parties and awarded to the Plaintiff or to the Defendant, I would have

found no equity to be awarded, I simply would have said you can have the property, I find no equity."

The Trial Court had within its discretion the authority to consider the realtor's fees as found in the recent case considered by this Court of Asper v. Asper, 753 P.2d 987 (Utah App. 1988) wherein this Court found that the Aspers had agreed to the value of the home and the equity in it and "the deduction of anticipated real estate charges seems to be reasonable as each party was charged with half of those charges." It further found that in the distribution of marital estate, there is no fixed rule or formula... The responsibility of the Trial Court is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis. This Court found that the Trial Court in Asper had reasonably divided the marital property taking into consideration those realty fees.

Even if this Court were to find that the Trial Court had not properly taken into consideration potential realtor's fees in finding no equity, the actual value of the marital home at the time of the trial could have very well been a negative value or a deficiency because of the foreclosure that had been commenced eight or nine months earlier.

The Trial Court did not abuse its discretion in finding no equity in the marital home as none existed under one of two theories, either the value of the home at the time of the trial, or the fact that with the deduction of properly considered realty fees there would have been no equity and there has been no abuse of discretion by the Trial Court and the Trial Court's decision in regards to the equity of the marital home should be affirmed.

POINT IV.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN AWARDING $387.00 PER MONTH IN CHILD SUPPORT UNDER THE LAW THEN IN EFFECT.

The Utah Code Annotated § 78-45-7 prior to its amendment did require a Trial Court to consider at least seven factors listed therein in arriving at a child support award consisting of:

(a) The standard of living and situation of the parties;

(b) The relative wealth and income of the parties;

(c) The ability of the obligor to earn;

(d) The ability of the obligee to earn;

(e) The need of the obligee;

(f) The age of the parties;

(g) The responsibility of the obligor for the support of other parties.

The Trial Court did consider these factors in its Memorandum Decision in finding that both parties were employed, that the Plaintiff receives an income of approximately $2,000.00 per month, that the Defendant's income was a base pay of $2,594.00 a month, but that his income to date of September 4, 1988, had been in the sum of $30,925.88 or an average of $3,771.00 per month. The Trial Court further found that testimony was also offered that the overtime has decreased and is not expected to be at the same level it was of the first eight months of the year. The Court then found that under the Uniform Child Support Schedule, the child support level for one child on the Defendant's base pay would be $316.00 per month but under the Appellant's historical income it would be $458.00 per month."

The Trial Court then found that "the Appellant also had other children, no known child support obligation was shown to exist for them, found that should in the future child support obligations be assured for those children then additional children would be considered for child support adjustment."

Finally, the Trial Court found that the Court was unable to conclude based on the evidence whether the income

of the Appellant will likely continue at the $3,700.00 per month level or the $2,500.00 per month level so that the Court will take an average of those based on the Child Support Schedule at an amount of $387.00 and that the Appellant would be ordered to pay that sum.

The Trial Court then found that should the Appellant in the future be able to assert to the Court that his income was not commenserate with the child support level of $387.00 a month but remained at the base pay of $2,594.80, then he could petition the Court for a reduction of the child support as provided by law and also that the Plaintiff could move to increase the child support should the income continue at the historical levels.

The Court did assess the requirements enumerated in Utah Code Annotated § 78-45-7 and did enter specific findings therein which can be supplemented to the Findings of Fact prepared by the parties under the Utah Rules of Civil Procedure, Rule 52(a).

The Trial Court further granted in its findings and in explanation as allowed under the Utah Code Annotated § 30-3-5 that if at any time due to the continuing jurisdiction of the Trial Court there should be a substantial change in circumstances such that the income of the Appellant should decrease or increase then due to that continuing

jurisdiction the Court could modify the award of child support. The final award was one as to a discretionary decision of the Judge due to the historical earnings of the Appellant up to the time of the trial and a question as to whether or not those earnings would drop off resulting in a figurative splitting of the baby with options open to either party to increase or decrease that child support amount in the future.

Appropriate Findings of Fact through the Memorandum Decision were found by the Trial Judge in ascertaining the award of child support and in taking into consideration Utah Code Annotated § 78-45-7.14 which is used as rebuttable Child Support Guidelines.

In regards to the awarding of back child support in the paternity action, Utah Code Annotated § 78-45a-3 of the Section entitled "Uniform Act on Paternity" specifically designates limitation on recovery from the father in a paternity action and states:

> The father's liability for past education and necessary support are limited to a period of four years next proceeding the commencement of an action.

