1999

Tylder D. Boyce v. Tammy L. Goble : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TYLER D. BOYCE, Petitioner and Appellee, -vs- **TAMMY L. GOBLE,** Respondent and Appellant.	**CASE NO. 990641-CA** Priority 15

BRIEF OF APPELLEE

Appeal from the Judgment and Order of the
Second Judicial District Court, Davis County, State of Utah
The Honorable Jon M. Memmott, Second District Court Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

IN THE UTAH COURT OF APPEALS

TYLER D. BOYCE, Petitioner and Appellee -vs- **TAMMY L. GOBLE,** Respondent and Appellant.	**BRIEF OF APPELLEE** Case No. 990641-CA Priority 15

Appellee, Tyler D. Boyce, hereinafter "Petitioner" submits the following brief:

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Rule 3 and 4 of the Utah Rules of Appellate Procedure and §78-2a-3(2)(h), *Utah Code Annotated* (1998).

STATEMENT OF ISSUES

1. Did the Appellant correctly marshal the evidence for this appeal?

2. Did the trial court abuse its discretion in finding that there existed a substantial change in circumstances to modify child support in this case?

3. Did the trial court abuse its discretion in modifying child support on the facts of this case?

STANDARD OF REVIEW

This Court must review the trial court's interpretation of the child support guidelines for *correctness* to the extent it involves questions of statutory interpretation. *Utah Sign, Inc. v. Utah Dept of Transp.*, 896 P.2d 632 (Utah 1995). In reviewing child support proceedings generally, the appellate courts accord substantial deference to the trial court's findings and should not disturb its actions, absent manifest injustice or inequity that indicates a clear abuse of discretion. *Crockett v. Crockett* 836 P.2d 818, 821 (Utah Ct. App. 1992); *Woodward v. Woodward*, 709 P.2d 393 (Utah 1985).

DETERMINATIVE STATUTORY PROVISIONS

Petitioner sets forth in the attached Addendum, the complete code provisions referenced in this brief as follows:

1. §78-45-2(10) Utah Code Annotated (Definition of Joint Physical Custody)
2. §78-45-7.2 Utah Code Annotated (Application of Guidelines)
3. §78-45-8 Utah Code Annotated (Continuing Jurisdiction)

STATEMENT OF THE CASE

This is an appeal from a final order of the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Jon M. Memmott, presiding.

The parties in this action were divorced by Decree of Divorce entered in the Second Judicial District Court on or about November 25, 1997. That Decree awarded the parties joint legal and physical custody of their three minor children and awarded Petitioner "equal control and input into the children's lives" and "liberal rights of visitation." These vague

terms in the Decree led to conflicts between the parties and both filed cross petitions to modify less than a year after the divorce was entered. Both petitions alleged that the Decree was "unworkable" and cited problems in defining reasonable visitation. Additionally, Petitioner requested modification of child support, and orders defining communication and treatment of the children. Respondent's petition sought to end the joint custody provisions in favor of her having sole custody and Petitioner having standard visitation rights.

In the course of the action, the parties attended mediation and hearings before the Commissioner. Through that process, they arrived at an agreed, specific time sharing schedule which was set forth in a stipulated Court Order entered February 18, 1998. That schedule awarded Petitioner regular visitation consisting of: alternate weekends from Friday night until Monday morning; one mid-week overnight each week; alternate holidays per the standard schedule.

At the time of trial in this matter, the remaining disputes were: first, what child support worksheet should be applied and whether there was a substantial material change in circumstances to justify a support modification.

At trial, the Court found that there were material changes in circumstances which were not foreseeable at the time of divorce which supported a change in the child support amount. These included the lack of a defined visitation schedule, the parties stipulated agreement to liberal (more than standard) visitation, and Petitioner's household expenses for the children being higher than anticipated at the time of the Decree. Based on these

findings, the Court ruled that child support in this case should be based on a joint physical custody worksheet.

The trial on the Petition for Modification was held July 13, 1998 before the Honorable Jon M. Memmott presiding. Respondent filed a Motion for Reconsideration or New Trial under Rule 59, the matter was briefed and a hearing held April 20, 1999 before the Honorable Jon M. Memmott presiding. That motion was denied and the Order and transcript of the ruling well explains the overall findings of the trial court in this matter and is included in the Addendum. Respondent then filed a Motion for Stay of Judgment which was denied and this Notice of Appeal was filed on or about July 22, 1999.

STATEMENT OF FACTS

Petitioner submits the following statement of relevant facts:

1. These parties were divorced by Decree entered November 25, 1997.

2. The Decree awarded the parties joint legal and joint physical custody of their three minor children and awarded Petitioner "equal control and input into the children's lives" and "liberal rights of visitation."

3. Petitioner, Tyler Boyce filed a Petition for Modification on or about August 4, 1997 seeking clarification and changes to the Decree concerning visitation and child support. He alleged that since the Decree, he generally had visitation from Friday evening until Monday morning on alternate weeks, a weekly midweek and 4 to 6 weeks in the summer.

4. Respondent remarried after the divorce and Petitioner's access to the children became more difficult and less clear. This led Petitioner to file a petition to modify for clarification of the visitation terms in the Decree.

5. The Respondent, Tammy L. Goble, filed an Answer and Counter-Petition to Modify on August 27, 1997, seeking changes in custody and visitation. Paragraph 6 of her petition alleged there had been a significant and material change of circumstances in that the parties were unable to cooperate in joint custody and visitation arrangements.

