

1989

# Marilyn J. Durfee v. Frank W. Durfee : Brief of Appellant

Utah Court of Appeals

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E. H. Fankhauser; Attorney for Respondent.

J. Franklin Allred; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

89-221 CA

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MARILYN J. DURFEE (WOLF),	)	
	)	
Plaintiff-Respondant,	)	BRIEF OF APPELLANT
	)	
vs.	)	
	)	
FRANK W. DURFEE,	)	Case No. 890221-CA
	)	Priority No. 14
Defendant-Appellant.	)	

---

BRIEF OF THE APPELLANT

---

Appeal From A Final Judgment and Order Entered in The Third  
Judicial District Court, Tooele County, Judge Pat Brian

---

J. Franklin Allred  
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Salt Lake City, Utah 84102

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Appellant

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Respondent

1990

JRM,  
Court  
Appellate

IN THE UTAH COURT OF APPEALS

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MARILYN J. DURFEE (WOLF),	)	
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IN THE UTAH COURT OF APPEALS

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STATEMENT OF JURISDICTION

This Court has jurisdiction to decide the appeal pursuant to § 78-2a-3(2)(g), U.C.A. 1953, as amended 1987.

NATURE OF THE PROCEEDINGS

This is an appeal from a final order of the Court modifying a divorce decree by increasing child support payments and denying defendant-appellant's counterpetition for modification.

STATEMENT OF ISSUES

I. Did the Court err in denying Appellant's request to terminate payment of support to the legal custodian who did not have actual physical custody or economic responsibility for the minor child?

II. Did the Court err in finding a material change of circumstances due to: a) a change in gross income of the non-custodial parent over a ten year period and rejecting Appellant's theory of comparison of discretionary income, or b) taking judicial notice of the increase of the costs of raising children as they grow older?

III. Did the Court err in following the guidelines to determine the amount of support and in rejecting the traditional

pre-guideline analysis of needs of the children and ability to pay?

IV. Did the Court err in preventing cross-examination as to the specific expenses allocable to the children for whom support was to be paid by Appellant?

V. Did the Court err in modifying the decree of divorce to require the noncustodial parent to pay one-half of the noncovered medical and dental expenses?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Annotated 1953, As Amended

§ 30-3-5

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties. . . .

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

Utah Rule of Evidence 201.

A. Scope of Rule.

This Rule governs only judicial notice of adjudicative facts.

B. Kinds of Facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2)

capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Code of Judicial Administration, Appendix H, Uniform Child Support Guidelines.

I.4. Application to Existing Orders: THE ADOPTION OF THESE GUIDELINES AND ANY CONSEQUENT IMPACT ON EXISTING CHILD SUPPORT ORDERS DOES NOT CONSTITUTE A SUBSTANTIAL CHANGE OF CIRCUMSTANCES TO INDEPENDENTLY ALLOW MODIFICATION OF AN EXISTING ORDER.

Petitions for modification of existing child support orders in place on October 30, 1988 will be considered on a case-by-case basis. Courts have continuing jurisdiction to modify child support orders under circumstances amply described by present case law to advance the welfare of the child when there is a material change in circumstances. In determining requested modifications of support orders entered prior to the effective date of the guidelines, the court will consider the totality of the present circumstances of the parties and avoid modifications which would work undue hardship on the parties or any children presently dependent thereon.

II.B.1.(a) Health and Dental Insurance Premiums for Children

. . . Those non-covered routine medical and dental expenses will be borne by the custodial parent. Routine expenses include routine office visits. Physical examinations and immunizations.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition

The parties were divorced in 1978 and the plaintiff mother was awarded custody of two minor children with defendant



father being required to pay \$150.00 per month as child support for a total of \$300.00 per month. In August 1988, plaintiff filed a petition to amend the decree of divorce asking for an increase in child support and that defendant be required to pay and assume one-half of the deductibles in non-covered hospital, medical, dental and optical expenses incurred by the minor children. The defendant filed a counter-petition asking that his obligation to pay support to the plaintiff for Craig Wayne Durfee be terminated and that plaintiff be ordered to execute the appropriate Federal form to allow defendant to claim the minor children as his exemptions on his State and Federal income tax return.

The trial was held on January 13, 1989 before the Honorable Pat B. Brian in Tooele County, State of Utah. The Court announced its decision in the case at the conclusion of the trial. (Tr. 109). The defendant filed a motion for a new trial. (R. 117). The Court denied defendant's motion for a new trial (R. 181). The Court entered a judgment and order on February 27, 1989 (R. 153), which order increased child support to \$323.00 per month for the minor child Chris, age 12, and \$375.00 per month for the minor child Craig, age 16, and required each party to assume and pay one-half of the noncovered and unpaid medical, hospital, dental, orthodontial and optical expenses of the minor children presently outstanding and denying the request of defendant made in his counterpetition to terminate support for Craig and to require the plaintiff to execute the appropriate Federal form to allow defendant to claim the minor children as

his exemptions for the purposes of his State and Federal income tax filings.

B. STATEMENT OF FACTS

The Court announced prior to the beginning of trial in chambers that he strictly followed the Guidelines and later on the record his statements assumed the Guidelines applied and attempted to elicit a proffer regarding gross income and other facts from the parties. (Tr. 13). Testimony was thereafter taken from both parties and certain exhibits were marked and received concerning the income and expense analysis of the defendant (R. 86, 89) (Addendum 1, 2), and the expenses of plaintiff (R. 85) (Addendum 3). During cross-examination of plaintiff, the Court sustained the objection of plaintiff's attorney to questions by defendant's counsel regarding the actual economical impact of the minor child in her custody (Tr. 83) stating that the Court could take judicial notice that children are more expensive as they age (Tr. 84), that the Court had experience with its own six children in that connection, and that the Court was not going to listen to evidence of actual expense or experiences in connection with the children at the present time (Tr. 84). Plaintiff had testified over defendant's foundational objection that Chris cost \$500.00 per month, and Craig cost \$600.00 per month (Tr. 73).

During the course of trial the credible evidence and best evidence showed that defendant's income in the year of the divorce was \$32,634.00 (R. 80, Tr. 31) and during the year 1988, defendant's income was, after adjustments, \$41, 536.00 (R. 89,

90, Tr. 27, 29). The Court found that the 1978 income was approximately \$29,000.00, and that the 1988 income was approximately \$45,000.00. The exhibits offered by defendant indicated that his gross income had increased over the ten years from the divorce by a sum of \$8,902.00, or \$890.00 a year, or an average increase of 2.72 percent per year on 1978 income. The Court found that the gross income had increased \$1,600.00 per year, or 5.5 percent based on the Court's finding of \$29,000.00 in 1978 (Tr. 109). The defendant provided evidence of his discretionary income at \$684.50 in the year of divorce (R. 86) (Addendum 1) compared with the \$416.00 in 1988 (R. 89) (Addendum 2). The Court did not address this aspect of the evidence.

The evidence indicated that the oldest child of the parties Craig Durfee lived in Grantsville with his grandmother (Tr. 41, 42), and that plaintiff lived in Salt Lake City with her current husband (Tr. 80). No evidence was offered that plaintiff contributed anything to the support of the child Craig Durfee. No evidence was offered by plaintiff as to the cost of maintaining the minor children of the parties in the year of the divorce, nor was there a proper foundation to the cost of maintaining the minor children during the year and at the time of the modification. (Tr. 73). Counsel for defendant was prevented from inquiring into the subject matter in his cross-examination concerning plaintiff's claimed household expenses. (Tr. 83). Plaintiff's Exhibit D Monthly Living Expenses (R. 85) (Addendum 3) claimed approximately \$1,000.00 for mortgage, taxes and insurance, \$300.00 for school expenses for plaintiff, \$100.00 for

child care for plaintiff's child with her current husband.

