

1989

Gaydi S. Allred v. John Franklin Allred : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO.

890335-01

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

GAYDI S. ALLRED,

Plaintiff-Respondent

vs.

JOHN FRANKLIN ALLRED,

Defendant-Appellant.

Court of Appeals No. 890335-CA
Argument Priority: 14b

BRIEF OF RESPONDENT

Appeal from the Third Judicial District Court, Salt Lake County
Judge Scott Daniels, Presiding

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS
STATE OF UTAH

GAYDI S. ALLRED,
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vs.)

JOHN FRANKLIN ALLRED,

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I. STATEMENT OF THE COURT OF APPEALS' JURISDICTION

Under Utah Code Annotated, section 78-2A-3 (1989), the Utah Court of Appeals has appellate jurisdiction over this case. Section 73-2A-3(h) and Utah Court of Appeals Rules 3 and 4 furnish the Court with authority in final orders involving domestic relations, including child support.

II. STATEMENT OF THE NATURE OF THE PROCEEDINGS

This case concerns an order filed by Judge Scott Daniels, modifying the parties' Divorce Decree. The order centers on Appellant's request, on January 19, 1988 and amended on May 2, 1988, that Ms. Allred pay additional child support and carry two of the children on her medical insurance.

On May 5, 1989, following two hearings, the court ordered Ms. Allred to pay child support and Mr. Allred to provide medical insurance coverage. Mr. Allred filed a Notice of Appeal on May 11, 1989.

III. STATEMENT OF ISSUES

1. Did the trial court make adequate findings of fact supporting its order? Can Mr. Allred challenge the trial court's findings as inadequate when he approved of the court's decision, drafted the findings, and did not object to them as inadequate at the second hearing?

2. Did the trial court err in requiring Mr. Allred to carry the two minor children on his insurance policy when Ms.

Allred's employer does not allow employees to carry insurance for anyone who is not claimed as a tax deduction?

3. Did the trial court err in awarding \$100 per month child support for Corey Allred after Mr. Allred had stipulated to \$100 per month child support for Derek Allred, and when Corey came to live with him, had reduced owed monthly child support by \$100?

4. Did the trial court err in requiring Corey's child's support to be placed in an interest-bearing account, after finding that as satisfaction for past child support owed to Ms. Allred, the court had ordered Mr. Allred to set up similar accounts for two of the children, but, he never complied?

5. Did the trial court err in ordering that the interest-bearing account be paid to Corey Allred after his eighteenth birthday, when Mr. Allred had agreed, and does not object, that child support be paid to Derek Allred after his eighteenth birthday?

6. Did the trial court err in considering, as a layperson, Ms. Allred's formal objections fourteen days after Mr. Allred served the findings of fact and conclusions of law, when Ms. Allred had earlier written to the court, and Mr. Allred, concerning her objections and asking to be informed if a motion was required?

IV. Determinative Statutes

1. Utah Rules of Civil Procedure, Rule 52(a) Findings by the Court:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for finds are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56 and 59 when the motion is based on more than one ground.

(Emphasis added).

2. Utah Code Annotated, section 78-45-7(3) (1989).

Determination of amount of support -- Rebuttable guidelines:

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors including but not limited to:

- (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 needs of the obligee, the obligor, and the child;
- (f) the ages of the parties;

(g) the responsibility of the obligor for the support of others.

(Emphasis added).

3. Utah Code Annotated, section 78-45-7.2(1)(a) (1989).

Application of guidelines -- Rebuttal:

(1)(a) The guidelines apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989.

(Emphasis added).

4. Code of Judicial Administration Rule 4-904(2)(A) Child Support Guidelines:

(2) Application of guidelines.

(A) The guidelines are advisory to the court. Final orders in all cases shall be made at the discretion of the court based upon the facts of the individual case.

(Emphasis added).

4. Utah Code Annotated, section 15-2-1 (1989). Period of minority.

The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage. It is further provided that courts in divorce actions may order support to age 21.

(Emphasis added).

5. Utah Code Annotated, section 30-3-5(3) (1989). ... Court to have continuing jurisdiction:

(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.

(Emphasis added).

V. STATEMENT OF THE CASE

A. Nature of the Case

This case concerns a change in the custody of Corey Allred. After Corey began living with his father, Appellant John Franklin Allred, Mr. Allred filed a Motion for Modification of the Divorce Decree. Mr. Allred sought child support of approximately \$250, and also, by amendment, that Ms. Allred carry both Corey and an older son, Derek, on her medical insurance.

Ms. Allred contested the amount of child support requested. She also opposed including the children on her medical insurance.

B. Course of the Proceedings

Mr. Allred filed a Motion for Modification of the Divorce Decree on January 19, 1988, requesting a change in custody for Corey Allred. On March 1, 1988, Ms. Allred responded, pro se, opposing the custody change and counter petitioned for unpaid child support. Mr. Allred answered Ms. Allred's counter-petition on March 3, 1988. Judge Scott Daniels, of the Third Judicial District Court, heard the Motion on March 18, 1988 and granted Mr. Allred temporary custody. At that time, Judge Daniels ordered a custody evaluation and continued the matter for trial.