6. The parties attended mediation with Dr. Matthew Davies which resolved the visitation and custody disputes.

7. The parties appeared before Domestic Relations Commissioner David S. Dillon on February 18, 1998 and stipulated to a visitation schedule resulting in the children being with Petitioner 35.5% of the time and with Respondent 64.5% of the time. The issue of child support revision was reserved for trial.

8. The Decree awarded child support of $796 per month based on Petitioner's income of $3279 and Respondent's income of $1891. That support was calculated based on a sole custody worksheet.

9. The trial took place July 13, 1998 before the Honorable Jon M. Memmott presiding. The Court made the following Findings and Orders:

(a) The Decree awarded joint legal and joint physical custody and gave Petitioner equal rights of visitation. The Court found that "clearly there was joint physical

custody" with the language vague as to liberal visitation, more than standard. Further, that the record of visitation as of 1997 is that Petitioner had the children 38% of the time . . .

(b) The Court found that it was the testimony of *both* parties that if the liberal visitation resulted in Petitioner having similar expenses to Respondent, that would represent an unanticipated change of circumstances and the Court made this finding. The Court then held, that the child support should be calculated by using a joint custody worksheet.

(c) For purposes of child support calculation on a joint custody basis, the Court found the parties' incomes to be $3,279 gross per month for Petitioner and found that Respondent was not working and that she should have zero income imputed to her. This resulted in a support amount for three children under a joint custody calculation of $563 per month.

10. On November 6, 1998, Respondent filed a Motion for Reconsideration or New Trial based on Rule 59(c) URCP.

11. A hearing was held on that Motion on April 29, 1999 before the Honorable Jon M. Memmott presiding and the Motion was denied. A copy of the Order on Motion for Reconsideration or New Trial and the transcript of this ruling is appended to this brief in the Addendum.

SUMMARY OF ARGUMENT

1. The Respondent has failed to marshal the evidence for this Appeal. The appellate court cannot determine whether findings are erroneous or whether the exercise

of trial court discretion was proper, unless the Appellant properly marshals evidence. This Court has defined the marshaling requirement as requiring the Appellant to cite "every scrap of competent evidence introduced at trial" that supports the trial court's findings. *West Valley City vs. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah Ct. App. 1991). It is also evident that what facts the Appellant does include are one-sided and are selective facts favorable to Respondent's position, rather than properly marshaled evidence.

2. The trial court understood and applied the correct legal standard for modification of child support. The Appellant asserts that the trial court confused the modification standard for child custody and the standard for child support. This is not the case. In fact, the Court adopted the schedule of liberal visitation mediated by the parties and calculated the percent of time sharing. The Court concluded that support be calculated using a joint physical custody worksheet. This was a correct result under the support guidelines and recent case law. *Udy v. Udy* 893 P.2d 1097 (Utah Ct. App. 1995).

ARGUMENT

I. Standard for Modification of Child Support

(a) Standard of Utah Law for Support Modification

The calculation of child support pursuant to fixed guidelines has been in place since July 1, 1989 and is codified in the *Uniform Civil Liability for Support Act*, UCA §78-45-1 et seq. It is specifically stated that a court a shall "retain jurisdiction to modify or vacate the order of support where justice requires." UCA §78-45-8. See, Addendum. The main provisions for modification of the support guidelines are contained at UCA §78-

45-7.2(6) and (7). For purposes of this appeal, the subparagraph (7)(a) is applicable and provides that "a parent may at any time petition the court to adjust the amount of child support if there has been a substantial change in circumstances." For purposes of that subsection, the statute provides examples for what a substantial change in circumstances may include such as:

(i) material changes in custody;
(ii) material changes in the relative well or assets of the parties;
(iii) material changes of 30% or more in the income of a parent;
(iv) material changes in the ability of a parent to earn;
(v) material changes in the medical needs of the child; and
(vi) material changes in the legal responsibilities of either parent for the support of others

The statute also references the need for the court to determine the best interests of the child in a modification proceeding in the following terms:

> Upon receiving a petition under subsection (7)a, the court shall, taking into account the best interest of the child, determine whether a substantial change has occurred. If it has, the court shall then determine whether the change results in a difference of 15% or more between the amount of child support ordered the amount that would be required under the guidelines. If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines. UCA §78-45-7.2 (7)(c).

Arguably, if the support in a case was not to be determined under the guidelines, the court must refer to common law to determine if a substantial change of circumstances warranting modification of child support exists. *Harrison v. Harrison* 450 P.2d 456 (Utah 1969).

(b) Was the Standard Applied Correctly to the Present Case?

The Respondent alleges that the trial court herein confused the different standards for modifications of divorce orders. She references the modification standard of custody at UCA §30-3-10.4(1)(a) which outlines a basis for substantial changed circumstances as a custody decree becoming "unworkable or inappropriate under the circumstances." Respondent then leaps to the conclusion that the court in this case found an unworkable custody decree and on that basis, changed child support. There is no evidence that the trial court misunderstood the standard and no evidence that a wrong standard was applied in this case. In fact, quite the contrary is established on the record of proceedings.