The evidence showed plaintiff's new husband had filed a petition in bankruptcy in 1988, and that a large percentage of the household monetary needs of plaintiff was created for the house payment itself, which house was purchased in 1985 by plaintiff and defendant for \$150,000.00, and on which the \$1,800.00 monthly payment was reduced by the Bankruptcy Court to \$800.00 a month, pending the resolution of the bankruptcy petition (Tr. 80). Counsel was prevented by the Court's ruling as to questions on cross-examination from exploring the full circumstances of plaintiff and the responsibility for the monetary requirement created by those circumstances as it may be allocated between plaintiff and her husband and the child, or children, the Court stating that it was irrelevant. (Tr. 83, 84).

The Court ruled that the Guidelines applied (Tr. 110) and in so ruling failed to consider the equitable nature of the proceeding and directed counsel to calculate the support obligation on a gross income of defendant of \$45,000.00, using the three-child schedule. The Court also ruled that non-covered and unpaid medical and dental expenses would be shared equally by the parties. (Tr. 110).

The children who were ages 6 and 1 at the time of the divorce were 16 years and 12 years of age at the time of trial. The oldest boy Craig Wayne Durfee had been living with his maternal grandmother in Grantsville since approximately 1986, and was living with her at the time of trial (Tr. 42). The younger

child moved with the mother on her remarriage to Salt Lake City and resided with her at the time of trial (Tr. 64). The plaintiff was not employed at the time of the original decree of divorce, nor was she employed at the time of trial, her work had been sporadic and for a period of less than 32 months since the divorce (Tr. 64).

The decree of divorce in this case had preceded the effective date of the "Child Support Guidelines" (R. 00000) and the Court in its opening remarks to counsel prior to the evidentiary portion of the trial indicated it would follow the Guidelines in this case. The calculations subsequently made translated directly into a dollar amount of support by applying the Guidelines. The Court did not consider or make findings with respect to the costs of the maintenance of either of the households of the parties, nor did the court make findings with respect to the abilities of the defendant to pay support, nor did the Court make findings with respect to the specific cost increases as to either boy, nor did the Court consider the impact on the plaintiff's household expenses of the nonresident child. Defendant's request that he be relieved of the obligation to pay child support to plaintiff for the minor child not living in her residence and dependent on her for support was denied.

At the time of trial, the defendant had remarried and had one child and offered evidence indicating that an analysis of his household expenses and his income in the years to be compared reflected no material change of circumstances for the better (Tr. 44), or, in the alternative, his discretionary income limited any

increase in child support to a very small one, if at all, and approached the analysis in his pleading and proof as had been the custom in petitions for modifications in such cases prior to the effective date of "Child Support Guidelines". It appears the Court rejected this method of determining whether or not a material change had occurred and likewise rejected defendant's proposed method of arriving at a support figure, if a change was indicated, and relied solely on the application of the Guidelines to the finding by the Court of the level of defendant's gross income the year immediately preceding trial.

#### SUMMARY OF ARGUMENT

1. The plaintiff in this action did not have the actual physical custody of the minor child Craig Durfee. Craig, living with his grandmother in Grantsville and was imposing no economic cost on plaintiff. The Court by reference to the Guidelines required defendant to pay the full amount for a child between the age of 16 as calculated in the Guidelines published in the Utah Code of Judicial Administration. The Court refused to terminate the requirement to pay the custodial parent, notwithstanding that parent did not have actual custody of the child. The defendant urges that the appropriate measure of support due is not under the Guidelines, but is the actual cost of caring for the child, and further that when the custodial parent has allowed a child to live elsewhere than in the home of the custodial parent, those payments should be paid to the actual care provider considering all the cost factors incurred by that care provider in connection with the child.

2. Two grounds of material and substantial change of custody were alleged in plaintiff's petition for a modification of the divorce decree. The first was that a change in the gross income of the defendant had taken place, and the second was that the cost of raising children increased as the children aged. The Court found both factors to present a material and substantial change of circumstances and the defendant challenges both. The defendant claims that an analysis of his income on a gross basis under the Guidelines was improper, and further that the analysis as applied led to the wrong conclusion. Also, defendant claims that the Court was not entitled to take judicial notice of the fact that children require greater support contributions or assistance from the parents as they age. Defendant claims urging the correct proof of whether or not the children as they age impose a greater economic burden on the parents is evidence showing the actual costs and impact of that child on the household; and the possible savings on the costs of the household generated by the child's earnings, if any; and in this case, the child's living in a home other than the residence of the custodial parent.

3. The Trial Court applied the Guideline schedules to fix the dollar value of support. In so doing, the Court ignored the wording in the Uniform Child Support Guidelines referring to decrees already in existence prior to the adoption of the Guidelines and prevented an inquiry into the "totality of the present circumstances of the parties" focusing exclusively on the gross income to the exclusion of other evidence. The fair

meaning of the Guideline position with respect to prior decrees being that the method used before the existence of the Guidelines to determine the need for and capacity to pay child support be applied in such cases.

4. Plaintiff offered as an exhibit her recapitulation of monthly expenses. In testing those claims, counsel was cross-examining as to the specifics of many of the items. After some questioning an objection was interposed and the Court prevented by sustaining the objection, any further inquiry as to the actual costs on the basis that they were not relevant to the analysis being undertaken. The defendant claims that to the extent possible, the needs of the children in cases arising prior to the Guidelines must be established by actual costs if those can be determined and allocated.

5. In the Order Modifying the Decree, the Court required the noncustodial parent to assume responsibility for one-half of all non-covered medical and dental expenses, and made that retroactive to currently existing expenses, some of which were dental expenses which were not properly proved. The Court in so doing ignored the Guidelines with respect to those routine medical expenses which the Guidelines contemplated would be borne by the custodial parent.

#### ARGUMENT

##### POINT I

The evidence shows that the minor Craig Wayne Durfee had been living with his grandmother in Grantsville since 1986. The mother and custodial parent, on the other hand, lived in Salt



Lake City with her new husband, the youngest child of the parties, and a child of the mother's current marriage. The plaintiff claimed that the \$150.00 being paid by defendant for Craig Wayne Dufee's support was in fact forwarded to her mother with whom Craig was living. No evidence was offered to show the actual costs of providing for the minor child Craig Durfee, nor was there any evidence offered to show what contribution Craig made, if any, to providing for himself.

Defendant urged on the Court the proposition that the biological mother, not having physical custody, was entitled to no support payment pursuant to the Guidelines, or any other method of establishing the same. While no Utah case is directly on point, the defendant ought not, in fairness and equity, be required to pay more than a proportion of the actual costs to support said child in terms of the reasonable and necessary expenses, and that payment should be made to the person incurring the cost of providing the support. In one Utah case, the Supreme Court expressed its opinion that a third party providing support for a child "then has the right to claim reimbursement from the parent the same as any other past debt. This right of reimbursement belongs to whomever furnished the support . . . ." Hunter v. Hunter, 669 P.2d 540 (Utah 1983). In the Hunter case the Court points out the well-settled principle that it is the "right of a child to receive support money from his father (parent) . . . . Hunter v. Hunter, at 431. Thus, it is clear that the right belongs to the child and not to the biological parent. Support money is generally paid to the parent with

custody because that parent has the immediate opportunity to apply payments to the child's benefit.