On May 2, 1988, Mr. Allred moved to amend his motion to include claims for insurance coverage and medical benefits. Ms. Allred filed objections on May 16, 1988. The court heard the custody issue on October 7, 1988 and Ms. Allred agreed not to oppose the transfer of Corey's custody to Mr. Allred.

Judge Daniels heard the child support and insurance coverage issues on December 21, 1988. On January 5, 1989, Mr. Allred prepared proposed findings of facts and conclusions of law. Ms. Allred filed objections on January 24, 1989. The court ordered a second hearing, to be held on March 10, 1989. Following the hearing Judge Daniels issued an order on May 5, 1989 resolving the insurance coverage, medical costs, unpaid child support, and child support issues. Mr. Allred appealed on May 11, 1989.

C. Trial Court's Disposition

The trial court ordered that the child support owed to Ms. Allred be setoff against medical costs and child support owed to Mr. Allred. It further awarded Mr. Allred \$100 monthly child support. Finally, the court order requires Ms. Allred to place the \$100 monthly payments into an interest-bearing account, not to be withdrawn without court order.

D. Relevant Facts

In August 1980, Gaydi Allred filed for divorce from John Franklin Allred. After almost a year long bitter custody battle the court granted Ms. Allred the divorce, custody of the three children, and child support. Ms. Allred retained custody of all three children for more than five years.

In 1986, the parties modified the divorce decree, exchanging custody of the second child, Derek, after he began living with Mr. Allred. (December 21, 1988 Transcript at 11). In connection with Derek's custody change, Mr. Allred stipulated to Ms. Allred providing \$100 monthly child support. Id. at 3. Furthermore,

Mr. Allred also received the right to claim both Corey and Derek as deductions. Id. at 10-11.

After Mr. Allred refused to make current overdue child support payments on the other two children, Ms. Allred obtained a thousand dollar judgment against him. Id. at 8. In November 1987, following a motion to set aside the judgment, Mr. Allred agreed to satisfy the \$1,000 debt by:

immediately placing \$500 into an interest-bearing account in the name of each child in [Ms. Allred's] custody, Aaryn and Corey Allred, with herself as trustee and with each child to receive the contents of the account when he or she reaches the age of 18 years.

Id. at 33. In spite of a court order containing this agreement, Mr. Allred never complied. Id. at 34.

Late in 1987, the youngest child, Corey, also began residing with Mr. Allred. Consequently, through reducing the child support amount he owed to Ms. Allred for the oldest child, Mr. Allred accepted additional \$100 monthly child support payments from Ms. Allred. Id. at 4. Thus, for each of the younger two children, Derek and Corey, Mr. Allred accepted \$100 per month in child support.

The court conducted a hearing concerning Corey's custody, insurance coverage, medical costs, and unpaid child support on December 21, 1988. Both Mr. Allred, an attorney, and Ms. Allred, a layperson, appeared pro se. At that time, the court considered evidence on both parties' insurance policies. Id. at 25-28. Ms. Allred explained that her employer would not allow her to insure Derek and Corey because she could not claim them as deductions.

Id. at 25. After hearing all of this evidence, the court found Ms. Allred's insurance inadequate, terming it "... not a very good plan." Id.

The court also considered the standard of living and situation of the parties. Thus, for example, the court heard Ms. Allred testify about the children's "educational, surgical, psychological, dental, orthodontic, child care, and extracurricular expenses while they resided with [her]." Id. at 15. She explained that she had provided these items and raised all three children on \$33,000 a year. Id. at 31. Ms. Allred further testified concerning her inability to provide outings for Corey, and meals and movies for his friends should she be required to pay child support. Id. at 16-17. Legal fees had cost Ms. Allred more than \$13,000, for which she was still making monthly payments. Id. at 14.

Mr. Allred testified about the cost he incurs for Derek's psychiatrists, and Corey's medical treatment for asthma. Id. at 18-20. In addition, he reported that he owned income property in Tooele, Utah. Id. at 23. Mr. Allred stated that his obligations had increased, and that he liquidated his Keogh plan. Id. at 22-23. Mr. Allred also described his legal practice, DUI defense, and its deterioration due to a change in the law. Id. at 32-33.

In addition to standard of living and situation, the court also considered the wealth and income of the parties. Ms. Allred testified that her income was \$29,000. Id. at 17. Mr. Allred testified that his total income for that year reached \$171,000.

Id. at 24. He estimated that his income for 1988 would be \$80,000 Id.

Regarding the parties' ability to earn, Ms. Allred testified that her past earnings had been between \$18,000 to \$20,000 per year. Id. at 31. Moreover, the court found that although Mr. Allred's legal practice was suffering, he could "get into something else and make a lot of money." March 10, 1989 Hearing, Transcript at 10.