The court's reasoning in this area is well expressed in the hearing which took place on the Respondent's Motion for Reconsideration, April 20, 1999. A transcript of this ruling is included in the Addendum herein where the trial judge states:

> " . . . that they had agreed to joint physical and legal custody. That they had not been able to implement the visitation schedule. That the Court found a change of circumstances in the implementation of the visitation schedule." Addendum at A-7.

It is clear that both parties in this case were dissatisfied with the reality of the joint legal and joint physical custody situation. The original decree was extremely brief and contained no detail on how that agreement was to work. Importantly, however, the parties never had much disagreement on the actual amount of time that Petitioner, Mr. Boyce was to spend with his children. In his petition, he alleged that he generally had the children Friday night

until Monday morning alternate weeks, and one additional midweek overnight, and six weeks in the summer. The parties attended mediation to resolve the petitions to modify and ended up with essentially this same schedule, but on a clear calendar rotation. This schedule was not in dispute at the time of trial and had already been ratified in a court order arising from an appearance before the Commissioner.

Thus, the primary issue at the time of trial was whether the child support being paid by Petitioner at the time of Decree should be adjusted. As the trial court clearly stated in the above-quote, it is the application of the changed custody terms that resulted in the most clear substantial material change in circumstances in this case. The trial court for the first time in the divorce case, quantified the amount of visitation into percentage terms finding that Petitioner had the children in his care 35.5% of the time and Respondent had the children 64.5%. Based on these percentages, the trial court simply applied the law. This law is well defined in the statutes contained at UCA §78-45-2(10) which defines *joint physical custody* as a child staying with a parent "overnight for more than 25% of the year" and both parents contributing to the expenses of the child in addition to child support. Addendum at A-1. The court took evidence on the issue of what expenses were paid directly by Petitioner for the benefit of the children. The court was persuaded that there were substantial direct payments being made for the benefit of the children in addition to the child support paid to Respondent. The court also made the additional finding that the level of expenses was quite high and that *both* parties testified that this high level of expenses in fact not contemplated and was unforeseeable at the time of the Decree.

Respondent thus confuses the issue by claiming that the trial court applied a custody modification standard to the child support change in this case. That is simply not true. The trial court's finding of changed circumstances for support resulting from application of the newly defined visitation schedule is exactly within the purview of the statute at UCA §78-45-7.2(7)(b)(i) which references a "material change in custody" as a statutory basis for changing child support. The parties simply had not quantified the vague terms of *liberal visitation* set forth in their Decree before the modification trial. When that quantification took place, the parties clearly made a material change which required use of a joint custody worksheet. Although Respondent may complain that the visitation change in this case was a very small change, that is beside the point. There is a clear statutory directive that when overnights reach the level of 25% of the year, then child support will be calculated pursuant to a joint physical worksheet. Thus, if visitation had been a total of 24% before a change and 25% after, then that 1% of change would absolutely result in a child support change under the application of the guidelines. It appears to be Respondent who is confused about the relationship of the custody modification procedures and not the trial court. The Respondent references the *Hogge v. Hogge*, standard as requiring a bifurcated procedure for changing child support. See *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982). That case has nothing to do with child support modification and the circumstances at bar. Because we have a specific test, that is a visitation order which meets 25% of the overnights, there is no need to apply any other threshold test, rather the requirement to use

the joint worksheet is automatic. Where the legislature has spoken so clearly in a statute, it would be error for the court not to follow that mandate.

(c) The Case Law Supports the Trial Court Ruling and Has Not Been Distinguished.

At the time of trial, the Petitioner pointed out to the court the controlling case law in this area set forth in the Court of Appeals decision of *Udy v. Udy* 893 P.2d 1097 (Utah Ct. App. 1995). Respondent does not even address this opinion in her brief. This case held that labels of custody such as *sole* or *joint* do not control the child support determination, rather, a trial court is required to follow the actual timesharing ordered in a case and to determine from that which worksheet to use. There is nothing in the case before the court that would take it out of the application of the *Udy* principle.

There have now been additional decisions on the same point which merely emphasize the correctness of the trial court's ruling herein. The case of *Rehn v. Rehn*, 974 P.2d 306 (Utah App. 1999) has very similar facts to the present case. That was an appeal of a case where the parties stipulated to child support pursuant to the guidelines and the father received visitation which clearly exceeded 25% of the nights in the year. The trial court made the support calculation on a sole custody worksheet and the appeal followed. In its opinion, the Court of Appeals held that the stipulation of the parties was apparently only to use the child support guidelines and not to use of a sole custody worksheet. Based on the visitation award, the trial court was "required to follow the mandate of Utah's child support guidelines and use a 'joint custody child support worksheet' or make findings of

fact justifying its deviation." Citing *Udy*, 893 P.2d @ 1100. Certainly, if a trial court intends to deviate from strict application of the guidelines and finds such guidelines to be rebutted, it must set forth clear reasons to do so.

There is no question that this line of cases represents the controlling law in this area and Respondent has put forth no evidence to distinguish this case from a strict application of the support guidelines which require use of a joint physical custody worksheet. For that reason, the trial court's ruling should be affirmed in all respects.

II. The Findings of the Trial Court to Modify Support Herein Were Legally Sufficient

The Respondent attacks the findings of the trial court and provides a series of case references. What Respondent fails to do however, is to state any specific factual finding that was omitted by the trial court and which was essential to the matter.

