1989

Hurt v. Hurt : Brief of Appellant

Utah Court of Appeals

Dale M. Dorius; attorney for appellant.
Pete N. Vlahos, F. Kim Walpole; Vlahos, Sharp, Wight & Walpole; attorneys for respondent.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

CINDY A. HURT,	)	
Plaintiff and Respondent,	)	No. 890142-CA
vs.	)	
FRANCIS O. HURT, JR.	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

APPEAL FROM AN ORDER DECREEING DIVORCE PATERNITY, CHILD SUPPORT, AND PROPERTY DIVISION BY THE DISTRICT COURT IN AND FOR BOX ELDER COUNTY, JUDGE GORDON LOW PRESIDING

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PARTIES

The only parties to this action are those named in the caption.

JURISDICTION

This Court is authorized by Section 78-2A-3(h), Utah Code Annotated (1953 as amended) to hear this appeal from the First District Court for Box Elder County. This is a divorce or domestic relations case.

NATURE OF THE PROCEEDING

This is a consolidated appeal.

This is an appeal from a final judgment of the Honorable Gordon J. Lowe, Judge of the First District Court of Box Elder County in a civil action for divorce, paternity, property division, and child support. It is also an appeal from a subsequent order to show cause which was signed by Judge Low to enforce child support provisions of the divorce decree.

ISSUES PRESENTED

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 worth of equity in the family home?

DETERMINATIVE AUTHORITY

Kofford v. Flora, 744 P.2d 1343 (Utah, 1988) establishes stringent standards for the admissibility of HLA blood testing in paternity actions. Appellant contends that under this case, the tests used should not have been admitted in this case.

Under Sather v. Gross, 727 P.2d 212 (Utah, 1986), Peters v. Peters, 394 P.2d 71 (Utah, 1964) a court's decision is not effective until an order is signed. Appellant contends that the trial court had no jurisdiction to award temporary child support between the period of the time that

the court ruled in Respondent's favor and the time that an order was actually signed.

Under Johnson v. Johnson, 103 UAR 22 (Utah, 1989) the trial court was required to make specific findings of fact before awarding child support.

Under Paryzek v. Paryzek, 110 UAR 46 (Utah, 1989), a trial court's property division in a divorce may be overturned if the court abuses its discretion.

DISPOSITION IN THE TRIAL COURT

A trial was held in this case on September 26, 1988 before the Honorable Gordon J. Low in Brigham City, Utah. Judge Low ruled that Appellant was the father of one of the Respondent's children. Judge Low held that sufficient grounds existed for the divorce. Judge Low awarded child support and back child support. Judge Low granted future child support in the amount of $387 per month in favor of the Respondent. Judge Low distributed the marital property and debts in such a manner that Appellant's equity in his home was not taken into consideration. The decree of divorce is attached to this brief as an addendum.

Judge Low subsequently granted an Order to Show Cause in favor of Respondent awarding back child support. This was appealed from separately. The appeals have since been consolidated. A copy of this order is attached to this brief as an addendum.

STATEMENT OF FACTS

Respondent sued Appellant for paternity and divorce in the First Judicial District Court in Box Elder County. As part of the paternity action, Respondent called Dr. Charles Dewitt to testify concerning HLA and ABO blood testing which had been done in this case. T.13 Dr. Dewitt ran blood tests in 1988 on the Appellant, Respondent, and a child Kathy Heyden. From these tests, he gave an opinion during the trial that the Appellant was Kathy Heyden's father. T.20

On cross examination, Dr. Dewitt revealed that in 1979, he had been called upon to do blood tests to establish paternity for Kathy Heyden. In 1979, the results of the tests Dr. Dewitt ran were much less certain. In fact, they were only 89% probable. T.25 Dr. Dewitt himself testified that this was insufficient for admission as evidence. T.25 A previous paternity action against the Appellant was dismissed in 1979. T.98

Including Kathy Heyden, Respondent had a total of three children. It was alleged that Appellant was only the father of Kathy. He was never alleged to be the father of the other children. The other children were apparently born out of wedlock as well.