The court acknowledged the need of the parties, and in particular of the child, Corey. Thus, for example, the court found that Ms. Allred should pay some child support. December 21, 1988 Transcript at 34; March 10, 1989 Transcript at 23. The court further found that although Mr. Allred supported the second child, Derek, Mr. Allred did not need the child support to raise both of the boys. March 10, 1988 Transcript at 24. Thus, the court concluded that the best interests of Corey would be served by creating an interest-bearing account with the child support payments to be used for his education. Id. at 24.

Mr. Allred approved of the court's award of \$100 month child support payments:

THE COURT: Okay. That's a good way to do it. That will be the order. No more child support will be required for Derek, but beginning in January of '89, \$100 a month will be required for Corey until Corey reaches his 18th birthday.

MR. ALLRED: Perfect.

December 21, 1988 Transcript at 36. Mr. Allred then drafted the court's findings. Id. at 36.

On December 28, 1988, Ms. Allred discussed with Mr. Allred, by letter, the possibility of using the child support payments to create an interest-bearing account for Corey's education. Exhibit A, Addendum. On January 2, 1989, Ms. Allred informed the court of her proposal for an interest-bearing account. Being unrepresented by legal counsel, Ms. Allred asked the court to inform her if she needed to file a formal motion of some kind. Exhibit B, Addendum.

Mr. Allred mailed Ms. Allred a copy of the court's proposed findings on January 6, 1989, however, she did not receive them until January 15, 1989. She immediately wrote to the court requesting additional time for a response. Exhibit C, Addendum. Ms. Allred filed her objections to the proposed order on January 24, 1989.

VI. SUMMARY OF THE ARGUMENT

1. The trial court's findings of fact, granting Mr. Allred \$100 monthly child support should be upheld because they are not clearly erroneous.

2. The trial court entered adequate findings of fact to support the \$100 monthly child support payments, the insurance coverage, and the interest-bearing account.

3. The court properly considered Ms. Allred's proposal to place the child support payments into an interest-bearing account.

VII. DETAIL OF THE ARGUMENT

A. The trial court's findings of fact are not clearly erroneous and therefore should not be disturbed.

The Utah Rules of Civil Procedure, Rule 52, clearly state that a trial court's findings of fact "shall not be set aside unless clearly erroneous." In interpreting this standard of review, the Utah State Supreme Court stated: "On appeal of a judgment from the bench, after trial, we defer to the trial court's factual assessment unless there is clear error." Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 93 (Utah 1988).

A "clearly erroneous" finding exists when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (quoted in State v. Walker, 743 P.2d 191, 193 (Utah 1987)). Thus, "[t]he mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside." Walker, 743 P.2d at 193 (quoting Wright & Miller, Federal Practice and Procedure section 2585).

Furthermore, in determining whether the court has made a mistake, and whether the evidence supports the court's decision, the reviewing court must "presume the findings of fact of the trial court to be correct." Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah App. 1987). See also Horton v. Horton, 695 P.2d 102, 106 (Utah 1984) ("On review of questions of fact, this Court views

the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings.").

In particular, the trial court's decisions relating to financial apportionment in a divorce should be upheld. See e.g., Maughan v. Maughan, 770 P.2d 156, 161 (Utah App. 1989) ("[W]e defer to the trial court's modification of a child support award. We will not upset the trial court's apportionment of financial responsibilities in the absence of manifest injustice or inequity that indicates a clear abuse of discretion."); Canning v. Canning, 744 P.2d 325, 327 (Utah App. 1987) ("The monthly \$50 difference between what she requested and what she received can hardly be characterized as an abuse of discretion. We will not second-guess the award."); Hansen v. Hansen, 736 P.2d 1055, 1056 (Utah App.) ("The trial court is permitted considerable discretion in adjusting the financial interests of the parties to a divorce, and its actions are entitled to a presumption of validity."), cert. denied, 765 P.2d 1277 (Utah 1987).

In this case, the trial court's findings of facts are not clearly erroneous. The record reveals that the court considered numerous factors in determining the child support award and insurance coverage. Repeatedly, Judge Daniels inquired about parties' insurance policies and premiums. See December 21, 1988 Hearing, Transcript at 25-28; March 10, 1989 Hearing, Transcript at 10-12. Furthermore, the court had before it information concerning the parties' incomes, debts, past history of

agreements and payments, children's medical expenses, and desires for the children's future. See Part V.D., Relevant Facts, supra.

Based upon all of this information, the court decided to award Mr. Allred \$100 monthly child support, to be placed in an interest-bearing account, and require him to pay the insurance coverage. The trial court's decision does not exhibit "manifest injustice or inequity" indicating "a clear abuse of discretion."

B. The trial court entered adequate findings of fact to support the \$100 monthly child support payments, the insurance coverage, and the interest-bearing account.