In the immediate case at hand, in October of 1987 an Order to Show Cause was commenced by the Plaintiff/Respondent for recovery of child support which was left open to a future determination of paternity and the original

action was filed in August of 1987 such that an award of child support back to that date would be in compliance with the Utah Code Annotated § 78-45a-3.

Based on the above and foregoing, the Trial Court did not commit reversible error in awarding $387.00 per month in child support but did properly consider the factors enumerated in the Utah Code Annotated § 78-45-7 in arriving at a halfway mark between the evidence actually presented and the possibility of a reduced amount of income in the future with an unnecessary but obvious note by the Trial Judge that either party under the continuing jurisdiction of the Trial Court could petition the Court for a modification for either an increase or decrease depending on future events, all which is within the sound discretion of the Trial Court.

POINT V.

THE TRIAL COURT DID HAVE JURISDICTION TO AWARD CHILD SUPPORT PRIOR TO JANUARY 18, 1989.

Appellant's Point IV essentially addresses two different issues, although not quite understandable by Respondent. Issue one would deal with whether or not the Trial Court has jurisdiction to either enforce or modify the Decree of Divorce and Issue two would seem to revolve around whether or not the Trial Court can backdate or award child support

retroactive before the January 18, 1989, Decree of Divorce entry.

In regards to Issue number one, Peters v. Peters, 394 P.2d 71 (Utah 1964) does indicate that upon appeal further jurisdiction as to the issues of, in particular here support money, are no longer vested in the Trial Court. This would deal with modification issues which is exactly what the Appellant in this case attempted to do in response to the Order to Show Cause in Re Contempt by the Respondent. The Trial Court found at the Order to Show Cause in Re Contempt hearing that it did not have jurisdiction to modify the Judgment but that pursuant to the Utah Code Annotated § 30-3-5 it did have authority to award on-going child support and to enforce the support Order previously awarded through the Decree of Divorce and its Memorandum Decision of October 13, 1988.

In particular, the Utah Supreme Court in the case of Cannon v. Keller, 692 P.2d 740 (Utah 1984) held that a District Court's "Memorandum Decision" was susceptible of enforcement as a final judgment appealable to the Supreme Court notwithstanding that it was not designated as a "Order" or a "Judgment".

In the immediate case at hand, the Memorandum Decision in regards to the child support and back child support was

entered by the Trial Court on October 13, 1988, and was fully enforceable.

The Memorandum Decision and Decree of Divorce as well as any judgment even though on appeal, are still enforceable unless the party seeking non-enforcement has posted a supersedeas bond.

Unless the Appellant has filed a supersedeas bond to stay enforcement of the judgment, the Trial Court still has jurisdiction to enforce judgment and collection which is what the Respondent did under the Order to Show Cause and was eventually awarded correctly back child support.

Additionally, in Peters v. Peters, 394 P.2d 71 (Utah 1964) at page 73, the Supreme Court found as follows:

> ...Until the Plaintiff refused to pay the $2,500.00 and took the appeal, the Defendant could not have petitioned for the allowances of which the Plaintiff complains upon the basis set forth because the circumstances giving rise to the need did not exist until then. Her petition stating those facts invoked the jurisdiction of the Court in a new and supplemental proceeding in which it was authorized to make such further orders as it deemed reasonable, equitable and just under the circumstances.

In regards to Issue two and the Trial Court's authority to award retroactive child support or to award child support that the Appellant could be responsible for, that would be owing prior to the signing of the Decree on January 18, 1989, the Utah legislature in 1965 enacted Utah Code

Annotated § 78-45a-3 entitled "Limitation on Recovery from the Father" states as follows:

> The father's liability for past education, necessary support are limited to a period of four years next preceding the commencement of an action.

In the immediate case at hand, the Respondent filed her Complaint for divorce and for a determination of paternity in August of 1987 at the time that the minor child was approximately 11 years of age, which would have entitled the Respondent to necessary support for a period of four years next preceding the commencement of the action or back to 1983, giving the Trial Court full discretion to award child support back to that time period when in fact the actual back child support award was only back dated to August of 1987 at the time the Respondent commenced the action.

Based on the above and foregoing statutes and case law, the Trial Court had jursidiction to award child support prior to January 18, 1989, even as far back as August, 1983, and maintains jurisdiction to enforce any child support arrearage and on-going child support, although no jurisdiction exists as to a modification until the appeal is decided.

POINT VI.