During the trial Respondent testifed that she worked at Thiokol and earned an hourly wage of $11.40. Her net take-home pay per month was $1,473.64. T.57 She also received about four

hours overtime per month because of her work schedule. T.58

Respondent and Appellant bought a home for $59,500. This home was foreclosed on by Western Mortgage in January of 1989. T.62,63. Respondent moved out of the family home in October of 1987. Respondent resided in the home with her children. Appellant had been forced to move out of the home. Respondent made her last house payment in August of 1987. T.66

A real estate broker appraised the home at $65,000. This left equity of approximately $5000. T.84 Respondent refused to surrender possession of the home to Appellant unless he gave her $2000. Respondent also failed to make payments on the home for her last several months of occupancy. T.85 Appellant testified that he would have been able to keep the home if Respondent had vacated the premises before back mortgage payments accumulated. After Respondent and Appellant separated, it took Appellant approximately seven months to obtain possession of the home again. At this point, he was simply unable to make up all the back mortgage payments. T.100,101 The home was sold by Western Mortgage at a foreclosure sale. T.108

The Appellant also works at Thiokol. He has an income of $14.97 an hour. He currently receives very little overtime. However, in 1987 he had considerable overtime because of an accident which killed five people and caused considerable property damage at Thiokol. T.111

The court found the Appellant to be the father of Kathy

Heyden. T.135 The court than ordered the Appellant to pay child support of $387.00. T.144 The figure of $387.00 was obtained as an average from an income which varied from $2,594 per month to $3,771.00 because of overtime in 1987. Court records establish that the Appellant's overtime was indeed temporary and is not ongoing. R.137-141 Appellant is not getting significant overtime anymore. Back child support was awarded from August 1987 through October 1988 at $458.00 per month. The court refused to find that there was any equity in the family home.

The trial court signed a memorandum decision on October 13, 1988 awarding back child support and future child support. However, it was not until January 18, 1989 that the Court signed a Decree of Divorce. A Notice of Appeal was filed by Appellant from this decree and order on February 15, 1989.

On April 3, 1989, Respondent filed an Order to Show Cause. She wanted immediate payment of the back child support. The trial court signed an order requiring payment. Appellant appealed from this order. The Notice of Appeal is dated April 14, 1989.

These appeals have been consolidated for purposes of judicial economy.

SUMMARY OF ARGUMENT

The Utah Supreme Court has realized the dangers of allowing any new scientific evidence into a court of law. There must be guarantees that the evidence is thoroughly understood and is

reliable. This is particularly the case when evidence consists of statistical probabilities. It is hard for a trier of fact to objectively weigh numerical evidence against eyewitness testimony, photographs, and descriptive evidence. Therefore, in a case where HLA test results differ depending on the test, the court should refuse to receive the results into evidence. Any other result would be prejudicial to the Appellant.

The undisputed evidence in this case was that there was equity in the family home prior to the date it was lost in a foreclosure sale. Such evidence came from an appraisal, the purchase price of the home, and the Appellant´s testimony. Consequently, it was wrong for the trial court to find that no equity existed in the home.

The trial court erred when it considered temporary overtime earnings of the Appellant in computing the amount of child support he should pay his child. This is particularly essential when Appellant´s actual earnings (base pay) are only two-thirds of what his earnings mixed with temporary overtime turned out to be.

The trial court had no jurisdiction to grant Respondent´s order to show cause or to award any BACK child support. This because a statute divests the trial court of jurisdiction over a matter once it is appealed. Additionally, orders are only effective from the date they are signed.

ARGUMENT

POINT I: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING THE BLOOD TESTS AND THE TESTIMONY BY DR. DEWITT IN LIGHT OF EARLIER CONFLICTING TESTS

The Utah Supreme Court has spoken concerning the use of HLA and other blood testing during paternity lawsuits. Specifically, the court has expressed the view that such tests are inadmissible in paternity cases unless they are extremely reliable and appropriate safeguards are observed.

In Kofford v. Flora, 744 P.2d 1343 (Utah, 1987), the Utah Supreme Court held that in order to be admissible as evidence during a paternity trial that HLA and ABO blood tests must have a 95% or greater statistical probability of paternity. This is after the assumption is made that there is already a 50% prior probability of paternity. Additionally, the court held that evidence must be produced that the particular tests which were relied upon in the case were conducted in a reliable manner. Specifically, such tests must be conducted as specified by Standards for Parentage Testing Laboratories as developed by the American Association of Blood Banks or other equally reliable sources.