Appellant, Mr. Allred, argues that the court's decision must be reversed and remanded because it (1) did not enter adequate findings of fact, and therefore, (2) failed to justify a departure from the advisory guidelines. This argument ignores the relevant statutes and the plain discussion on the record.

As Appellant notes, when a trial court fails to make findings of fact, the case must be reversed. See e.g., Bake v. Bake, 772 F.2d 461, 466 (Utah App. 1989); Jefferies v. Jefferies, 752 P.2d 909, 911 (Utah App. 1988). These findings, however, include those written, and those orally made. Utah Rules of Civil Procedure, Rule 52(a) ("Findings of fact, whether based on oral or documentary evidence") (emphasis added). See Erwin v. Erwin, 773 P.2d 847, 849 (Utah App. 1989) ("[T]he findings may be expressed orally from the bench or contained in other documents"); Hansen v. Hansen, 736 P.2d 1055, 1058 (Utah App.) ("[Rule 52(a) now explicitly authorizes us to look beyond the written findings of fact to the trial record and and evaluate

the sufficiency of the judge's oral findings") cert. denied, 765 P.2d 1277 (Utah 1987).

Furthermore, the court's findings, when based upon sufficient evidence in the record, may be expressed generally. See e.g., Pearson v. Pearson, 561 P.2d 1080, 1082 (Utah 1977) ("[F]indings of fact and conclusions of law will support a judgment, though they are very general Findings should be limited to the ultimate facts and if they ascertain ultimate facts, and sufficiently conform to the pleadings and the evidence to support the judgment, they will be regarded as sufficient, though not as full and as complete as might be desired."); Sorenson v. Beers, 614 P.2d 159, 160 (Utah 1980) ("[T]he trial court's finding, although conclusory in nature ... is sufficient."); Colman v. Colman, 743 P.2d 782, 789 (Utah App. 1987) (quoting Pearson with approval).

In arriving at findings in a child support case, the court should consider the relevant statutory factors. Utah Code Annotated, section 78-45-7(3)(1989); Bake v. Bake, 772 P.2d 461, 466 (Utah App. 1989), Jefferies v. Jefferies, 752 P.2d 909, 911 (Utah App. 1988).

In this case, the trial court sufficiently complied with these procedures. It made findings, both oral and written, concerning the ultimate facts. And, as a consequence, the court concluded that Ms. Allred must pay monthly child support for Corey (Conclusions of Law, #1); that these monthly child support payments should be \$100 (Conclusions of Law, #3); that Mr. Allred

must provide insurance coverage (Conclusions of law #5); and that the \$100 payments should be put into an interest bearing account, not to be withdrawn without court order (Order, May 5, 1989). Furthermore, the court based all of its findings and conclusions upon the factors enumerated in section 78-45-7.

Specifically, as detailed in section VI.D., supra, the court considered the standard of living and situation of the parties. It examined the types of activities, debts, and obligations of both parties. December 21, 1988 Hearing, Transcript at 14-20, 22-23, 31-33. In addition, the court heard the parties testify as to their wealth and income. Id. at 17 and 24. The court also noted that Mr. Allred bears the support for two minor children. Findings of Fact and Conclusions of Law, #2. Relating to the parties ability to earn, the court considered Ms. Allred past earnings, and observed that Mr. Allred could "make a lot of money." March 10, 1989 Hearing, Transcript at 10. Even with his current income, the court noted that Mr. Allred did not need the child support. Id. at 24

Of particular importance, moreover, the court considered the need of the child. Recently, the Utah legislature explicitly provided that a child's need must be considered in determining child support. A fact which Appellant apparently overlooked in quoting section 78-45-7. While the litigation over who should pay what, and how, may become petty at times, the trial court in this case recognized that the child's need is paramount. Accordingly, because Mr. Allred did not need the money, the trial

court found that the opportunity provided by the interest bearing account, to go to college, would be "a good thing" for Corey. March 10, 1989 Hearing, Transcript at 24.

Section 78-45-7 does not limit the court to the enumerated factors. And, in this case, the court did consider additional points such as, Mr. Allred's stipulation to accept \$100 per month for Derek. December 21, 1988 Hearing, Transcript at 3. Moreover, when Corey came to live with him, Mr. Allred reduced his monthly child support obligation to Ms. Allred by \$100. Id. at 4. And, Mr. Allred received income tax deductions for both boys. Id. at 10-11. In addition, Mr. Allred broke his agreement to set up similar, interest bearing accounts for two of the children. Id. at 33-34. Furthermore, Mr. Allred has never contributed to the oldest child's college education, and has expressed reluctance to contribute to Derek's college education. March 10, 1989 Hearing Transcript at 16 and 20. Likewise the court considered the parties insurance policies and premiums, including the fact that Ms. Allred could not obtain insurance for the children through her employer, since she did not claim them as deductions. December 21, 1989 Hearing, Transcript at 25-28. Clearly, the court had before it ample evidence supporting its decision. And, although the findings may have been expressed generally, the Utah Supreme Court has determined that to be sufficient. See Pearson v. Pearson, 561 P.2d 1080, 1082 (Utah 1977).