> IF THE APPELLANT'S APPEAL IS FRIVOLOUS OR FOR DELAY, RESPONDENT IS ENTITLED TO DAMAGES INCLUDING REASONABLE ATTORNEY'S FEES, AND IF THE JUDGMENT IS AFFIRMED, RESPONDENT IS ENTITLED TO COSTS AGAINST THE APPELLANT.

The Rules of the Utah Court of Appeals, Rule 33, entitled "DAMAGES FOR DELAY OR FRIVOLOUS APPEAL" states as follows:

> (a) Damages for delay or frivolous appeal. If the Court determines a motion made or an appeal taken under these Rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party.

Should the Court determine that the Appellant's appeal is either frivolous or for delay, it should award just damages and single or double costs, including reasonable attorney's fees, to the Respondent.

Rule 34 of the Rules of the Utah Court of Appeals entitled "A AWARD OF COSTS", states:

> (a) To whom or allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the Court; if a judgment order is affirmed, costs shall be taxed against the appellant unless otherwise ordered.

Should Appellant's appeal be denied and Respondent's judgment affirmed, costs should be taxed against the Appellant unless otherwise ordered.

CONCLUSION

The Trial Court was clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions in this case, which it did, and there is no clear abuse of discretion in that it acted correctly in doing so.

Further, based on the requirements as outlined in the Kofford case and the testimony of Dr. De Witt, the issue of paternity in the Appellant was correctly determined and here again the Trial Court did not abuse its discretion.

Based on evidence and testimony concerning the equity, or lack thereof, in the family home, the Trial Court was correct in its findings that there was no equity or even the possibility of a negative equity based on the fact that the the home had been forclosed upon.

The Trial Court used proper discretion in the awarding of child support based on the standards in existence at the time of the trial and further stating that either party could petition the Court for a modification if there was a substantial increase or decrease in income and/or other determining factors.

The Trial Court did not abuse its discretion in that it did have jurisdiction over this matter based on the various Memorandum Decisions and statutes of the State of Utah.

The Respondent should further be awarded her attorney's fees and costs and such other relief as the Court deems proper in that the Appellant's appeal would seem to be one of a frivolous nature and/or for delay in concluding of this matter.

Finally, this Court should affirm the decision of the Trial Court in full based on the above and foregoing facts presented herein in that it clearly did not abuse its discretionary powers.

RESPECTFULLY SUBMITTED this 22 day of November, 1989.

PETE N. VLAHOS
Attorney for
Plaintiff/Respondent

IN THE FIRST JUDICIAL DISTRICT COURT, BOX ELDER COUNTY

STATE OF UTAH

CINDY A. HURT	)	
Plaintiff	)	MEMORANDUM DECISION
VS	)	CASE NO. 870030225
FRANCIS O. HURT JR.,	)	
Defendant	)	

This matter is before the Court on Defendant's Motion and Petition to Reduce Child Support. Neither the motion nor the response thereto is accompanied with an affidavit. The Petition simply requests this Court to reduce the child support from $387.00 per month to the sum of $332.00 per month on the basis that the Defendant is not receiving nor will receive in the future the over-time he did in the past and that the Court should not consider over-time in calculating Defendant's income.

This Court considered the historical income of the Defendant and set the child support at $387.00 per month. If in fact his income this year has substantially changed, then perhaps affidavits to that effect should be filed with the Court. Based upon what the Court has before it at this time, the Defendant's historical income justifies the amount ordered for as and for child support. If in fact the Defendant's income has decreased as alleged and will continue at a decreased level, the Defendant is correct and the Court should reduce the amount of child support ordered. This Court does not have before it sufficient information to justify a modification of the decree. Further, it appears that this matter is on appeal and a further modification of the decree may not be in order. Counsel for the Plaintiff is directed to prepare a formal order in compliance herewith.

Dated this 3rd day of April 1989.