When the minor child does not live with the "custodial" parent and is dependent on another party for his reasonable and necessary support, the party providing that support in accordance with the rule of the Hunter case has the right to claim reimbursement from the parent(s). Hunter, at 431.

Thus, in this case, the Court erred in law in failing to terminate the requirement that defendant pay plaintiff support money for a child that she was not supporting. The Court might have directed that payments of support be paid by defendant directly to the person supporting the minor child Craig Durfee, that is, his grandmother. However, such payments would have to be in the amount equivalent to the costs incurred by the party providing the support and only to the extent of reasonable and necessary expenses for the child.

#### POINT II

The Guidelines themselves direct and instruct the Court not to apply the simplistic approach of determining the gross income of the obligor and the mechanistic determination of support by use of the schedules. Rather, the wording "case by case" and the "totality of the present circumstances of the parties" direct the Court away from the application of the Guidelines and require determination of the obligation and ability pursuant to "present case law". Utah Code of Judicial Administration, Appendix H, I, paragraph 4.

The evidence of defendant's gross earnings in the years

1978 and 1988 were offered by defendant, the plaintiff offering none, and were unrefuted. The Court nevertheless and without persuasive evidence thereon found against the statements of the defendant and against the weight of the evidence in connection with the totality of the earnings in the material years. There was no evidence that the defendant was making only \$29,000.00 in 1978, the evidence being he made \$32,634.00 that year. Defendant's 1988 salary, excluding a one-time strike payment, and the extraordinary receipt of two paychecks during the month of July 1988, which resulted in defendant's being paid 13 months in that year, was \$41,536.00. Almost exactly the same figure could be arrived at by adding his straight time plus average overtime plus differential for a monthly gross in 1988 of \$3,373.92.

To show a material change of circumstances, the movant is required to show a "substantial change in circumstance occurring since the entry of the decree and not contemplated in the decree itself." Stettler v. Stettler, 713 P.2d 699 (Utah 1985). With respect to a change in defendant's circumstances, his evidence showed a 2.7 percent gross annual increase and the Court's findings found a 5.5 gross percent annual increase. Both findings ignore tax impact and cost increases. Under either amount it could not reasonably be argued such a modest increase in salary was not contemplated by the parties at the time of the entry of the decree of divorce. Thus, the ruling that the mere increase in gross salary of defendant constituted a change was clearly erroneous.

The Court committed error in law by taking judicial

notice that the aging of children is a material change of circumstance. Implicit in that notice is an assumption the fact of aging itself creates additional costs. Rule 201 of the Utah Rules of Evidence governs judicial notice of adjudicative facts. In subparagraph b of that rule, a court is authorized to notice only facts "not subject to reasonable dispute that are either 1) generally known within the territorial jurisdiction of the trial court, or 2) capable of accurate and ready determination." The Court in taking judicial notice that the aging of children created greater costs referred to its own experience with its six sons. The Court complied with neither of the aspects which would entitle it to take notice of the adjudicated fact in that the resort of the court to its personal experience as a source was improper. That the experience in the Brian household is universal is disputed and disputable.

It may be that greater funds are generally committed to older children, but it may also be that those funds do not fall within the realm of "reasonable and necessary", but fall within the realm of discretionary, or helpful, and reflect a refusal of the parent to require and encourage the child to provide for itself and be a productive part of the family unit. In addition, it is only the current popular lax attitude of parents that does not rigorously demand a contribution both in services and economics to the maintenance of a household and a living environment. Thus, to fall victim to a personal belief that children as they age cannot counterbalance their expenses with the production of income and the provision of services in the

household and to further compound that misplaced attitude as standard in the community or territory is not sanctioned by the rule.

### POINT III

In failing to allow the full scope of the trial to include evidence on the cost to plaintiff of supporting the subject children, an analysis of the ability of the defendant to pay additional support, and to allow examination into the actual needs of the children, the Court failed both to apply the Guidelines pursuant to their directions, or to apply the vast body of law concerning the needs of the children and the obligations of the parents as that prior law governed modification hearings prior to the adoption of the Guidelines. The Guidelines require "that petitions for modification of existing child support orders in place on October 30, 1988 (should be treated by the Court) under circumstances amply described by present case law (and) . . . the Court will consider the totality of the present circumstances of the parties . . . ." Utah Code of Judicial Admin., Appendix H, I, 4. The Court announced at the outset of the trial that it would follow the Guidelines and then proceeded to fail to follow the Guidelines in its restrictive rulings on the evidence and its refusal to consider the analysis of defendant which was offered to show the circumstances of the parties under the present case law method of so showing and to consider the totality of the present circumstances of the parties.

Without receiving evidence as to the totality of the

present circumstance of the parties, it was impossible for the Court to follow paragraph 4 of the Guidelines and the Court in failing to allow the breadth of the proceeding as mandated by paragraph 4 of the Guidelines abused its discretion. The phrase "totality of the present circumstances of the parties" necessarily demand an inquiry beyond mere gross income of the defendant as to the amount of any increased support and necessarily demands an inquiry beyond the mere suggestion by the moving party that the expenses of raising the child have increased materially.

Further, the Court failed to follow the mandate of the Guidelines in "avoid(ing) modifications which would work undue hardship on the parties or any children presently dependent thereon." The reasonable expenses of defendant left only \$116.00 of discretionary income available to him and his current wife and new daughter (Addendum 2). The Court ordered an increase of amounts payable for the two minor children of the parties of \$398.00 over the present amount, which amount necessarily must be provided by cutting into an already bone lean expense allocation of the defendant and cannot under any stretch of the imagination be said not to work a hardship on defendant. It appears that it is not possible for the defendant to pay the amount demanded by the Court.

A proper approach to the question of whether or not a material and substantial change in circumstances had occurred with respect to the economic posture of the defendant would, under present case law on a case-by-case basis as required by the

Guidelines, lead the Court to an analysis as suggested by the defendant, that is, with a comparison of the discretionary income of the year in which the divorce occurred and the discretionary income in the year when the claimed material and substantial change for the better was incurred. The defendant offered Exhibit 1, (addendum 1) his analysis of earnings and discretionary income for 1979 and Exhibit 2, (addendum 2) a similar analysis for 1988. After a comparison of the discretionary income left, it is clear that the general economic posture of the defendant has not in fact improved, but has rather deteriorated. The Court did not address the defendant's method of proving a material and substantial change because its attention was directed toward the application of the gross income analysis by the Guidelines. The analysis by use of defendant's figures as to his discretionary income would have demanded the Court make a finding that no material and substantial change in the economic circumstances of the paying party, the defendant, had occurred.

#### POINT IV

Common sense demands that to show a change in circumstances of the plaintiff owing to increased costs of the children, a comparison must be made as to the costs then and now. No evidence was received nor was it permitted on cross-examination to be elicited as to either. Rather, the plaintiff made the bare unsubstantiated statement that it cost \$500.00 or \$600.00 to raise these children and the Court purported to take judicial notice that the advanced ages indicated a material

change. Neither proposition is supportable in law. The first because there was no evidence to support the assertion of plaintiff, and defendant was prevented in his attempt to cross-examine on the claim, and the second, because the facts, had defendant been able to produce them, may well have shown that a well-managed household might not have experienced the same cost increase as was expressed by the court as being experienced in the Brian household (Tr. 84).