Ironically, Appellant now argues that the court made inadequate findings of fact supporting the \$100 monthly payment even though he had characterized the decision as "perfect" and had drafted the proposed findings. December 21, 1988 Hearing, Transcript at 36. Consequently, Appellant's argument lacks merit. See Pearson v. Pearson, 561 P.2d 1080 (Utah 1977).

In Pearson, the Utah Supreme Court refused to reverse the trial court's decision even though "the Findings are not comprehensive." Id. at 1082. Furthermore, the court noted that the decision should be particularly upheld because of "appellant's concession that the property division was not unjust or inequitable" Id. (emphasis in original). Similarly, in this case, Appellant's agreement with the trial court and his drafting of the proposed findings, undermines his argument that the findings are inadequate.¹

Appellant further argues that the court should not have departed from the statutory child support guidelines. However, as the Appellant well recognizes, the court has complete discretion whether or not to adopt the guidelines. See Code of

¹ The cases upon which Appellant relies simply do not apply to the circumstances here. Thus, unlike this case, in Bake v. Bake, 772 P.2d 461 (Utah App. 1989) the trial court failed to consider any of the factors listed in section 78-45-7. Similarly, in Johnson v. Johnson, 771 P.2d 696 (Utah App. 1989) the trial court made no finding on the parties' economic circumstances. Finally, in Jefferies v. Jefferies, 752 P.2d 909 (Utah App. 1988) the parties failed to provide adequate financial information. Furthermore, the appellate court limited its holding to support involving an adult child. Id. at 911. And, in none of these cases did the appellant approve of the findings as is the case here.

Judicial Administration, Rule 4-904(2)(A) ("The guidelines are advisory to the court. Final orders in all cases shall be made at the discretion of the court based upon the facts of the individual case."); Utah Code Annotated, section 78-45-7.2(1)(a) ("The guidelines apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989.") (emphasis added); Johnson v. Johnson, 771 P.2d 696, 698 (Utah App. 1989) ("The guideline might have some probative value, but should not be controlling.").

Finally, because the trial court clearly made adequate findings of fact, perhaps Appellant actually is arguing that the findings do not support the decision. As noted above, in Section VII.A., the trial court's decision must be upheld unless clearly erroneous, decidedly not the case here. Furthermore, Appellant has failed to meet the "heavy burden" entailed in such an argument. Mountain States Broadcasting v. Neale, 776 P.2d 643, 646 (Utah App. 1989). In a recent divorce case, the Utah Court of Appeals outlined the requirements for challenging a court's findings of fact:

To mount a successful attack on the trial court's factual findings, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that, even viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings, or that its findings are otherwise clearly erroneous.

Schindler v. Schindler, 776 P.2d 84, 88 (Utah App. 1989) (citation omitted). See also, Fitzgerald v. Critchfield, 744

P.2d 301, 304 (Utah App. 1987) (appellant's burden "neither elective nor optional").

C. The court properly considered Ms. Allred's proposal to place the child support payments into an interest-bearing account.

Appellant, Mr. Allred, argues that the trial court erred in ruling that the \$100 monthly child support be placed in a trust account for Corey's education. He bases this argument on two reasons: (1) the court did not make findings of special or unusual circumstances justifying support after Corey's eighteenth birthday; and (2) the court was without jurisdiction to modify the findings of fact and conclusions of law to include the interest bearing account.

Appellant's arguments lack merit for three reasons. First, neither the transcripts of the hearings nor the court order indicate that the child support payments must necessarily extend beyond Corey's eighteenth birthday. Second, Appellant fails to mention that he expressly agreed that the support payments continue after both Derek's and Corey's eighteenth birthdays. And, third, Ms. Allred, as a layperson, had timely informed the court and Appellant of her desire to create the account.

Appellant assumes that the interest bearing account provides support after Corey's eighteenth birthday. However, Ms. Allred's and the court's statements that the account would provide Corey "an opportunity to have a little money to go to college" furnishes the only evidence supporting this belief. And, even these statements don't compel support past age eighteen. Thus,

Corey could graduate from high school and begin attending college earlier. Consequently, the child support payments need not necessarily extend beyond age eighteen. Moreover, the court order does not even target college education as the reason for the interest bearing account. Rather the order merely states that the payments should be placed in an interest bearing account, "not to be withdrawn without court order." Order on May 5, 1989. Furthermore, even if the support could be characterized as extending past age eighteen, the court has discretion to so order.