BY THE COURT:

Judge, Gordon J. Low
First District Court

CERTIFICATE OF MAILING

****

I hereby certify that on this 10th day of April 1989, I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to Pete N. Vlahos, Attorney for the Plaintiff, 2447 Kiesel Avenue, Ogden, Utah 84401 and to Dale M. Dorius, Attorney for the Defendant, P.O. Box "U", 29 South Main Street, Brigham City, Utah 84302

/s/ Christine Morrison

Christine Morrison
Deputy Court Clerk

PETE N. VLAHOS, ESQ., #3337
VLAHOS, SHARP, WIGHT & WALPOLE
Attorney for Plaintiff
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: 621-2464

COPY

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

CINDY A. HURT,	/	
Plaintiff,	/	DECREE OF DIVORCE
vs.	/	
FRANCIS O. HURT, JR.,	/	Civil No. 870030225
Defendant.	/	

2447 KIESEL AVENUE
OGDEN, UTAH 84401

This matter having come on regularly for trial on the 16th day of September, 1988, before the Honorable Gordon J. Low, one of the Judges of the above entitled Court, sitting without a jury, and the Plaintiff appearing in person and with her attorney, Pete N. Vlahos, and the Defendant appearing in person and with his attorney, Dale M. Dorius, and each of the parties having been sworn and testifying in their own behalf, exhibits having been offered and received, Dr. DeWitt having been called as a witness and testimony

having been given, and the Court having taken said matter under advisement and having rendered his Memorandum Decision in writing, and the Court being fully cognizant of all matters pertaining therein, and having made its Findings of Fact and Conclusions of Law, separately stated in writing, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff, Cindy A. Hurt, is granted a Decree of Divorce from Francis O. Hurt, Jr., said divorce to become final upon the signing and entry.

2. That Plaintiff is awarded the care, custody and control of the minor child, Kathy Jo Hurt, born February 12. 1976, subject to the Defendant's right to visit as allocated by the Division of Family Services and/or the Adult Probation and Parole.

3. That the Defendant is ordered to pay to the Plaintiff the sum of $387.00 per month as and for support, based on an average between the Defendant's base income of $2,594.00 and his historical income of $3,771.00 per month; should Defendant in the future be able to assert to the Court that his income has not been commensurate with that child support level, but rather remains at the base pay of $2,594.80, then he may petition the Court for a reduction of the same as provided by law.

LEGAL FORUM BUILDING
2417 KIESEL AVENUE
OGDEN, UTAH 84401

4. That if the Defendant becomes obligated to pay support for the two (2) children he claims he has in the future, then additional support for these children should be considered for child support adjustment and the Defendant may petition the Court for a modification of the Decree as to child support.

5. That should the Defendant's income remain at the historical income, then the Plaintiff shall also have the right to petition the Court for an increase in child support.

6. That the Plaintiff is granted a Judgment of delinquent support from August, 1987 through September 30, 1988 in the sum of $5,496.00.

7. That the Defendant is entitled to an offset of $2,000.00 for debts the Defendant has paid to date, plus another offset of $3,500.00 for debts still remaining unpaid, said sums to be subtracted from the delinquent child support and gives the Defendant a credit of $4.00 towards the support.

8. Defendant is obligated to assume and discharge all of the marital debts incurred in the marriage, and the Plaintiff is obligated to pay First Security Bank of approximately $1,900.00, Norwest Finance of $2,261.00, Mastercard

First Security Bank of $780.00, Peoples First Thrift of $1,100.00 and Attorney Wynn E. Bartholomew of $1,000.00, and that the Defendant shall assume and discharge all other debts, holding the Plaintiff harmless from same with the offsets.

9. That Plaintiff is entitled to a Judgment of $277.00 for the HL-A and $152.50 for the expert testimony of Dr. DeWitt and costs, for a total Judgment of $429.50.

10. That the Plaintiff and Defendant are each ordered to maintain their health and accident insurance on the minor child so long as it is available through their place of employment, with the Defendant being the primary provider and the Plaintiff the secondary provider, provided however that each of the parties are responsible for one-half (½) of all medical and dental expenses incurred by the minor child not covered by both insurance policies.

11. That the Defendant is ordered to maintain his present life insurance naming the child as a beneficiary, provided however that other children of the Defendant may also be named as co-insurers and co-beneficiaries on an equal basis.

12. That neither party is awarded any alimony.

13. That if there is a deficiency on the family home, then each of the parties are ordered to assume and pay one-half (½) of the deficiency.

14. That each of the parties are awarded their own personal belongings and effects and automobiles presently they each now have in their respective custody and control.

15. That each of the parties are awarded their own savings bonds that they have accumulated since the filing of the divorce and is not considered marital assets.

16. That each of the parties are ordered to assume and pay their own attorney fees and costs.

DATED this 18th day of January, 1989.