In addition, the Court may make orders subsequent to the divorce for "the children and their support, maintenance and health and dental care . . . as shall be reasonable and necessary." Utah Code Ann. § 30-3-5 (1953). The Court is not prevented from taking into account that children as they become employable defray some of the expenses from their incidentals, entertainment and food for the reason that at their option they elect to eat, play and procure incidentals apart from those available in the household. And, further, while plaintiff testified that the minor child Craig "is driving" (Tr. 73), exhaustive research shows no case including in the "reasonable and necessary" expenses to be contributed to by the parents, the cost of an automobile, insurance, or gasoline. In this case, in fact the costs of Craig's driving are paid by his grandparents (Tr. 74). Thus, the evidence was wholly inadequate to justify a finding that a material change of circumstances of the plaintiff in fact occurred, or, if it occurred, it was chargeable to the needs and demands of the children rather than the excesses of the plaintiff and her new husband.



During the cross-examination of plaintiff by defendant's counsel, the Court exclaimed to plaintiff after an objection had been interposed that it had been waiting for an objection for a considerable period of time (Tr. 23) and that it was going to prevent the entire line of questioning designed to look at specific costs incurred by the children for whom support was going to be required (Tr. 83). Had the Court applied the Guidelines as they direct, on a case-by-case basis, and in order to avoid a modification which would work hardship on the parties, it would have allowed and encouraged counsel in his examination of the actual costs of maintaining both children. In failing to do so, the Court disenabled itself from obtaining sufficient facts to make a decision in accordance with the instructions in the Guidelines.

#### POINT V

The Guidelines, Code of Judicial Administration, Appendix H.II.B(1), specifically address noncovered expenses and requires "those noncovered routine medical and dental expenses will be born by the custodial parent. Routine expenses include routine office visits, physical examination, immunizations" in requiring a contribution by the defendant to every noncovered medical expense and in concluding that the Uniform Child Support Guidelines prevented the lessening of burden on defendant by allowing him the State and Federal tax exemptions of the children, the Court further erred.

#### CONCLUSION

The Uniform Support Guidelines were advisory in their

inception and brief existence. It appears in this case that the Court placed great weight and abrogated its responsibility to make a searching inquiry in reliance on the Guidelines. The Guidelines were not intended at any time to be a substitute for a close analysis and scrutiny of the situations brought to court by parties litigant. Because of the numerous errors previously cited, the Order of the District Court should be vacated and the matter remanded for a new trial.

Dated this \_\_\_\_\_ day of September, 1989.

\_\_\_\_\_  
J. Franklin Allred  
Attorney for Defendant-  
Appellant

#### CERTIFICATE OF MAILING

I hereby certify that I have served via Pedal Express four copies of Brief of Appellant on E. H. Fankhauser, Attorney for Plaintiff-Appellant, 243 East 400 South, Suite 200, Salt Lake City, Utah 84111.

Dated this \_\_\_\_\_ day of September, 1989.

\_\_\_\_\_  
J. Franklin Allred  
Attorney for Defendant-  
Appellant



WAYNE DURFEE  
1978  
INCOME AND EXPENSE ANALYSIS

INCOME (Assume 1981 equivalent) (Gross pre-tax)		\$32,634.00
Deduct:		
Federal Tax	\$ 7,547.00	
F.I.C.A.	1,975.00	
State Tax	<u>1,578.00</u>	
	\$11,100.00	<u>-11,100.00</u>
Annual Net		\$21,534.00
Monthly Net		\$ 1,794.50

EXPENSES:

Rent:	\$ 150.00
Utilities	100.00
Groceries	150.00
Blazer (Furniture)	50.00
GMAC (Car)	150.00
Doctor bills	20.00
Health & dental ins.	15.00
Work transportation	30.00
Auto expense (tires, gas, etc., ins.)	75.00
Insurance	30.00
Entertainment	100.00
Charitable Contr.	30.00
Gifts	30.00
Clothing	50.00
Miscellaneous	<u>30.00</u>
	\$1010.00

Total Monthly Expenses	\$ 1,010.00
------------------------	-------------

Discretionary Income Analysis:

1978 Monthly Net Income	\$ 1,794.50
1978 Monthly Expense	<u>1,010.00</u>
MONTHLY DISCRETIONARY INCOME FOR 1978:	\$ 684.50

1040 Department of the Treasury—Internal Revenue Service U.S. Individual Income Tax Return 1981 (B)

For the year January 1–December 31, 1981, or other tax year beginning 1981, ending 19 OMB No. 1545-0074

Use IRS label. Otherwise, please print or type.

Your first name and initial (If joint return, also give spouse's name and initial) Last name  
Frank W. Durfee

Present home address (Number and street, including apartment number, or rural route)  
285 West Apple Street

City, town or post office, State and ZIP code  
Grantsville, Utah 84029

Your social security number  
529 32 1594

Spouse's social security no.

Your occupation  
J Foreman

Spouse's occupation

Presidential Election Campaign

Do you want \$1 to go to this fund? . . . . . Yes No

If joint return, does your spouse want \$1 to go to this fund? . . . . . Yes No

Note: Checking "Yes" will not increase your tax or reduce your refund.

Filing Status

Check only one box.

1 ☒ Single

2 ☐ Married filing joint return (even if only one had income)

3 ☐ Married filing separate return. Enter spouse's social security no. above and full name here

4 ☐ Head of household (with qualifying person). (See page 6 of Instructions.) If he or she is your unmarried child, enter child's name

5 ☐ Qualifying widow(er) with dependent child (Year spouse died 19 ). (See page 6 of Instructions.)

For Privacy Act and Paperwork Reduction Act Notice, see Instructions.

Exemptions

Always check the box labeled for yourself. Check other boxes if they apply.

6a ☒ Yourself ☐ 65 or over ☐ Blind

b ☐ Spouse ☐ 65 or over ☐ Blind

c First names of your dependent children who lived with you

d Other dependents:

(1) Name (2) Relationship (3) Number of months lived in your home (4) Did dependent have income of \$1,000 or more? (5) Did you provide more than one half of dependent's support?

Enter number of boxes checked on 6a and b

Enter number of children listed on 6c

Enter number of other dependents

Add numbers entered in boxes above

Wage and Tax Statement

Copy C For employee's records

Department of the Treasury Internal Revenue Service

This information is being furnished to the IRS and appropriate State officials

Employee's name, address and ZIP code  
AX MAGNESIUM CORP  
AX CENTER  
EENACH, COVA 35336

Employee's social security number  
529 32 1594

9 Federal income tax withheld  
8,154.01

10 Wages, tips, other compensation  
32,344.91

11 FICA tax withheld  
1,975.35

13 FICA wages  
27,700.00

14 FICA tips

17 State income tax  
2120.33

18 State wages, tips, etc.  
32344.91

19 Name of State  
UTAH IN

20 Local income tax

21 Local wages, tips, etc.

22 Name of locality

17 Rents, royalties, partnerships, estates, trusts, etc. (attach Schedule E)

18 Farm income or (loss) (attach Schedule F)

19a Unemployment compensation (insurance). Total received

19b Taxable amount, if any, from worksheet on page 10 of Instructions

20 Other income (state nature and source—see page 11 of Instructions)

21 Total income. Add amounts in column for lines 7 through 20

22 Moving expense (attach Form 3903 or 3903F)

23 Employee business expenses (attach Form 2106)

24 Payments to an IRA (enter code from page 11)

25 Payments to a Keogh (H.R. 10) retirement plan

26 Interest penalty on early withdrawal of savings

27 Alimony paid

28 Disability income exclusion (attach Form 2440)

29 Other adjustments—see page 12

30 Total adjustments. Add lines 22 through 29

Adjustments to Income

(See Instructions on page 11)

1



# INDIVIDUAL INCOME TAX RETURN

RESIDENT LONG FORM  
For the year ending December 31, 1981, or other taxable year  
beginning , 19 , ending , 19

UTAH  
FORM TC-40

1981

Use label, otherwise type or print in ink.	Name (if joint return, give first names and initials of both) <i>Frank W.</i>	Last Name <i>Durfee</i>	Your social security number <i>529   32   1594</i>	
	Present home address (Number and street including apartment number, or rural route) <i>285 West Apple Street</i>		Spouse's social security number	
	City, town or post office <i>Grantsville,</i>	County <i>Tooele</i>	State and Zip code <i>Utah 84029</i>	Telephone No.