The findings of the trial court are stated in the most detail in the order on Motion for Reconsideration or New Trial and in the transcript of the court's ruling on that Motion. Addendum at A-6 and A-15. In those documents, it is clearly stated that the parties stipulated at the outset of trial to joint legal and joint physical custody and to liberal visitation. The only required findings of the trial court were thus to quantify the visitation schedule which the court did, finding that Respondent had the children 63% of the time and the Petitioner had the children 37% of the time. The court then made a clear and correct legal conclusion from those percentages of time sharing, that the joint physical custody worksheet must be used to determine support in this case. Additionally, the court had to

make findings on income to apply the support formula and the court made clear and specific findings of the parties' incomes and changes since the time of Decree. After hearing the evidence, the court *sua sponte*, deemed that zero income should be imputed to Respondent for purposes of calculating support as since the time of the divorce, she had remarried, had another child and was staying home and not working as a school teacher for the time being. See, Paragraph 3, Order on Motion for Reconsideration or New Trial, Addendum at A-16.

In the transcript of the ruling on the Motion for Reconsideration and in that Order, the court clarified the findings of substantial changed circumstances. In short, it was the application of the newly defined and clarified custody/visitation terms that resulted in needing to adjust child support. The court quantified the percentages of visitation based on the mediated agreement of the parties and based on the fact that Petitioner would have the children more than 25% of the nights, the court found it appropriate to adjust child support and use a joint custody worksheet. Additional findings were also made, that there were unforeseeably higher expenses being paid by Petitioner for the benefit of the children in his home in addition to his payment of child support. These were certainly sufficient findings to support the modification orders of the court in this matter and were not vague or unclear.

III. The Appellant Failed to Meet the Marshaling Requirements on Appeal.

This Court has stated on many occasions that a critical requirement of appellate advocacy is the duty of the Appellant to marshal the evidence when challenging

the trial court's findings of fact. Respondent herein made no effort to marshal the evidence in the case. As set forth in the preceding argument section, the trial court made clear and sufficient findings of fact to support the modification of child support. None of these are referenced in the Respondent's brief and he has thus failed to meet the marshaling requirement. All Respondent provides in his brief are conclusory allegations that the trial court's findings were insufficient. Given a review of the rulings in this case, both a transcript of trial and the denial of the motion for reconsideration, it is clear that the trial court in fact made sufficient and specific findings on all material elements.

In the recent case of *Moon v. Moon*, 973 P.2d 431 (Utah Ct. App. 1999), the Court found on appeal that Mr. Moon had simply reargued his own evidence and because he failed to marshal the evidence supporting the trial court's findings, the Appellate Court had to assume that the record supported the findings of the trial court. Similarly, in this case, the failure to marshal the evidence must also lead to this Court of Appeals to affirm the findings of the trial court as complete and correct, for purposes of this appeal.

CONCLUSION

The trial court correctly applied the child support statutes in this case and correctly followed the controlling law in this matter. Given the material change in circumstances which occurred when for the first time, the visitation schedule was quantified resulting in over 25% of the nights for Petitioner, the trial court was mandated to calculate child support based on a joint physical custody worksheet.

The trial court did not misunderstand the standard for support modification or misapply the standard. The child support guidelines sets forth a clear procedure for modification which was followed in this case and all elements of that procedure were correctly met. For these reasons, it is appropriate that the trial court order be affirmed in all respects and this appeal denied as there has been no abuse of discretion established herein.

Respectfully submitted this 31 day of January, 2000.

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I caused two copies of the foregoing Brief of Appellee to be mailed this 31st day of January, 2000 postage prepaid, to:

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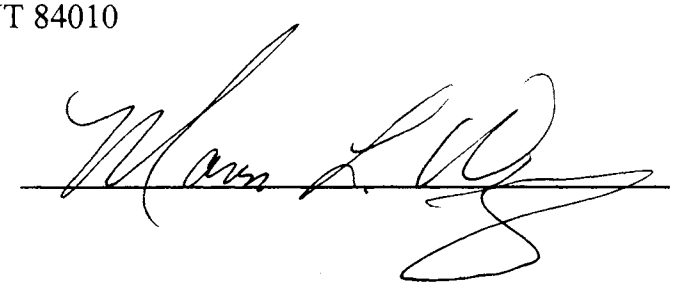

ADDENDUM

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78-45-2. Definitions.

As used in this chapter:

(1) "Adjusted gross income" means income calculated under Subsection 78-45-7.6(1).

(2) "Administrative agency" means the Office of Recovery Services.

(3) "Base child support award" means the award that may be ordered and is calculated using the guidelines before additions for medical expenses and work-related child care costs.

(4) "Base combined child support obligation table," "child support table," "base child support obligation table," "low income table," or "table" means the appropriate table in Section 78-45-7.14.

(5) "Child" means a son or daughter younger than 18 years of age and a son or daughter of any age who is incapacitated from earning a living and is without sufficient means.

(6) "Court" means the district court, juvenile court, or administrative agency which may enter a child support order as defined in Section 62A-11-401.

(7) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and specifically includes periodic payment pursuant to pension or retirement programs, or insurance policies of any type. Earnings specifically includes all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets.

(8) "Guidelines" means the child support guidelines in Sections 78-45-7.2 through 78-45-7.21.

(9) "IV-D" means Title IV of the Social Security Act, 42 U.S.C. Section 601 et seq.