Under Utah Code Annotated, section 15-2-1, a court may order in a divorce action that child support continue to age 21. See e.g., Harris v. Harris, 585 P.2d 435, 436 (Utah 1978) ("Under UCA, section 15-2-1 (1953), as amended the trial court has discretion in deciding whether or not to order support to continue after age 18." (citing cases in n.1)). The court's discretion to continue child support past age eighteen includes any child, depending on the circumstances. Jackman v. Jackman, 696 P.2d 1191, 1193 (Utah 1985) (trial court must consider any evidence on appropriateness of child support past age eighteen, discretion not limited to those with a particular handicap).

In this case, the trial court had before it several special circumstances justifying Corey receiving the child support for his future education. First, the court found that Appellant did not need the child support payments to raise Corey. March 10, 1989 Hearing, Transcript at 24. Second, Appellant had agreed to

create two similar interest bearing accounts. In spite of this stipulation, and a court order further requiring him to do so, Appellant never established the accounts. Id. at 23-24; December 21, 1988 Hearing, Transcript at 33-34. Third, the record demonstrates that Appellant has consistently ignored his children's interest in college. The oldest child, Aaryn, receives no assistance from Appellant for her college education. March 10, 1989 Hearing, Transcript at 16. And, Appellant expressed reluctance to support Derek's education. Id. at 20. Finally, Appellant had agreed that both Derek's and Corey's support should continue past age eighteen.

At the December 21, 1988 Hearing, the court twice stated that Corey's child support payments should continue only until his eighteenth birthday. Transcript at 35 and 36. However, when Appellant drafted the proposed findings of fact and conclusions of law, he reworded the court's finding to state: "[Ms. Allred] should pay to [Appellant] the sum of \$100 per month ... until such time as the minor child Corey Allred obtains the age of 18 years and completes high school." Exhibit A, Appellants Brief (emphasis added). Appellant's proposed findings further required Ms. Allred to pay child support for Derek through high school graduation. Id. When Ms. Allred objected to this latter finding as extending beyond Derek's eighteenth birthday, Appellant successfully argued that the finding should stand. In other words, Appellant essentially stipulated that Derek's child support payments would stretch beyond age eighteen. Therefore,

Appellant cannot now be heard to complain that Corey's support would also continue past age eighteen. Cf., Despain v. Despain, 627 P.2d 526 (Utah 1981).

In Despain, as in this case, the husband agreed that child support should continue beyond majority. Id. at 526. Later, he argued, as Appellant argues here, that no special or unusual circumstances existed warranting the extended support. Id. at 527. The trial court disagreed and ordered payment to continue. On appeal, the husband argued that the trial court had no jurisdiction to continue support beyond age twenty-one. In rejecting this argument, the Utah Supreme Court upheld the right of the parties to agree on support continuing beyond the child's majority. Id. Likewise, Appellant in this case has agreed that support should continue beyond Corey's eighteenth birthday.²

Finally, as in the Despain case, Appellant argues that the court lacked jurisdiction to modify the findings of fact and conclusion of law. However, as the Despain court noted:

A husband, who has undertaken an obligation in consideration of the provisions of the property

² Cases cited by Appellant in support of his argument that payments in this case cannot reach beyond age eighteen can readily be distinguished. In Harris v. Harris, 585 P.2d 435 (Utah 1978) the court did not consider special or unusual circumstances. Indeed, as Appellant admits, the trial court merely mistook when majority occurs. In this case, it is not at all clear that the court has ordered support beyond age eighteen. Furthermore, even if so ordered, the decision to extend support arises not only from the trial court's order, but also from Appellant's agreement. Again, in Jefferies v. Jefferies, 752 P.2d 909 (Utah App. 1988), the court did not have before it an agreement by the parties to continue support beyond eighteen. In addition, the court's award there, and in English v. English, 565 P.2d 409 (Utah 1977) both encompassed a permanent benefit.

settlement agreement which were for his benefit, cannot subsequently complain that the court, in the absence of such agreement, would have been without power to order him to do so.

Id. Admittedly, the facts in Despain differ from those here. The husband in Despain paid child support, and Appellant receives it. However, the principle remains the same. A husband who agrees that support should continue past majority, cannot later complain that the court lacks jurisdiction to order the same. See also, Utah Code Annotated, section 30-3-5(3) (1989) ("The court has continuing jurisdiction to make subsequent changes or new orders for ... children and their support"); Myers v. Myers, 101 Utah Adv. Rep. 57 (Utah App. 1989) (stipulation incorporated into decree was subject to continuing jurisdiction of court and could be modified); Balls v. Hackley, 745 P.2d 836, 838 (Utah App. 1987) ("The terms of the stipulation thereby fall under the continuing jurisdiction of the court in divorce actions.").

Moreover, Appellant's argument that the court lacked jurisdiction because Ms. Allred did not file her formal objections within the allotted time also lacks merit. As Appellant states, he mailed his proposed findings on January 5, 1989. Ms. Allred mailed her objections on January 24, 1989. And, Rule 4-504 requires objections to be submitted within five days after service. Appellant's Brief at 17.