READ instructions on page 3 to see if you can use the short form (TC-40S). If you do not qualify to use the short form, you must use this form.

<b>1. FILING STATUS — Check only one</b> A. <input checked="" type="checkbox"/> Single, except head of household B. <input type="checkbox"/> Head of Household — Enter qualifying name C. <input type="checkbox"/> Married filing joint return D. <input type="checkbox"/> Married filing separately. Give spouse's social security number in heading above and enter spouse's full name here	<b>2. EXEMPTIONS</b> <table><thead><tr><th></th><th>Regular</th><th>65 or over</th><th>Blind</th><th>Enter number of boxes checked</th></tr></thead><tbody><tr><td>Yourself</td><td><input checked="" type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td>A. <i>1</i></td></tr><tr><td>Spouse</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td><input type="checkbox"/></td><td>B. _____</td></tr><tr><td>Number of dependent children who lived with you</td><td colspan="3"></td><td>C. _____</td></tr><tr><td>Number of other dependents</td><td colspan="3"></td><td>D. <i>1</i></td></tr><tr><td colspan="5">TOTAL EXEMPTIONS CLAIMED</td></tr></tbody></table>		Regular	65 or over	Blind	Enter number of boxes checked	Yourself	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	A. <i>1</i>	Spouse	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	B. _____	Number of dependent children who lived with you				C. _____	Number of other dependents				D. <i>1</i>	TOTAL EXEMPTIONS CLAIMED					<b>3. ELECTION CAMPAIGN FUND —</b> Check box indicating (1) party to which you wish to make a \$1.00 contribution or, (2) no contribution: Checking box will not increase tax or reduce refund. <table><thead><tr><th></th><th>Yours</th><th>Spouse</th></tr></thead><tbody><tr><td>A. Democratic</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr><tr><td>B. Republican</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr><tr><td>C. No Contribution</td><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr></tbody></table>		Yours	Spouse	A. Democratic	<input type="checkbox"/>	<input type="checkbox"/>	B. Republican	<input type="checkbox"/>	<input type="checkbox"/>	C. No Contribution	<input type="checkbox"/>	<input type="checkbox"/>
	Regular	65 or over	Blind	Enter number of boxes checked																																								
Yourself	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	A. <i>1</i>																																								
Spouse	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	B. _____																																								
Number of dependent children who lived with you				C. _____																																								
Number of other dependents				D. <i>1</i>																																								
TOTAL EXEMPTIONS CLAIMED																																												
	Yours	Spouse																																										
A. Democratic	<input type="checkbox"/>	<input type="checkbox"/>																																										
B. Republican	<input type="checkbox"/>	<input type="checkbox"/>																																										
C. No Contribution	<input type="checkbox"/>	<input type="checkbox"/>																																										

4. Federal Return: (Check type of return filed. Attach complete copy with all schedules) ☒ Form 1040 ☐ Form 1040 A To file an Amended return use form TC-40X

5. Federal Adjusted Gross Income (From Federal Form 1040 line 31 or Form 1040A line 10)	•	5	<i>32643</i>
6. Deductions: Note. Read instructions for line 6 on page 4 before completing this section			
(A). Itemized Deductions (amount shown on line 39 of Federal Schedule A)			
(B). Standard Deductions (for single, married filing jointly and head of household, \$1,300.00 minimum or 15% of line 5 with a \$2,000.00 maximum. For married filing separately: \$650.00 minimum or 15% of line 5, with a \$1,000.00 maximum. Please read instructions for exceptions)			
7. Exemptions (Total exemptions claimed (line 2d) times \$750.00)	•	6	<i>4645</i>
8. Federal Income Tax Determined for the same period (see instructions for line 8)	•	7	<i>750</i>
9. Interest from U.S. Government Obligations included in Federal adjusted gross income	•	8	<i>7547</i>
10. Retirement Income (Complete Schedule B on back of this return)	•	9	
11. State Tax Refund (if reported on line 9 of Federal Form 1040)	•	10	
12. Adoption Expenses and Other Deductions (See instructions; attach explanation)	•	11	
13. Total Exemptions and Deductions (add lines 6 through 12)	•	12	
14. Total Income Less Exemptions and Deductions (line 5 less line 13)	•	13	<i>12,942</i>
15. Add State Income Tax (claimed as an itemized deduction on Line 11 of Federal Schedule A)	•	14	<i>19692</i>
16. Equitable, Lump Sum and Other Adjustments (See instructions; attach explanation)	•	15	<i>2120</i>
17. Total Additions (add lines 15 and 16)	•	16	
18. Total Utah Taxable Income (add lines 14 and 17)	•	17	<i>2120</i>
	•	18	<i>21812</i>

## COMPUTE THE TAX ON AMOUNT ON LINE 18 PER TAX RATE SCHEDULE ON REVERSE OF FORM

19. Utah Income Tax (from Tax Rate Schedules on back)	•	19	<i>1578</i>
20. Credit for Utah Income Tax withheld (attach withholding forms)	•	20	<i>2120</i>
21. Credit for Income Taxes Paid to Another State (Complete Schedule A on back of form)	•	21	
22. Credit for Agricultural Off-Highway Gas and Gasohol Tax (Complete Schedule C on back of form)	•	22	
23. Credit for Utah Income Tax Prepaid (attach proof of pre-payment)	•	23	
24. Credit for Energy Systems Installation (attach Schedule TC-40E with energy office approval)	•	24	
25. Total Credits (add lines 20 through 24)	•	25	<i>2120</i>
26. Additional Tax Due - If line 19 is larger than 25, subtract line 25 from line 19 and enter balance - PAY THIS AMOUNT. ☹	•	26	
27. Refund - If line 25 is larger than line 19, subtract line 19 from line 25 and enter balance	•	27	<i>542</i>
28. Utah Nongame Wildlife Fund. I wish to contribute <input type="checkbox"/> \$1, <input type="checkbox"/> \$5, <input type="checkbox"/> \$10 or \$ (enter amount), or <input type="checkbox"/> I do not wish to contribute. Enter contribution amount on line 28 at right	•	28	<i>1</i>
29. Net Refund - subtract line 28 from line 27. This amount will be refunded to you. Please allow 90 days for processing ☺	•	29	<i>541</i>
Send return and payment to:			
UTAH STATE TAX COMMISSION STATE OFFICE BUILDING SALT LAKE CITY, UTAH 84134			
30. Did you file a Utah return for 1980? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO If no, give reason	•		
		FOR OFFICIAL USE ONLY	
		CODE	APPROVAL

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which he has any knowledge.