(10) "Joint physical custody" means the child stays with each parent overnight for more than 25% of the year, and both parents contribute to the expenses of the child in addition to paying child support.

(11) "Medical expenses" means health and dental expenses and related insurance costs.

(12) "Obligee" means any person to whom a duty of support is owed.

(13) "Obligor" means any person owing a duty of support.

(14) "Office" means the Office of Recovery Services within the Department of Human Services.

(15) "Parent" includes a natural parent, an adoptive parent, or a stepparent.

(16) "Split custody" means that each parent has physical custody of at least one of the children.

(17) "State" includes any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico

(18) "Stepchild" means any child having a stepparent

(19) "Stepparent" means a person ceremonially married to a child's natural or adoptive custodial parent who is not the child's natural or adoptive parent or a person living with the natural or adoptive parent as a common law spouse, whose common law marriage was entered into in this state under Section 30-1-4 5 or in any other state which recognizes the validity of common law marriages

(20) "Work-related child care costs" means reasonable child care costs for up to a full-time work week or training schedule as necessitated by the employment or training of the custodial parent under Section 78-45-7 17

(21) "Worksheets" means the forms used to aid in calculating the base child support award

History: L. 1957, ch. 110, § 2; 1979, ch. 131, § 1; 1982, ch. 63, § 1; 1989, ch. 214, § 2; 1990, ch. 100, § 1; 1994, ch. 118, § 1; 1994, ch. 140, § 13.

Amendment Notes. — The 1994 amendment by ch 140, effective May 2, 1994, added the definition of "office" and redesignated the other subsections accordingly

The 1994 amendment by ch 118, effective July 1, 1994, added Subsections (2), (6), (9), (11), and (20) and redesignated the remaining subsections accordingly, in Subsection (3), inserted "that may be ordered and is" and deleted "uninsured" before "medical expenses", in Subsection (4) inserted "base child support obligation table," "low income table," and "appropriate", in Subsection (8), substituted "78-45-7 21" for "78-45-7 18", deleted former Subsection (15) which defined "total child support award", and made stylistic changes

This section is set out as reconciled by the Office of Legislative Research and General Counsel

Federal Law. — Title IV-D of the federal Social Security Act is codified as 42 U S C § 651 et seq

Cross-References. — Adoption, Chapter 30 of this title

NOTES TO DECISIONS

ANALYSIS

Joint physical custody
Cited

Joint physical custody.

Court-ordered visitation that included a total of over 120 overnight stays per year, plus additional visitation days, exceeded the threshold for joint physical custody under Subsection (10) and, thus, the court was required to follow the mandate of the child support guidelines and use the joint custody child support worksheet or make findings of fact justifying its deviation Udy v Udy, 893 P 2d 1097 (Utah Ct App 1995)

Cited in Jefferies v Jefferies, 752 P 2d 909 (Utah Ct App 1988), Asper v Asper, 753 P 2d 978 (Utah Ct App 1988), Ball v Peterson, 912 P 2d 1006 (Utah Ct App 1996)

A-2

78-45-7.2. Application of guidelines — Rebuttal.

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

(2) (a) The child support guidelines shall be applied as a rebuttable presumption in establishing or modifying the amount of temporary or permanent child support.

(b) The rebuttable presumption means the provisions and considerations required by the guidelines, the award amounts resulting from the application of the guidelines, and the use of worksheets consistent with these guidelines are presumed to be correct, unless rebutted under the provisions of this section.

(3) A written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case.

(4) (a) Natural or adoptive children of either parent who live in the home of that parent and are not children in common to both parties may at the option of either party be taken into account under the guidelines in setting or modifying a child support award, as provided in Subsection (5).

(b) Additional worksheets shall be prepared that compute the obligations of the respective parents for the additional children. The obligations shall then be subtracted from the appropriate parent's income before determining the award in the instant case.

(5) In a proceeding to modify an existing award, consideration of natural or adoptive children other than those in common to both parties may be applied to mitigate an increase in the award but may not be applied to justify a decrease in the award.

(6) (a) If a child support order has not been issued or modified within the previous three years, a parent, legal guardian, or the office may petition the court to adjust the amount of a child support order.

(b) Upon receiving a petition under Subsection (6)(a), the court shall, taking into account the best interests of the child, determine whether there is a difference between the amount ordered and the amount that would be required under the guidelines. If there is a difference of 10% or more and the difference is not of a temporary nature, the court shall adjust the amount to that which is provided for in the guidelines.

(c) A showing of a substantial change in circumstances is not necessary for an adjustment under Subsection (6)(b).

(7) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.

(b) For purposes of Subsection (7)(a), a substantial change in circumstances may include:

(i) material changes in custody;

(ii) material changes in the relative wealth or assets of the parties;

(iii) material changes of 30% or more in the income of a parent;

(iv) material changes in the ability of a parent to earn;

(v) material changes in the medical needs of the child; and

(vi) material changes in the legal responsibilities of either parent for the support of others.

(c) Upon receiving a petition under Subsection (7)(a), the court shall, taking into account the best interests of the child, determine whether a substantial change has occurred. If it has, the court shall then determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines. If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines.

(8) Notice of the opportunity to adjust a support order under Subsections (6) and (7) shall be included in each child support order issued or modified after July 1, 1997.

History: C. 1953, 78-45-7.2, enacted by L. 1989, ch. 214, § 4; 1990, ch. 100, § 3; 1990, ch. 275, § 2; 1994, ch. 118, § 4; 1997, ch. 232, § 72.