Contrary to Appellant's contention (Id.), however, Ms. Allred did more than file handwritten objections fourteen days late. Appellant fails to mention that Ms. Allred informed him of

her desire, that an interest bearing account be established, with a letter dated December 28, 1988. Exhibit A, Addendum. In addition, Ms. Allred sent the court a letter, and Appellant a copy, with the same suggestion on January 2, 1989. Exhibit B, Addendum. At that time, Ms. Allred advised the court that she was unrepresented by legal counsel and asked that she be notified if she needed to file a formal motion. Id. Finally, although Appellant served his proposed findings on January 5, 1989, Ms. Allred did not receive them until January 15, 1989. She then immediately wrote the court and asked for an extension of time to file objections. Exhibit C, Addendum.

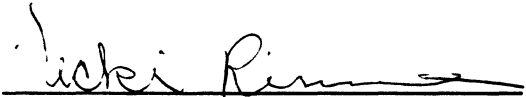
As the Utah Supreme Court recognizes, a layman acting as her own attorney should be given considerable deference. See e.g., Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983) ("[W]e have also cautioned that 'because of his lack of technical knowledge of law and procedure [a layman acting as his own attorney] should be accorded every consideration that may reasonably be indulged.'") (quoting Heathman v. Hatch, 372 P.2d 990, 991 (Utah 1962)). In this case, Ms. Allred acted promptly upon actual receipt of the proposed findings. In addition, she had already informed both the court and Appellant of her proposal. Furthermore, she specifically requested to be notified if a motion was required. In pursuit of Corey's best interest, the court used its equitable powers to consider Ms. Allred's

suggestion. Accordingly, Appellant's argument that the court lacks jurisdiction must fail.³

VII. CONCLUSION

The trial court's findings of fact and conclusion of law must not be disturbed absent clear error. Clear error does not exist in this case because the court entered adequate findings which support its judgment. In addition, the court's equitable powers and concern for Corey Allred's best interest provided adequate jurisdiction. Therefore, the Utah Court of Appeals should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 16th day of December, 1989.


Vicki Rinne
Attorney for Respondent


³ Appellant cites Crofts v. Crofts, 445 P.2d 701 (Utah 1968) in support of his contention that the court lacked jurisdiction. However in Crofts, the request to "interpret" the decree came three years after the court's final judgment. Furthermore, even then, the Supreme Court allowed some of the trial court's findings to stand. Id. at 703. Moreover, the court explicitly recognized that an order may be modified upon a showing of good cause. Id. In this case, the trial court specifically stated that the order's modification was based upon good cause. March 10, 1989 Hearing, Transcript at 24.

Appellant also cites Winn v. Winn, 651 P.2d 51 (Montana 1982). However, Appellant provides no reason why a Montana case, based upon Montana's Rules of Civil Procedure, applies to Utah law. Finally, Appellant cites Burgess v. Maiben, 652 P.2d 1320 (Utah 1982) and Richards v. Siddoway, 471 P.2d 143 (Utah 1970). Burgess, however, concerned a libel action and Richards involved the ownership of land. Neither case related to domestic relations and thus, the court's continuing jurisdiction under section 30-3-5 did not apply.

PROOF OF SERVICE

I certify that I mailed, postage prepaid, four copies of this brief to counsel for the Appellant, Randall Gaither, at 321 South 600 East, Salt Lake City, Utah 84102 on December 16, 1989.

Dated this 16 day of December, 1989.



Vicki Rinne
Attorney for Respondent

ADDENDUM

This brief contains the following attachments:

1. Exhibit A, December 28, 1988 letter to John Franklin Allred.
2. Exhibit B, January 2, 1989 letter to Judge Scott Daniels.
3. Exhibit C, January 17, 1989 request for extension of time.

DECEMBER 28, 1988

DEAR JOHN,

I AM WRITING THIS LETTER AS A PROPOSAL REGARDING THE MONEY I AM TO PAY YOU FOR COREY.

I PROPOSE THAT RATHER THAN PAYING YOU \$100.- EACH MONTH, I WILL PLACE THAT MONEY INTO AN INTEREST-BEARING ACCOUNT IN COREY'S NAME. NEITHER YOU NOR I WILL HAVE ACCESS TO THAT ACCOUNT, SO IT CANNOT BE LIQUIDATED FOR ANY PURPOSE OTHER THAN COREY'S COLLEGE EDUCATION.

BY THE TIME COREY TURNS EIGHTEEN HE WOULD HAVE MORE THAN SIX THOUSAND DOLLARS TO START COLLEGE (SOMETHING HE EXPRESSES A DESIRE TO DO).

PLEASE CONSIDER THIS IDEA. I STRONGLY BELIEVE IT IS A WAY FOR BOTH OF US TO MAKE A SIGNIFICANT CONTRIBUTION TO COREY'S FUTURE.

LET ME KNOW OF YOUR DECISION.

ON THIS MATTER.