IGN ERE	► Your signature _____ Date _____	► Preparer's signature (other than taxpayer) _____ Date <i>4-12-82</i>
	► Spouse's signature (if filing jointly, BOTH must sign even if only one had income) _____	► <i>4445 West 4775 South Kearns, Ut. 528-24-7278</i> Address (and ZIP CODE) Preparer's Emp Ident or Soc. Sec. No

WAYNE DURFEE  
1988  
INCOME AND EXPENSE ANALYSIS

INCOME (Gross From Year End Check Stub)		\$48,247.33
Adjustments to 1988 Income:		
1/13th of total Income	\$ 3,711.33	
Strike payments above salary	<u>3,000.00</u>	
	\$ 6,711.33	- <u>6,711.33</u>
Adjusted 1988 Gross Pre-Tax		\$41,536.00
Deduct:		
Federal Tax (From tax tables)	\$ 6,360.00	
F.I.C.A. (92.3% of total)	3,119.00	
State Tax (41,536-11821)	<u>2,007.00</u>	
	\$11,486.00	-11,486.00
Annual Net		<u>\$30,050.00</u>
Monthly Net		\$ 2,504.00

EXPENSES:

Rent:	\$ 250.00
Valley Bank (car)	260.00
Utilities	200.00
Household retail	55.00
(furniture)	
Tooele Fed. Credit U.	240.00
Key Bank Visa	25.00
Rocky Mountain	55.00
Groceries	400.00
Insurance (car &	75.00
renters)	
Insurance (Health)	30.00
Work clothing	50.00
Glasses & contacts	20.00
Radio Shack	35.00
Work transportation	75.00
Contributions	30.00
Entertainment	100.00
Gifts	38.00
Clothing	50.00
Auto expenses	50.00
Miscellaneous	<u>50.00</u>
	\$2088.00

Total Monthly Expenses	\$ 2,088.00
------------------------	-------------

Discretionary Income Analysis:

1988 Monthly Net Income	\$ 2,504.00
1988 Monthly Expense	<u>2,088.00</u>

MONTHLY DISCRETIONARY  
INCOME FOR 1978:

\$ 416.00

RETAIN FOR YOUR RECORDS

CURRENT EARNINGS				TAXES AND DEDUCTIONS		
TYPE	HOURS	AMOUNT	STAT-EXMPS	TYPE	CURRENT	YEAR TO DATE
REG SALARY	20.00	3,123.92	M 05	FICA U.S.	23.05	3,379.50
VRM		360.44	M 05	U.S. W/H TX	374.26	5,062.09
SHIFT DIFF		70.00	M 05	UTAH	168.86	2,479.99
				TFT LOAN	132.96	531.84
				LTSC INSUR	22.27	289.51
				HMO EQU UT	28.37	226.96
				TOOELE FCU	240.00	2,740.00
				TFT BASIC	187.44	2,436.72
				U.S. BONDS	25.00	325.00
MISCELLANEOUS						
CURRENT EARNINGS					SOCIAL SECURITY NO	
3,554.36					529-82-1594	
CURRENT TAXES					EARNINGS - Y.T.D.	
566.17					48,247.33	
CURRENT DEDUCTIONS						
636.04					.00	
NET PAY					CHECK NO.	
2,352.15					0401539	
PERIOD ENDING					DATE	
12/31/88					12/30/88	

Resident Long Form  
Individual Income Tax Return

for the year ending Dec. 31, 1988, or other taxable year beginning  
19 and ending 19

UTAH  
1988  
FORM  
TC-40

Use label. Otherwise, please type or print in black ink.	If no label, enter your full name (first, middle initial, last). If married, also enter spouse's full name.			Your social security number	
	Present home address (number and street including apartment number or rural route)			Spouse's social security number	
	City, town or post office	County (province)	State and ZIP code (foreign country)	Daytime telephone number	

1. Filing Status

- a. Single ☐ 1a ☐
- b. Head of household - enter name of qualifying child/dependent on line e. ☐ 1b ☐
- c. Married filing joint return ☐ 1c ☐
- d. Married filing separate returns enter name of spouse on line e. ☐ 1d ☐
- e. ☐

2. Exemptions

- a. Yourself (enter "1") ☐ 2a ☐
- b. Spouse (enter "1") ☐ 2b ☐
- c. Other dependents claimed on federal return ☐ 2c ☐
- d. Total exemptions (add 2a, 2b and 2c) ☐ 2d ☐

\*Enter "0" if you did not claim yourself on federal return.

3. Election Campaign Fund

- |                    | Yourself                 | Spouse                     |
|--------------------|--------------------------|----------------------------|
| a. American        | <input type="checkbox"/> | <input type="checkbox"/> A |
| b. Democrat        | <input type="checkbox"/> | <input type="checkbox"/> D |
| c. Libertarian     | <input type="checkbox"/> | <input type="checkbox"/> L |
| d. New Alliance    | <input type="checkbox"/> | <input type="checkbox"/> W |
| e. Republican      | <input type="checkbox"/> | <input type="checkbox"/> R |
| f. No contribution | <input type="checkbox"/> | <input type="checkbox"/> N |

4. Federal adjusted gross income from federal return (see instructions)	5. Itemized or standard deduction claimed on federal return (see instructions)	6. Personal exemptions (line 2d times \$1,462)	7. 1/3 Federal tax liability on federal return (divide by 3)	8. State tax refund included in federal income (include rebate)	9. Interest from U.S. Government obligations included in federal income	10. Retirement inc. from Sch. B on back - Over age 65? • Self <input type="checkbox"/> Spouse <input type="checkbox"/>	11. Adoption expenses, Indian income, railroad retirement	12. Total (add lines 5 through 11)	13. Deduct line 12 from line 4	14. State income tax deducted as itemized deduction on Federal Sch. A	15. Entire amount of lump sum distribution shown on Federal form 4972	16. Total (add lines 14 and 15)	17. Utah taxable income (add lines 13 and 16)	18. Utah tax (from Tax Rate Schedules on back using amount on line 17)	19. Utah use tax (compute from worksheet on page 5 of booklet)	20. Voluntary contribution to assist homeless <input type="checkbox"/> \$2 <input type="checkbox"/> \$5 <input type="checkbox"/> \$10 or \$	21. Total tax and voluntary contribution to assist homeless (add lines 18 through 20)	22. Utah income tax withheld (attach withholding forms)	23. Credit for Utah income tax prepaid on forms TC-636, TC-636A or TC-546	24. Credit for taxes paid to another state (from Schedule A on back of return)	25. Other credits (from Schedule C on back of return)	26. Total credits (add lines 22 through 25)	27. Additional tax due - if line 21 is larger than line 26, subtract line 26 from line 21. Enter and pay amount.	28. Refund - if line 26 is larger than line 21, subtract line 21 from line 26 and enter balance	29. Utah Nongame Wildlife Fund - I wish to contribute <input type="checkbox"/> \$1 <input type="checkbox"/> \$5 <input type="checkbox"/> \$10 <input type="checkbox"/> or \$ (enter amount)	30. Net refund - subtract line 29 from line 28. Check here if you want refund applied to next year's tax. <input type="checkbox"/>
4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
\$41,536	5000	4386	2120	315				11,821	29,715				29,715	2007				2007								

and return and payment to: Utah State Tax Commission, 160 East Third South, Salt Lake City, Utah 84134-0200

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Taxpayer's signature

Date

Occupation

Spouse's signature (if filing jointly, both MUST sign even if only one had income)

Date

Occupation

Preparer's signature, name and address

Date

Preparer's social security number



**Resident Long Form - Schedules A, B and C  
and 1988 Utah Tax Rate Schedules**

**Schedule A - Credit for taxes paid to another state**

1. Federal adjusted gross income taxed in state of: .....	1	\$	
2. Federal adjusted gross income from federal return (see instructions) .....	2		
3. Percent of other state gross income to total income (line 1 divided by line 2) .....	3		%
4. Utah income tax (line 18 on front of return) .....	4		
5. Credit limitation (line 4 times percentage on line 3) .....	5		
6. Actual income tax paid to state of: .....	6		
7. Credit for taxes paid to another state (line 5 or 6, whichever is less). Enter on line 24 on front of return. ....	7	\$	

**YOU MUST ATTACH A SIGNED COPY OF ALL OTHER STATE INCOME TAX RETURNS FOR WHICH CREDIT IS CLAIMED**

**Schedule B - Schedule for retirement income deduction**

A. Enter amount from Worksheet 1 or 3 .....	A	\$	
B. Enter amount from Worksheet 2 .....	B		
C. Total boxes A and B .....	C	\$	

This is your retirement income deduction, enter on line 10 on the front of return, form TC-40, or line 10 on front of return, form TC-40NR.