HLA blood testing is still a test or relatively recent origin. As late as 1980, the Utah Supreme Court held that it had not been proven to be of sufficient reliability to be used as evidence on the issue of paternity. Phillips v. Jackson, 615 P.2d 1228 (Utah, 1980). While this is no longer the case, it is

certainly evidence of the fact that HLA testing is still new and in its infancy. Great caution must be exercised with anything new.

The harm that can result from a mistaken finding of paternity is obvious. This is stated in a recent Utah Law Review article. Here, the author stated:

> In a paternity action, the defendant is faced with the imposition of a life-long relationship with significant financial, legal, and moral dimensions. Unlike any other civil judgment, the establishment of a parental relationship has the potential to set in motion a process of engagement that is powerful cumulative, and whose duration spans a lifetime. [U.L.R., 1988, P.717]

In the case at bar, the Appellant had previously been given HLA blood tests in 1979 to determine whether he was the father of Kathy Heyden. These earlier tests came up with an 89% probability of paternity. Such tests would not have been admissible under the Kofford decision.

Tests run on the Appellant in 1988 indicated a 99% probability of paternity. Appellant contends that it was prejudicial, misleading, and confusing to the trier of fact to admit the more recent blood tests into evidence in light of the conflicting results from the earlier tests. The chance for confusing the trier of fact (judge) is great when one is dealing with scientific evidence. Appellant submits that in any case where conflicting tests are done that HLA testing results should not be received into evidence. There is something about

statistical or numerical evidence that is particularly dangerous in a court. It is very difficult to weigh such evidence along with eye witness testimony, photographs, and descriptive evidence. Appellant asks that this court hold it was prejudicial error to admit the 1988 blood test result into evidence along with Dr. Dewitt's testimony.

POINT II: THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT FAILED TO HOLD THAT THERE WAS EQUITY IN THE FAMILY HOME AND GIVE THE APPELLANT CREDIT FOR SAID EQUITY

Prior to their separation and divorce, Appellant and Respondent had purchased a home for $59,900 in Brigham City, Utah. This home was appraised by a real estate agent as being worth $65,000. Appellant testified (as an owner of the property) that there was probably $5000 worth of equity in the home before the house payments became delinquent and foreclosure occurred.

Despite this evidence, the trial court found that no equity existed in the home. The house was purchased during Appellant's and Respondent's marriage. Therefore, any equity which would have accrued in the home should be split equally between the two.

The evidence presented at this trial established that the home was foreclosed upon and all its value has been lost to Appellant and Respondent. This occurred because Respondent failed to make several months worth of house payments during her sole occupany of the home in August 1987. Respondent literally refused to allow Appellant to move back into the dwelling until

months of unpaid mortgage payments were due. Consequently, the home was foreclosed upon by Western Mortgage.

Under Utah law, a trial court is given discretion in awarding property in a divorce action. Paryzek v. Paryzek, 110 UAR 46 (Utah, 1989). However, the court's ruling will be overturned if there is an abuse of discretion.

Appellant contends that it was an abuse of discretion to fail to find that there was equity in the family home at the time of the divorce. All evidence pointed to the contrary. Respondent admitted in her testimony that a real estate broker appraised the property at $65,000. Appellant testified that it was a nice home. He gave his opinion as a property owner that there was $5000 equity. The uncontroverted evidence shows that the home was purchased for $59,900.

Assuming that there was $5000 equity in the home, Appellant should be credited for one-half this amount of $2500. We ask that the court either modify the decision to give Appellant credit for this equity or that the case be reversed and remanded to the trial court to hear further evidence concerning the value of the equity in the home.

POINT III: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN AWARDING $387.00 PER MONTH IN CHILD SUPPORT

The trial court applied the Utah Child Support Guidelines in determining that Appellant should pay $387.00 per month in child support. [U.C.A. 78-45-7.14] The trial court committed error

because it improperly calculated the Appellant's monthly income.