/S/ GORDON J. LOW
GORDON J. LOW,
District Court Judge

APPROVED AS TO FORM:

/S/
DALE M. DORIUS,
Attorney for Defendant

OCT 17 1988

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF BOX ELDER
STATE OF UTAH

CINDY A. HURT, Plaintiff	)	MEMORANDUM DECISION
v.	)	
FRANCIS O. HURT, Jr.,	)	Civil No. 870030225
Defendant	)	
	)	

This matter came on before the Court for trial on the 26th day of September, 1988 with both parties and their respective counsel appearing. The Court having heard testimony and received evidence, has made certain findings and issues the followiwg Memorandum Decision.

1. Divorce

Plaintiff is granted a Judgment and Decree of Divorce against the Defendant, the same to become final upon entry and based upon the grounds of irreconciable differences.

2. Child Support

Defendant is the father of the minor child in question and is obligated to provide child support for said child. Both parties are employed. The Plaintiff receives an income of approximately $2,000.00 per month. The Defendant's income on base pay is $2,594.00. His income however to date of September 4, 1988, has been in the sum of $30,925.88 or an average of $3,771.00 per month.

There is testimony also that the overtime has decreased and is not expected to be of the same level it has of the first eight months of this year. Under the Uniform Child Support Schedule, the child support level for one child on defendant's base pay would be $316.00 per month. Under his historical income it would be #458.00 per month.

The Defendant also has other children though no child support obligation was shown to exist for the same. Should in the future child support obligations be assured for those other children, then additional children should be considered for child support adjustment

The Court being unable to conclude, based on the evidence, whether the income of the Defendant will likely continue at the $3,700.00 per month level or the $2,500.00 level, the Court will tak an average of the same at $387.00 and the Defendant will be ordered to pay said sum. Should he in the future be able to assert to the Court that his income has not been commensurate with that child support level, bur rather remains at the base pay of $2,594.80 then he may petition the Court for a reduction of the same as provided by law. The Plaintiff may also move to increase the same should his income continue at the historical levels.

3. Back Child Support

With respect to back child support the Court finds that during the period between the filing of this action, August 1987, and the present the Defendant's income was $3,700.00 per month and child support therefore should be based upon the $458.00 sum resul

in unpaid child support obligation from the Defendant to the Plaintiff in the sum of $5,496.00.

4. Debts and Obligations:

With respect to the debts and obligations, most of those incurred by the plaintiff were incurred subsequent to the separation, most of those carried by the defendant were incurred during the marriage against which he has paid approximately $7,000.00. Since his income has been almost double that of the Plaintiff it would only be reasonable that the responsibility for those debts and obligations would be double hers. Additionally, some of the debts that he has paid on have been debts incurred subsequent to the separation. The Court therefore finds that of the $6,732.00 which he has paid during the separation, $2,000.00 of the same will be the responsibility of the Plaintiff and the sum for back child support of $5,496.00 shall be reduced by the sum of $2,000.00. Plaintiff is also awarded judgment against the Defendant in the sum of $277.00 for the costs of expert testimony (Dr. Dewitt); $152.50 costs; and, a Withholding Order shall issue with respect to child support.

5. Insurance

Both parties are ordered to maintain Health and Accident Insurance on the child as available through their place of employment with the Defendant being the primary provider and the Plaintiff being the secondary provider. Life Insurance to be continued with the child as the beneficiary. Other children of the Defendant may

may also be named as co-insurers and co-beneficiaries on an equal basis.

6. Alimony

No alimony is awarded. It would appear that both parties are equally able to bear their own costs and attorney fees and therefore no attorney fees are awarded. The Findings are to reflect the income of the two parties and the Court as stated from the bench finds no loss of equity in the home.

With respect to debts and obligations should there be any deficiency on the home, the parties are equally libel therefore. From the testimony of the parties it would appear that there is approximately $14,000.00 due and owing, some of which was incurred by the Defendant himself. The bulk however was incurred during the course of the marriage. Of that, approximately $3,000.00 was used by the Defendant, some of which was for personal property now awarded to the Plaintiff and some to the Defendant. Of the approxim $10,000.00 remaining in debts incurred during the marriage and apparently used for essentially household expenses, and given the respective income of the two parties it would appear that $6,500.00 of the same should be payable by the Defendant and $3,500.00 by the Plaintiff. The sum of $3,500.00 is then to be furrher reduced from the amount of back child support owed by the Defendant to the Plaintiff. The property to be awarded as now in possession except as so stipulated in Court.

All other matters are as stated from the bench. Counsel for Plaintiff to prepare the formal order and findings.

Dated this 13th day of October, 1988.