ALL TAXPAYERS CLAIMING RETIREMENT DEDUCTIONS ARE REQUIRED TO ATTACH COPIES OF ALL FORMS W-2, W-2P, 1099, SSA-1099, RRB-1099, RRB-W2P, OR OTHER DOCUMENTATION TO SUPPORT THE RETIREMENT INCOME DEDUCTION, IN ADDITION TO THE WORKSHEET USED TO COMPUTE THE RETIREMENT DEDUCTION.

**Schedule C - Schedule of other credits**

1. Tax rebate credit - if your 1987 Utah tax was less than \$80, enter 12.5% of the tax amount paid (\$9.99 max.)...	1	\$	
2. Mineral production withholding tax credit (attach form(s) TC-675R or federal Schedule(s) K-1) .....	2		
3. Agricultural off-highway gas tax credit Tax paid gallons purchased 1/1/88 to 12/31/88 <input type="text"/> x 19¢ = <input type="text"/>	3		
4. Credit for energy systems installation (attach form TC-40E showing Energy Office approval) .....	4		
5. Credit to beneficiary of trust receiving accumulation distribution (see instructions) .....	5		
6. Credit for cash contribution to qualified sheltered workshop. Name of workshop <input type="text"/> Total cash contribution \$ <input type="text"/> x 50% (maximum credit is \$200) .....	6		
7. Credit for cash contribution to qualified research development partnership (read and complete instructions) .....	7		
8. Total of other credits (add lines 1 through 7 and enter total on line 25 on front of return) .....	8	\$	

**1988 Utah Tax Rate Schedules**

**TAX SCHEDULE A - Filing status is Single or Married Filing Separate returns.**  
Use this schedule if you checked box 1a or 1d on front of return. Calculate the tax based upon income amount shown on line 17 on front of return. Enter amount of tax on line 18 on front of return.

<u>If the state taxable income is:</u>	<u>The tax is:</u>
Not over \$750 .....	2.6% of the state taxable income
Over \$750 but not over \$1,500 ....	\$19.50, plus 3.55% of excess over \$750
Over \$1,500 but not over \$2,250 .	\$46, plus 4.5% of excess over \$1,500
Over \$2,250 but not over \$3,000 .	\$80, plus 5.45% of excess over \$2,250
Over \$3,000 but not over \$3,750 .	\$121, plus 6.4% of excess over \$3,000
Over \$3,750 .....	\$169, plus 7.35% of excess over \$3,750

**TAX SCHEDULE B - Filing status is Head of Household or Married Filing Joint returns.** Use this schedule if you checked box 1b or 1c on front of return. Calculate tax based upon income amount shown on line 17 on front of return. Enter amount of tax on line 18 on front of return.

<u>If the state taxable income is:</u>	<u>The tax is:</u>
Not over \$1,500 .....	2.6% of the state taxable income
Over \$1,500 but not over \$3,000 .....	\$39, plus 3.55% of excess over \$1,500
Over \$3,000 but not over \$4,500 .	\$92, plus 4.5% of excess over \$3,000
Over \$4,500 but not over \$6,000 .	\$160, plus 5.45% of excess over \$4,500
Over \$6,000 but not over \$7,500 .	\$242, plus 6.4% of excess over \$6,000
Over \$7,500 .....	\$338, plus 7.35% of excess over \$7,500



MONTHLY LIVING EXPENSES OF PLAINTIFF, MARILYN J. WOLF

Mortgage payment (at present time)	800.00
Real property taxes	104.50
Real property insurance	25.83
Maintenance - real property	50.00
Food and Household supplies	400.00
Utilities	150.00
Telephone	40.00
Laundry and cleaning	20.00
Clothing	100.00
Medical	50.00
Dental and orthodontia	100.00
Life insurance	31.00
Child care	100.00
School expenses - children	20.00
School expenses - Plaintiff	
(student loan payment)	300.00
Entertainment	50.00
Incidentals	75.00
Auto expense (gas, oil, repairs, ins.)	91.67
Auto payment	153.16
Installment payments	150.00
<hr/>	
TOTAL	\$ 2,811.16

E. H. FANKHAUSER  
Bar No. 1032  
Attorney for Plaintiff  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

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

---

MARILYN J. DURFEE (WOLF)

Plaintiff,

vs.

FRANK W. DURFEE,

Defendant.

\*

\*

\*

\*

\*

FINDINGS OF FACTS AND  
CONCLUSIONS OF LAW

Civil No. 9429

---

Plaintiff's Petition for Modification of Decree of Divorce and the Counter Petition of Defendant came on for evidentiary hearing before the above entitled Court, pursuant to notice, January 13, 1989, the Honorable Pat B. Brian presiding. Plaintiff appeared in person and was represented by her attorney, E. H. Fankhauser. Defendant appeared in person and was represented by his attorney, J. Franklin Allred. Each of the parties were duly sworn, testified and presented evidence to the Court; and the Court, being advised in the premises, and the matter having been argued and submitted to the Court for

determination and decision; and good cause appearing to the Court, finds as follows:

FINDINGS OF FACTS

1. A Decree of Divorce was entered in this action on November 27, 1978.

2. The Decree of Divorce awarded the care, custody and control of the two (2) minor children to the Plaintiff and ordered Defendant to pay child support to Plaintiff for the two (2) minor children at the rate of \$150.00 per month per child.

3. Since entry of the Decree of Divorce, both Plaintiff and Defendant have remarried. Plaintiff's name is now Marilyn J. Wolf. Both parties have one (1) child born to them of their present marriage.

4. Defendant, at the time of the Decree of Divorce, was employed and working for NL Industries, now AMAX Magnesium Corporation, and was earning approximately \$29,000.00 per year.

5. Plaintiff, at the time of the Decree of Divorce and this hearing was unemployed. She has been and is now attending Westminster College seeking a nursing degree. Plaintiff may eventually become employed and an income producing party, but is not at this time.

6. The claims of Plaintiff for support arrearage have been fully compromised and settled between the parties pursuant to prior hearing on Order to Show Cause.

7. The Court finds from the evidence presented that there has been a substantial and material change of circumstances of the parties which are as follows:

(a) Defendant has experienced a substantial increase in his income from approximately \$29,000.00 per year in 1978 to approximately \$45,000.00 per year in 1988. This is a total increase of \$16,000.00 per year since the Decree of Divorce and indicates to the Court that Defendant has experienced an increase in his income at the average of \$1,600.00 per year for the past ten (10) years and will continue to do so.

(b) The two (2) minor children, Chris, now age 12 and Craig now age 16, are ten (10) years older. The cost of living and support of these two (2) boys has increased materially.

The foregoing constitutes sufficient grounds to modify the Decree of Divorce.

8. The claim of Defendant, pursuant to his Counter Petition, that he be reimbursed all of the support payments he has paid for and on behalf of the minor child, Craig, since October, 1986 ordered to be paid by the Decree of Divorce is not a claim that can be sustained as a matter of law or in equity.