Evidence produced at trial indicated that Appellant regularly earned $14.97 per hour. Under the Utah Uniform Child Support Guidelines, a Appellant would be required to pay $332.00 per month to support one child. However, during the year preceding the divorce, Appellant was able to work a great deal of overtime at Thiokol. This was because of an accident which killed five employees and caused considerable property destruction. T.111

The court calculated that Appellant had a base pay of $2500 per month. However, with overtime he was actually earning $3,700.00 a month in the year preceding the divorce. The court averaged these two figures and set monthly child support at $387.00

It is a fact that Appellant's overtime has virtually come to an end. T.111, R.135-141 Consequently, his base pay of $2500 per month is what the trial court should have used to determine his child support. Failure to base the child support award on the $2500.00 base income will work a grievous and unfair hardship upon Appellant.

Appellant also contends that the Child Support Guidelines did not actually go into affect until July 1, 1989. Under old Utah law, the trial court was required to make certain findings of fact prior to awarding child support. The trial court made findings of fact. However, they are insufficient.

In Jeffries v. Jeffries, 752 P.2d 909 (Utah, 1988), the Utah Court of Appeals reversed a child support award because the trial court failed to make detailed findings of fact prior to awarding child support. This was mandated by U.C.A. 78-45-7, before it was amended. The court stated in this case that:

> Section 78-45-7 requires the trial court to consider at least the seven factors listed therein. Further, those factors constitute material issues upon which the trial court must enter findings of fact. In this case, however, the trial court failed to enter findings on all of the factors. [752 P.2d at 911]

The factors enumerated by U.C.A. 78-45-7, prior to its amendment were:

> (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;

In the instant case, the only findings of fact with relevance to child support concern the amount of the Appellant's and Respondent's income. No findings of fact with speak to standard of living, wealth, or the age of the parties. R.117-128

Other cases suggest such findings are/were necessary. Johnson v. Johnson, 103 UAR 22 (Utah, 1989).

Failure to make these findings mandates reversal of the child support award.

POINT IV: THE TRIAL COURT HAD NO JURISDICTION TO AWARD ANY CHILD SUPPORT PRIOR TO JANUARY 18, 1989

The trial court signed a memorandum decision in this case on October 13, 1988. However, no Decree of Divorce was signed until January 18, 1989. On February 15, 1989, Appellant filed a Notice of Appeal and appealed this case. On April 3, 1989, Respondent filed an Order to Show Cause attempting to enforce payment of back child support. The trial court ruled in favor of Respondent and made an order compelling Appellant to pay the back child support. Appellant appealed from this order on April 15, 1989. The back child support in question is from August of 1987 through January of 1989 (when the Decree of Divorce was signed).

Quite simply, the trial court was without jurisdiction to make such an order either in the decree or in a subsequent order to show cause. In Peters v. Peters, 394 P.2d 71 (Utah, 1964) the Utah Supreme Court held:

> It is true that the main judgment is a final and appealable judgment as to the issues therein dealt with. When those questions as to divorce, custody of children, support money, alimony, and/or property rights are therein adjudicated and an appeal is taken, the district court is without further jurisdiction as to them. [394 P.2d 73]

It is true that the court has jurisdiction to provide for the support and maintenance of the children during an appeal. UCA 30-3-5. However, such jurisdiction does not extend to enforcing a BACK child support order dated before the decree of the divorce is signed.

Additionally, the Appellant simply cannot be held liable for BACK child support before a decree of divorce is signed. In this case the decree was signed January 18, 1989. This is because of Utah Code Annotated 30-3-7. This section states:

> The decree of divorce becomes absolute on the date it is signed by the court and entered by the clerk in the register of actions or at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending...

Thus the decree of divorce in this case became a final judgment on the date it was signed as stated in the above section of the Utah Code. See also Sather v. Gross, 727 P.2d 21 (Utah, 1986). Pate v. Marathon Steel, 692 P.2d 765 (Utah, 1984). Wisden v. City of Salina, 696 P.2d 1205 (Utah, 1985). It follows that the court cannot direct ther Appellant to pay any amount of support prior to the date the decree and findings were signed by the court. The only back child support that Appellant could be responsible for would be that owing AFTER the decree was signed on January 18, 1989.