SINCERELY,

Opnd -

C.C. JUDGE SCOTT DANIELS

JANUARY 2, 1989

THE HONORABLE SCOTT DANIELS
THIRD JUDICIAL DISTRICT COURT
P.O. BOX # 1360
SALT LAKE CITY, UTAH 84114

RE: ALLRED VS. ALLRED
CIVIL NO. D30-3031

DEAR JUDGE DANIELS,

I WOULD LIKE TO BRING THE SPECIFICS BELOW
TO YOUR ATTENTION. AS I AM UNREPRESENTED
I AM DOING SO IN LETTER FORM. IF A
FORMAL MOTION OF SOME KIND IS IN ORDER,
PLEASE LET ME KNOW.

I HAVE DISCUSSED WITH JOHN MY LETTER
DATED DECEMBER 28, 1988 PROPOSING THAT
MY \$100.00 PAYMENT BE DEPOSITED INTO AN
INTEREST-BEARING ACCOUNT FOR COREY'S
EDUCATION. JOHN'S POSITION IS THAT THIS
IS UNACCEPTABLE.

BECAUSE JOHN HAS PREVIOUSLY SPENT MONEY
THAT HAD BEEN DESIGNATED BY THE COURT
EXCLUSIVELY FOR OUR CHILDREN'S BENEFIT.
THE COURT HAS ORDERED THAT THE
MONEY BE USED FOR THE CHILDREN'S
EDUCATION AND NOT FOR JOHN'S
PERSONAL USE.

FOR YEARS I MANAGED TO SUPPORT THREE CHILDREN WITH AN INCOME THAT NEVER EXCEEDED \$37,000. NOW JOHN, WHOSE MOST RECENT INCOME WAS BETWEEN \$75,000 - \$90,000, SOMEHOW REQUIRES MY \$100. PER MONTH CONTRIBUTION.*

WHILE I AM PREPARED TO COMPLY WITH THE COURT'S ORDER, I AM ASKING THAT YOU TAKE EVERY REASONABLE STEP TO INSURE THAT MY MONTHLY PAYMENT ACTUALLY BENEFITS MY CHILD. AS EVERY LOVING PARENT WANTS TO PROVIDE FOR THEIR CHILD'S COLLEGE EDUCATION, I DO NOT SEE HOW JOHN CAN REASONABLY REFUSE THIS REQUEST.

FINALLY, AS YOU HAVE ASKED JOHN TO PREPARE THE PROPOSED ORDER AND FINDINGS OF FACT IN THIS CASE, I WOULD LIKE AN OPPORTUNITY TO REVIEW THEM BEFORE ANY ORDER IS SIGNED. I AM SORRY TO

* I MIGHT ADD THAT JOHN HAS NOT YET BEEN REQUIRED BY THE COURT TO PROVIDE THE NECESSARY DOCUMENTATION (CORPORATE RECORDS, STOCK HOLDINGS, ETC.) TO REVEAL ALL OTHER ASSETS AND THE METHOD BY WHICH HE CAN AFFORD TO MAKE THE REQUESTED CONTRIBUTION.

TROUBLE YOU AGAIN WITH THESE MATTERS
BUT HOPE THAT THIS CASE CAN BE
EXPEDITIOUSLY RESOLVED.

RESPECTFULLY,

Gaydi Alred

GAYDI ALRED

1204 - FIRST AVENUE

SALT LAKE CITY, UTAH 84103

359-6958 HOME

524-2619 } WORK

524-2666 }

GAYDI ALRED

JANUARY 17, 1989

THE HONORABLE SCOTT DANIELS,
THIRD DISTRICT COURT
P.O. BOX #1860
SALT LAKE CITY, UTAH 84110

RE: CIV. CASE # D80-3031

DEAR JUDGE DANIELS,

I RESPECTFULLY REQUEST THAT THE COURT ALLOW ADDITIONAL TIME FOR A RESPONSE TO JOHN ALLRED'S FINDINGS OF FACT AND CONCLUSION OF LAW, JUDGEMENT AND ORDER MODIFYING DECREE OF DIVORCE.

I LEFT TOWN ON SATURDAY, JANUARY 6 AND DID NOT RECEIVE JOHN'S LETTER AND THE FORENAMED DOCUMENTS UNTIL

MY RETURN ON TUESDAY. HOWEVER,

I HAVE SOME VABLE OBJECTIONS, WHICH
NEED TO BE CONSIDERED; AND SINCE
AM NOT AN ATTORNEY, PREPARATION OF
LEGAL PAPERS PRESENTS A COMPLICATED
AND DIFFICULT TASK. ADDITIONALLY MY
WORK IS EXCEPTIONALLY DEMANDING AT
THIS PARTICULAR TIME.

WITH YOUR PERMISSION I WILL FILE MY
OBJECTIONS NO LATER THAN JANUARY 1.

THANK YOU FOR YOUR TIME AND CONSI-
DERATION.

SINCERELY,
John Albee

C.C. JOHN ALBEE