9. Since the filing of the Petition of Plaintiff and Counter Petition of Defendant, the Uniform Guidelines for child

support were implemented in this District on or about November 1, 1988. Defendant's request to modify the Decree of Divorce, granting to him the right to claim the two (2) minor children as exemption for tax purposes should be denied as a matter of law. However, the Court suggests that Plaintiff use fair play and if a condition exists where she can allow Defendant to claim the two (2) minor children as exemptions for tax purposes, she should do so.

10. Since entry of the Decree of Divorce, particularly in the past year, expenses have been incurred on behalf of the minor children for eye care and orthodontia and dental care. That there is presently owing and outstanding an obligation for orthodontia care for the minor child, Chris, which is payable at the rate of \$75.00 per month. Based on the evidence presented and the circumstances, the Court finds it is equitable to modify the Decree of Divorce and order both parties to be responsible to pay one-half (1/2) of the outstanding and noncovered hospital, medical, dental, orthodontia and optical expenses of the minor children not covered by insurance until their age of majority or emancipation.

11. Pursuant to stipulation, the Court finds that it would be in the best interest of the parties that a mutual Restraining Order issue, restraining each party or their agents from in any manner criticizing, demeaning, profaning, annoying, harassing or

otherwise interfering with the other party at any time and in their relationship with the minor children.

12. Plaintiff has incurred costs and expense for attorney's fees in connection with the preparation and hearing on her Petition for Modification of Decree of Divorce. That the attorney's fees and expenses incurred by her were reasonable and necessary. Plaintiff should be awarded \$500.00 as attorney's fees for the use and benefit of her attorney, which are to be paid in full on or before December 31, 1989. This award of attorney's fees to Plaintiff pertains only to her Petition for Modification of Decree of Divorce and the hearing thereon.

13. From the evidence presented, the support payable by Defendant to Plaintiff for the two (2) minor children should be increased and the support obligation of the Defendant be modified reflecting such increase. The amount of the increased support is to be determined in accordance with the support guidelines on the basis of a three (3) child household for Defendant. Support is to be payable one-half (1/2) on or before the 1st of the month and one-half (1/2) on or before the 15th of the month and continue to be payable through the Clerk of the Court. Defendant is to pay support at the increased amount commencing January 15, 1989.

From the foregoing Findings of Fact, the Court concludes as follows:

### CONCLUSIONS OF LAW

1. Plaintiff's Petition for Modification of Decree of Divorce seeking an increase in the support to be paid by Defendant to Plaintiff for the two (2) minor children of the parties should be granted. Child support should be increased to the amount determined under the support guidelines for a three (3) child household of Defendant. Plaintiff's counsel is to prepare a work sheet which is to be attached to these Findings of Facts and Conclusions of Law.

2. The Counter Petition of Defendant should be denied.

3. The Decree of Divorce should be modified with regard to payment of hospital, medical, dental and optical expenses on behalf of the minor children not covered by insurance. Each party should be required to pay one-half (1/2) of the outstanding and unpaid hospital, medical, dental, orthodontia and optical expenses incurred on behalf of the minor children not covered by insurance until age of majority or emancipation.

4. A mutual Restraining Order should issue restraining both parties or their agents from in any manner criticizing, demeaning, profaning, annoying, harassing or otherwise interfering with that party or with their relationship with the minor children. Further, each party or their agents is not to in any way criticize or demean the other party to the minor




children.

5. Plaintiff should be awarded \$500.00 to assist her in the payment of her attorney's fees in connection with her Petition for Modification of Decree of Divorce and hearing thereon for the use and benefit of her attorney. That the attorney's fees are to be payable in full on or before December 31, 1989.

6. The Decree of Divorce heretofore entered by this Court should remain in force and effect except as modified by these Findings of Facts and Conclusions of Law.

DONE IN OPEN COURT this 27 day of <sup>February</sup> January, 1989.

BY THE COURT:

  
PAT B. BRIAN  
DISTRICT JUDGE

Approved:

\_\_\_\_\_  
J. FRANKLIN ALLRED  
Attorney for Defendant

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to J. Franklin Allred, Attorney for Defendant, 321 South 600 East, Salt Lake City, Utah 84102 on this 18 day of January, 1989.

A handwritten signature in cursive script, appearing to read "J. Franklin Allred", is written over a horizontal line.

E. H. FANKHAUSER  
Bar No. 1032  
Attorney for Plaintiff  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

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

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MARILYN J. DURFEE (WOLF)

Plaintiff,

vs.

FRANK W. DURFEE,

Defendant.

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ORDER MODIFYING DECREE  
OF DIVORCE

Civil No. 9429

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The Petition of Plaintiff and Counter Petition of Defendant for Modification of Decree of Divorce came on for hearing at a regular term of the above entitled Court, pursuant to notice, January 13, 1989, the Honorable Pat B. Brian presiding. Plaintiff appeared in person and was represented by her attorney, E. H. Fankhauser. Defendant appeared in person and was represented by his attorney, J. Franklin Allred. The parties were duly sworn, testified and presented evidence to the Court; and the matter was argued and submitted to the Court for its determination and decision; and the Court, being fully advised in

the premises, having made its Findings of Facts and Conclusions of Law, now, in accordance therewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The support payments ordered to be paid under the Decree of Divorce by the Defendant to the Plaintiff for the two (2) minor children of the parties, CHRIS DURFEE and CRAIG DURFEE, are hereby increased as of January 15, 1989 as follows:

(a) \$323.00 per month for the minor child, Chris, now age 12;

(b) \$375.00 per month for the minor child, Craig, now age 16;

(c) Total support \$698.00 per month payable one-half (1/2) on the 1st of the month and one-half (1/2) on the 15th of the month commencing January 15, 1989 and each and every month thereafter until further order of the Court.

2. Each party is ordered to assume and pay one-half (1/2) of the noncovered and unpaid medical, hospital, dental, orthodontia and optical expenses of the minor children presently outstanding and until each child shall reach his age of majority or become emancipated.

3. Plaintiff and Defendant and/or their agents are hereby mutually restrained from criticizing, demeaning, profaning, annoying, harassing and/or interfering with the other party and their relationship with the minor children. Both parties and/or their agents are restrained from criticizing or demeaning the

other party to the minor children.

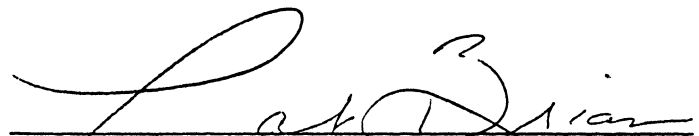
4. Plaintiff be and is hereby awarded a judgment against Defendant in the sum of \$500.00 for attorney's fees for the use and benefit of her attorney, which sum is to be paid in full on or before December 31, 1989.

5. The Counter Petition of Defendant for modification of Decree of Divorce be and the same is hereby denied.

6. The Decree of Divorce heretofore entered by this Court shall remain in full force and effect except as modified by this Order. Defendant shall continue to pay child support payments ordered to be paid directly through the Clerk of the Court until further Order of the Court.

DONE IN OPEN COURT this 27 day of ~~January~~ February, 1989.

BY THE COURT:

  
PAT B. BRIAN  
DISTRICT JUDGE

Approved:

\_\_\_\_\_  
J. FRANKLIN ALLRED  
Attorney for Defendant

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to J. Franklin Allred, Attorney for Defendant, 321 South 600 East, Salt Lake City, Utah 84102 on this 18<sup>th</sup> day of January, 1989.

*St. Francis*