Amendment Notes. — The 1997 amendment, effective July 1, 1997 rewrote Subsection (6) and added Subsections (7) and (8).

NOTES TO DECISIONS

Cited in Brinkerhoff v. Brinkerhoff, 945 P.2d 113 (Utah Ct. App. 1997).

COLLATERAL REFERENCES

A.L.R. — Application of child-support guidelines to cases of joint-, split-, or similar shared-custody arrangements, 57 A.L.R.5th 389.

A-4

78-45-8. Continuing jurisdiction.

The court shall retain jurisdiction to modify or vacate the order of support where justice requires.

History: L. 1957, ch. 110, § 8.
Cross-References. — General jurisdiction of district court, § 78-3-4.

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

*****

TYLER DARAN BOYCE	)	
	)	
PLAINTIFF,	)	
VS.	)	TRANSCRIPT OF RULING
	)	
TAMMY LINGE BOYCE	)	
	)	CASE NO# 964701453
	)	
	)	
DEFENDANT,	)	

*****

BE IT REMEMBERED THAT THIS MATTER CAME ON REGULARLY FOR HEARING BEFORE THE HONORABLE JON M. MEMMOTT, SITTING AT FARMINGTON ON THE 20TH OF APRIL, 1999.

APPEARANCES:

FOR THE PLAINTIFF: SUZANNE MARELIUS

FOR THE DEFENDANT: D. MICHEAL NIELSEN

REPORTED/TRANSCRIBED BY: JOANNE PRATT, CSR
800 WEST STATE STREET
FARMINGTON, UT 84025

APRIL 20, 1999

THE COURT: THE COURT WILL MAKE THE FOLLOWING FINDINGS. THAT AT THE HEARING AT THE TRIAL AND EVIDENCE THAT THE COURT HEARD, EVIDENCE THAT THEY WERE NOT -- THAT THEY HAD AGREED TO JOINT PHYSICAL AND LEGAL CUSTODY. THAT THEY HAD NOT BEEN ABLE TO IMPLEMENT THE VISITATION SCHEDULE. THAT THE COURT FOUND A CHANGE OF CIRCUMSTANCES IN THE IMPLEMENTATION OF THE VISITATION SCHEDULE. THE COURT FOUND, BASED ON THE AGREEMENT AND THAT THE CUSTODY ARRANGEMENT WHICH THE COURT HAD FOUND BASED ON THE LIBERAL VISITATION SCHEDULE, THAT THE APPROPRIATE CUSTODY OR CHILD SUPPORT SCHEDULE WAS THE JOINT CUSTODY. AND DOING THAT BASED ON FURTHER EVIDENCE PRESENTED BY THE DEFENDANT, THE COURT FOUND THAT IT WAS IN THE BEST INTERESTS THAT SHE NOT WORK AND THEREFORE THE COURT -- WITH THE PREVIOUS SCHEDULE SHE HAD WORKED FULL-TIME THE COURT FOUND SHE WAS NOT WORKING AND IT WAS IN THE BEST INTERESTS OF BOTH HER AND THE CHILDREN TO STAY AT HOME AND THEREFORE, THE COURT IMPUTED NO INCOME IN THE DETERMINATION OF HER SCHEDULE. AND I BELIEVE THAT THAT WAS THE RULING OF THE COURT. I DON'T BELIEVE -- I WOULD GUESS THAT THE BASIS OF THIS

THERE IS A MOTION FOR A NEW TRIAL IF THERE'S AN ERROR AT LAW. AND WHILE YOU'VE CHARACTERIZED THIS AS A MOTION FOR RECONSIDERATION --

MR. NIELSEN: NO. IT'S A MOTION FOR RECONSIDERATION OR A NEW TRIAL.

THE COURT: I UNDERSTAND. I'M SAYING I WOULD ASSUME YOU HAVE DONE THIS THAT THERE HAS BEEN AN ERROR OF LAW. BASED ON THE UDY DECISION WHICH I USED AND WHICH THE COURT INDICATED THAT ONCE -- HOWEVER YOU DETERMINE IT, ONCE THIS VISITATION SCHEDULE IS DONE, WHAT THE APPELLATE COURT INDICATED IS THAT I WAS REQUIRED TO USE THIS SCHEDULE FOR DETERMINING SUPPORT. AND I BELEVE THAT WHAT THIS COURT DID IN DOING THAT WAS FOLLOW THAT DECISION. AND IF I DIDN'T CORRECTLY FOLLOW IT, THEN I GUESS IT'S GOING TO BE A BASIS FOR THE APPELLATE COURT TO SAY THAT I DIDN'T FOLLOW IT CORRECTLY BECAUSE THE ATTEMPT OF THIS COURT WAS TO FOLLOW THE LAW AS SET FORTH IN THAT DECISION.

MR. NIELSEN: THE ONLY COMMENT I HAVE, JUDGE, AND IS THE COURT AWARE UDY VERSUS UDY WAS NOT A MODIFICATION. IT'S A CASE OF FIRST IMPRESSION.

THE COURT: UH-HUH.

MR. NIELSEN: OKAY. THANK YOU.

THE COURT: AND THEREFORE, THE COURT WILL

DENY THE MOTION FOR NEW TRIAL.