Consequently, the court must reverse the trial court's award of back child support. It must also reverse the trial court's

subsequent order to show cause which was granted in favor of the Respondent.

CONCLUSION

The Utah Supreme Court has reluctantly allowed statistical evidence from HLA-ABO blood testing to be received in lawsuits for paternity. The court has imposed rigids standards upon the trial courts before this evidence can be received. These standards require that the testing be done in accordance with specific procedures and rules. Additionally, the tests must show at least a 95% probability of paternity. In the instant case, it was prejudicial error to admit a recent test which had results considerably different from similar testing done ten years before. Sufficient guarantees of reliability and accuracy were not present. Therefore, the Court of Appeals must reverse the finding of paternity.

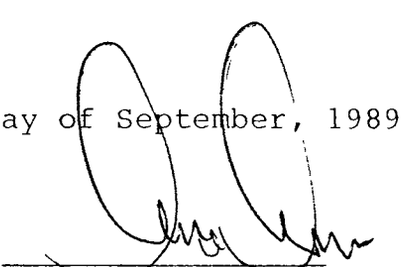
The trial court committed prejudicial error when it failed to find that there was equity in the family home. The uncontroverted evidence in this case was that the home was purchased for $59,900 and appraised at $65,000. The Appellant expressed an opinion that there was $5000 equity in the house. No evidence was presented from which opposite findings could be made. Therefore, the Court of Appeals must reverse and remand this case for a determination of the amount of equity in the home prior to its foreclosure.

The trial court committed prejudicial and reversible error

when it incorrectly determined Appellant's income for purposes of child support. The evidence presented unequivocably showed that Appellant's base salary was only $2500.00. It was true that overtime had brought his salary to approximately $3700 a month in 1987. However, this was a temporary fluke caused by a tragic accident at his workplace. Additionally, the trial court failed to make proper findings of fact before determining and awarding the child support that it did. Specifically, findings concerning the wealth, position, and ages of the parties should have been made. Accordingly, the court committed reversible error in awarding the amount of child support it did and this must be reversed.

The trial court acted without jurisdiction and in violation of the rules when it attempted to award and enforce child support which predated the decree of divorce. Once the divorce was appealed, the trial court lacked jurisdiction to enforce any back child support judgment. Additionally, support could only be awarded SUBSEQUENT to the entry of the Decree of Divorce. Consequently, the Court's award of back child support must be reversed. Additionally, the Order to Show Cause which the court granted enforcing the back child support order must be reversed as well.

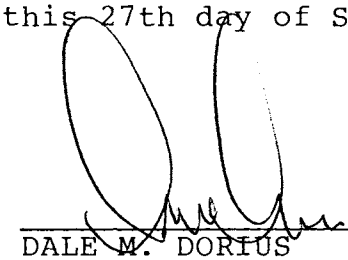
Respectfully submitted this 27th day of September, 1989.



Dale Dorius
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF to the Plaintiff/ Respondent's attorney, PETE N. VLAHOS at 2447 Legal Forum Building, Ogden, UT 84401, this 27th day of September, 1989.



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ADDENDUM

CONTENTS:

DECREE OF DIVORCE SIGNED BY THE COURT ON JANUARY 18, 1989

ORDER ON ORDER TO SHOW CAUSE SIGNED BY THE COURT ON MAY 9, 1989

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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.	/	

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.

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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

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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.

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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 19 day of January, 1989.

GORDON J. LOW,
District Court Judge

APPROVED AS TO FORM:

DALE M. DORIUS,
Attorney for Defendant

Wright & Walpole
ATTORNEYS AT LAW
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Attorney for Plaintiff

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

CINDY HURT, Plaintiff, vs.	)	ORDER ON ORDER TO SHOW CAUSE.
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 26 day of ~~April~~ May, 1989.

BY THE COURT:

Honorable GORDON J. LOW,
Judge of District Court

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27 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,

ATTORNEYS AT LAW
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OGDEN UTAH 84401

postage prepaid and addressed to the following:

Dale M. Dorius #0903
Attorney for Defendant
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29 South Main Street
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Frankie G. Embley
SECRETARY

Vlahos, Sharp
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