BY THE COURT:

Gordon J. Low
District Judge

IN THE FIRST JUDICIAL DISTRICT COURT, BOX ELDER COUNTY

STATE OF UTAH

CINDY A. HURT	)	
Plaintiff	)	MEMORANDUM DECISION
VS	)	CASE NO. 870030225
FRANCIS O. HURT JR.,	)	
Defendant	)	

This matter came on before the Court upon the 6th day of March 1989 upon the Plaintiff's order to show cause, requesting this Court to enter a judgment for unpaid child support from October 1, 1989 through March 1, 1989, in the amount of $387.00 per month for a total of $2322.00 The Defendant argues that the Court is without jurisdiction relative to amount of child support ordered under the decree, and has lost jurisdiction by reason of the appeal.

In order to avoid hardship to the children, the Court does have power to award a temporary order of child support and maintenance. Whether that be the case or otherwise, the Court orders the sum of $387.00 per month to be paid on a continuing basis during the pendency of this appeal, and a judgment may be entered for the sum as prayed as and for on-going support.

Dated this 3rd day of April 1988.

BY THE COURT:

Judge, Gordon J. Low
First District Court

Number_____

FILED

APR 3 1989

By_____

CERTIFICATE OF MAILING

****

I hereby certify that on this 10th day of April 1989, I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to Pete N. Vlahos, Attorney for the Plaintiff, 2447 Kiesel Avenue, Ogden, Utah 84401 and to Dale M. Dorius, Attorney for the Defendant, P.O. Box U, 29 South Main Street, Brigham City, Utah 84302.

/s/ Christine Morrison
Christine Morrison
Deputy Court Clerk

PETE N. VLAHOS, #3337
VLAHOS, SHARP, WIGHT & WALPOLE
Attorneys at Law
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Tele: 621-2464

Attorney for Plaintiff

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

CINDY HURT, Plaintiff,	)	ORDER ON ORDER TO SHOW CAUSE.
vs.	)	
FRANCIS O. HURT, JR., Defendant.	)	Civil No: 870030225

This matter having come on regularly for hearing on the 6th day of March, 1989, before the Honorable GORDON J. LOW, one of the Judges of the above-entitled Court, sitting without a jury, on the Plaintiff's Order to Show Cause in Re Contempt and for payment of continuing child support and for a Judgment on the arrearage, and on the Defendant's Affidavit to Modify the Divorce Decree, and the Court having made and entered an Order subject to the parties filing briefs, and said briefs having been filed by both parties and the Court having rendered its two (2) written Memorandum Decisions, and the Court being fully cognizant of all matters pertaining therein, enters the following Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff is entitled to a Judgment as and for delinquent support through March 1, 1989, in the sum of $2,322.00

and that the month of April, 1989 is not included.

2. That Defendant is ordered to continue making his child support in the sum of $387.00 per month, as previously ordered by the Court.

3. That the Court in order to avoid hardship to the children, does have the power to award a temporary order of child support and maintenance and does so.

4. That Plaintiff is granted a Judgment for $250.00 attorney fees, plus $53.50 costs.

5. That the Defendant's Petition to Modify the Decree of Divorce as to child support is denied in that Court does not have sufficient information to justify a modification of the Decree. Further, since the Defendant has appealed this matter in the Supreme Court, that a further modification of the Decree may not be in order in that the Court may not have jurisdiction to modify the Divorce Decree.

6. That Plaintiff's counsel has directed and ordered to prepare an Order in accordance with the Judge's Memorandum Decisions.

DATED this 9th day of ~~April~~ May, 1989.

BY THE COURT:

/S/ /S/ GORDON J. LOW
Honorable GORDON J. LOW,
Judge of District Court

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11 day of April, 1989, I mailed a true and correct copy of the above and foregoing ORDER ON ORDER TO SHOW CAUSE, by placing same in the United States Mail

postage prepaid and addressed to the following:

Dale M. Dorius #0903
Attorney for Defendant
P.O. Box U
29 South Main Street
Brigham City, Utah 84302

Frankie A. Eamley
SECRETARY

I, CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN FIRST DISTRICT COURT, BOX ELDER.

DATE 5-12-89
Christine Morrison
DEPUTY CLERK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22 day of November, 1989, I mailed four (4) true and correct copies of the above and foregoing BRIEF OF RESPONDENT by placing same in the U.S. Mail postage prepaid and addressed to the following:

Dale M. Dorius
Attorney for Defendant/Appellant
P.O. Box U
29 North Main Street
Brigham City, Utah 84302