MR. NIELSEN: YOUR HONOR, IF THE COURT'S GOING TO GIVE CONSIDERATION TO THE MOTION FOR ATTORNEYS FEES, I'LL NEED TO SPEAK TO IT.

THE COURT: WHY DON'T YOU SPEAK TO IT.

MR. NIELSEN: WHEN THE FIRST ORDER WAS SUBMITTED BY MISS MARELIUS, IT HAD MANY THINGS THAT WHILE A GOOD IDEA, WERE NOT IN THE TRIAL. LET ME REFRESH THE COURT'S MEMORY. WE HAD A TELEPHONIC CONFERENCE ABOUT THAT.

THE COURT: I DO.

MR. NIELSEN: AND YES, MY DEMEANOR HAS BEEN INAPPROPRIATE IN THE CASE AND I APOLOGIZE FOR THAT. BUT I DON'T BELIEVE THAT THAT'S APPROPRIATE EITHER FOR MISS MARELIUS TO DO JUST BECAUSE WE THINK THAT'S A GOOD IDEA. IF IT WASN'T PART OF THE COURT'S RULING, IT SHOULDN'T BE IN THE HEARING. IT SHOULDN'T BE IN THE ORDER. IT SHOULD EVEN BE DRAFTED AS A STIPULATION AND SENT TO THE OTHER ATTORNEY, SIGNED AND SUBMITTED AND IT WASN'T, SO THE COURT EVENTUALLY STRUCK ALL THAT. IN OTHER WORDS, WHAT I'M SAYING IS, I PREVAILED ON MY MOTION IN OPPOSITION TO HER -- MY OBJECTION TO HER ORDER. I WILL ADMIT WE BOTH EXPENDED ATTORNEYS FEES PLACING THIS ISSUE BEFORE THE COURT, BUT I THINK IT'S A

VALID CONCERN, JUDGE. AND I REALLY WANTED TO HEAR WHERE THE COURT WAS COMING FROM TO SATISFY MY CLIENT, MYSELF AND TO MAKE THE DECISIONS AS TO WHAT WE DO IN THE FUTURE.

SEE, IT REALLY ISN'T A PROBLEM RIGHT NOW BECAUSE YOU ARE RIGHT. SHE DOESN'T WORK. BUT YOUR HONOR, IN FIVE YEARS -- THIS IS A YOUNG CHILD. WE GOT A LOT OF YEARS OF CHILD SUPPORT LEFT. IN FIVE YEARS WHEN SHE MAKES PRETTY WELL EQUAL MONEY OR EVEN 15 OR 20 -- SHE'S A SCHOOL TEACHER. WHEN SHE GOES BACK TO THAT, CHILD SUPPORT DROPS TO ABSOLUTELY NOTHING BECAUSE OF THE COURT'S DECISION. AND SO I BELIEVE IT WAS A VALID CONCERN AND I APOLOGIZE FOR DEMEANOR BUT NOT FOR CONTENT. I THINK IT NEEDED TO BE HEARD AND I APPRECIATE THE COURT'S EXPLANATIONS TO US.

MS. MARELIUS: WELL, JUST AS TO WHETHER OR NOT IT WAS -- THE MODIFICATIONS MADE TO THE ORDER WERE CORRECT OR NOT, I STILL I THINK THEY WERE. IN FACT I KNOW. I'VE BEEN IN THIS CASE SINCE THE BEGINNING AND THEY WERE DISCUSSED AT PRETRIAL. IT'S TRUE THAT THE TRANSCRIPT DOESN'T SAY THE PARTIES AGREE IN MEDIATION TO THESE. AND IT'S PARENTING TERMS WE'RE TALKING ABOUT, A DISPUTE RESOLUTION MECHANISM. SOME OF THE PARENTING CONTENT THAT THEY

DID AT MEDIATION. AND IT WAS NOT RECITED AT TRIAL AND I GUESS THAT WAS AN ERROR. MR. CATHCART AND I AGREED TO IT AT THE PRETRIAL. SO IT REALLY WASN'T EVEN IN OUR MINDS AT TRIAL AND I BELIEVE IT WAS FULLY DISCUSSED AND AGREED BY THE PARTIES. I THINK IT'S SIGNIFICANT THAT THE TRIAL WAS JULY 13. THE OBJECTIONS BY MR. NIELSEN WERE -- AND THE FINDINGS AND ORDER WERE DONE FIVE DAYS LATER AND THEN ON THE 18TH THESE VAGUE OBJECTIONS WERE FILED. WE HAD A PHONE CONFERENCE OCTOBER 19 WHERE ONLY ONE WORD WAS CHANGED IN ALL OF THAT CONTENT. AND WE AGREED TO MAKING SOMETHING MUTUAL AS FAR AS INFORMATION EXCHANGE, I BELIEVE. AND THEN THIS MOTION TO RECONSIDER CAME A MONTH LATER. SO I FRANKLY THINK IT'S A PRETTY SLIM READ WHEN IT COMES TO THE ISSUING OF ATTORNEYS FEES TO SAY THAT OBJECTION WAS SO MEANINGFUL WHEN ALL OF OUR TIME, 90 PERCENT OF THE TIME, HAS BEEN ON THIS RESPONSE AND THE MOTION TO RECONSIDER.

MR. NIELSEN: AND THAT'S NOT A CORRECT REPRESENTATION. ENTIRE PARAGRAPHS WERE STRICKEN, NOT ONE. AND I'M SORRY THAT WE HAD TO GO THROUGH THAT. AND I MAKE NO APOLOGY FOR THE MOTION TO RECONSIDER. I THINK IT'S VALID. BY THE WAY, JUDGE, JUST FOR THE RECORD, IT IS NOT JUST A MOTION TO

RECONSIDER. IT'S A MOTION TO RECONSIDER OR FOR A NEW TRIAL BECAUSE SUZANNE'S RIGHT. THERE'S NO SUCH THING AS A MOTION TO RECONSIDER. WE'D ALL LIKE TO THINK THERE WAS. BUT IT'S FOR A NEW TRIAL.

THE COURT: ONE OF THE THINGS AS A NEW TRIAL, ONE OF THE THINGS THAT CONCERNS ME IS THE EVIDENCE, I GUESS THAT WOULD HAVE BEEN PRESENTED AT THE NEW TRIAL FOR THE STATE. (UNINTELLIGIBLE) THAT WASN'T REALLY PRESENTED. I MEAN, THERE WAS THE ONE LETTER, AFFIDAVIT, BUT THERE WASN'T REALLY EVIDENCE PRESENTED OF WHAT WOULD BE PRESENTED IF WE HAD A NEW TRIAL. SO REALLY IT WAS TREATED IN TERMS OF PLEADING MORE AS A MOTION TO RECONSIDER THAN IT WAS A MOTION FOR NEW RETRIAL BASED ON THE EVIDENCE THAT WAS SUBMITTED WITH. THE COURT IS GOING TO DENY THE MOTIONS FOR ATTORNEYS FEES. I THINK THIS HAS BEEN A DIFFICULT CASE. I'M NOT SURE (UNINTELLIGIBLE) I DO HAVE SOME CONCERNS THE WAY IT'S BEEN HANDLED, BUT I'M NOT GOING TO (UNINTELLIGIBLE).

MR. NIELSEN: THANK YOU, YOUR HONOR. MAYBE SHOULD I DRAFT AND SUBMIT AN ORDER FOR THE COURT.

MS. MARELIUS: I'D BE GLAD TO.

MR. NIELSEN: ONLY THING I'D ASK THAT IT SAY MOTION TO RECONSIDERR OR A NEW TRIAL SO THAT THE RIGHT TO APPEAL IS PRESERVED IN CASE MY CLIENT

DECIDES ON THAT. I APPRECIATE THE COURT'S PATIENCE WITH ME AND COUNSEL TOO.

(PROCEEDINGS CONCLUDED)

CERTIFICATE.

STATE OF UTAH)
) SS
COUNTY OF DAVIS)

THIS IS TO CERTIFY THAT THE FOREGOING 8 PAGES OF TRANSCRIPT TRANSCRIBED FROM VIDEOTAPE CONSTITUTE A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT FARMINGTON, UTAH THIS 10 DAY OF June 1999.

Joanne Pratt
JOANNE PRATT, CSR

A-14

SUZANNE MARELIUS (2081)
Attorney for Plaintiff
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CP

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

--------ooOoo--------

TYLER BOYCE, Plaintiff, vs. **TAMMY L. GOBLE,** Defendant.	**ORDER ON MOTION FOR RECONSIDERATION OR NEW TRIAL** Case No.: 964701453 DA Judge: Jon M. Memmott

--------ooOoo--------

The Defendant's Motion for Reconsideration or New Trial came before the Court on April 20, 1999 before the Honorable Jon Memmott presiding. Plaintiff was present in person and represented by Suzanne Marelius. Defendant was present in person and represented by counsel Michael Nielsen. The Court heard argument, reviewed the record and file herein and made the following findings and ruling:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Defendant's Motion for Reconsideration or New Trial is denied.

2. The Court finds that at the time of trial herein July 31, 1998 the Court heard evidence that the parties agreed in their original divorce stipulation to joint legal and joint physical custody of their minor children and liberal visitation. The Court found that since entry

A-15

of the Decree there have been substantial, material changes in circumstances wherein the parties were unable to agree on a visitation schedule and that both parties filed petitions to modify stating that the joint custody terms of the Decree were unworkable. At trial, the Court found that the parties had resolved many disputes in mediation and through the temporary orders of the Court including having agreed to continue the joint legal and joint physical custody of their children and having agreed on a visitation schedule awarding to Plaintiff Tyler Boyce 37% of the time with the children, and Defendant having 63% of the time with the children. Based on the new visitation schedule and percentages of time sharing, the Court deemed it appropriate that the parties use a joint physical custody worksheet to calculate the amount of future child support.

3. Further, at the time of trial, the Court learned through testimony that Mrs. Goble, the Defendant was not working full-time having previously been a school teacher and was currently staying home with the children. Based on that change, the Court sua sponte deemed it appropriate that zero income be imputed to Defendant for purposes of calculating child support.

4. The Court considered the Plaintiff's Motion for attorneys fees and finds that although Defendant did not really present evidence in her Motion which would have been considered in a new trial, that both parties reasonably incurred fees for the post-trial motions and each should bear their own costs and fees.

DATED this 23rd day of June, 1999.

BY THE COURT:

Jon M. Memmott

The Honorable Jon M. Memmott
DISTRICT COURT JUDGE

Approval as to Form:

D. Michael Nielsen

A-16

400