

1989

Karen Adams and State of Utah, Department of Social Services v. Howard H. Adams : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

BRIEF

UTAH

DEPARTMENT

OF

50

.A10

DOCKET NO.

890690-CA

IN THE UTAH COURT OF APPEALS

KAREN ADAMS and STATE OF UTAH,
DEPARTMENT OF SOCIAL SERVICES,

Plaintiffs/Appellant

vs.

HOWARD H. ADAMS,

Defendant/Respondent.

Case No. 890690-CA

Priority No. 14(b)

BRIEF OF APPELLANT STATE OF UTAH

ON APPEAL FROM A JUDGMENT AND DECREE OF THE SECOND JUDICIAL
DISTRICT COURT, IN AND FOR DAVIS COUNTY, STATE OF UTAH, HON.
DOUGLAS L. CORNABY, DISTRICT JUDGE, PRESIDING.

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FILED

FEB 23 1990

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BRIEF OF APPELLANT STATE OF UTAH

JURISDICTION

The Court of Appeals has jurisdiction over this appeal by virtue of the provisions of Utah Code Ann. §78-2a-3(2)(h) (Supp. 1989).

NATURE OF PROCEEDINGS BELOW

This is an appeal from a District Court order in a domestic relations case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can the parties to a divorce decree, by their mere agreement filed with the court clerk's office, modify the child support obligations ordered by the court in the divorce decree?

2. If the Department of Social Services (the "Department") was not a party to such an agreement, and the wife later begins receiving public assistance on behalf of the children, does the agreement (regardless of when it was made)

legally prevent the Department from collecting child support from the husband in accordance with the terms of the divorce decree?

3. Should the "in-kind" child support agreement between the defendant/respondent Howard Adams ("Mr. Adams") and the plaintiff Karen Adams ("Mrs. Adams") be "deemed" a court order modifying their child support obligation?

4. If the district court's ruling was that a modification should be granted which relates back to the date the "in-kind" child support agreement was filed, did the court err by allowing an impermissible retroactive modification of a child support order and by failing to properly consider the interests of the Department?

5. If the district court's ruling was to modify Mr. Adams' child support obligation as of the date of the trial, and to declare his child support current as of that date, did the court err in crediting "in-kind" child support against his previously ordered child support obligation of \$200.00 per month?

6. Regardless of what the basis was for the district court's decision to allow a modification of Mr. Adams' child support obligation, did it err in not permitting counsel for the Department to present relevant authorities to the court on a central issue?

7. Did the District Court commit reversible error in finding that the Department acted unreasonably and in bad faith in this action, and that the Department should therefore pay attorney's fees to Mr. Adams?

DETERMINATIVE STATUTES AND RULES

The following statutes are determinative in this case:

Utah Code Ann. §30-3-10.6(1) and (2) (Supp. 1989).

(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

Utah Code Ann. §62A-11-307.2, Subparagraphs (1)(d) and (2) (1953), as amended.

(1) An obligee whose rights to support have been assigned under Section 62A-9-121 as a condition of eligibility for public assistance has the following duties:

(d) The obligee may not enter into any agreement with an obligor that relieves him of any duty or responsibility of support or purports to settle past, present or future obligations either as settlement or prepayment without the office's written consent.

(2) The office's right to recover is not reduced or terminated by an agreement entered into in violation of Subsection (1)(d), whether that agreement is entered into either before or after public assistance is furnished on behalf of a dependent child.

The following rules are determinative in this case:

Rule 14, Rules of Practice of the Second Judicial District, first sentence (found in Utah Court Rules Annotated, 1988, at page 615).

Commencing April 1, 1987, proceedings to modify an existing Decree of Divorce in the Second Judicial District shall be commenced by the filing of a Petition to Modify in the original divorce action.

Rule 6-404, Code of Judicial Administration (1988), first sentence.

Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action.

STATEMENT OF THE CASE

This proceeding began when Mr. Adams obtained the issuance of an order to show cause and served it upon the Department. (R. 25-30). Through this order to show cause, Mr. Adams sought (1) court approval of an agreement regarding child support which he and Mrs. Adams had previously signed and filed with the clerk's office, (2) a determination that he owed no child support arrearages, (3) an order holding the Department to the terms of that agreement and preventing the Department from collecting child support from him, and (4) an award of attorney's fees against the Department. (R. 25-27).

The matter was first heard before the commissioner, who caused the Department to be made a party plaintiff and recommended that the relief requested by Mr. Adams essentially be granted. (R. 40, 79-81; Transcript of Proceedings before Commissioner Richards, page 11, lines 18-20).

The Department objected to the commissioner's recommendation (R. 41-42), and the matter was heard before the district judge on two separate dates, August 8, 1989 and September 14, 1989. The district judge sustained the recommendation of the commissioner and awarded an increased amount of attorney's fees to Mr. Adams. (R. 76-77, 79-81, and 82-85).

This appeal followed. (R. 86-87).

STATEMENT OF THE FACTS

1. Howard Adams and Karen Adams were married in 1975 and had two children as issue of their marriage. (R. 9-10). They were divorced in 1979 by virtue of a Decree of Divorce in the District Court of Davis County, Utah. (R. 13-15). Karen Adams was the plaintiff in that divorce proceeding, and Howard Adams was the defendant.

2. The decree of divorce awarded custody of the children to Mrs. Adams, and ordered Mr. Adams to pay \$100.00 per month per child as child support. (R. 13-14).

3. Some time before July 15, 1988, Mrs. Adams and the children began living in a home owned by Mr. Adams. (R. 23). On July 15, 1988, the two of them signed an agreement (the "in-kind" child support agreement) in which Mrs. Adams agreed to excuse Mr. Adams from making cash payments of child support during time periods that she was occupying the home rent-free. (R. 23-24). On July 27, 1988, they filed that agreement with the clerk of the court in Davis County, Utah, and it was placed in their divorce file folder. (R. 23-24). The Department was not a party to that

agreement. (R. 23-24). A copy of the agreement is located in the addendum of this brief.

4. The "in-kind" child support agreement was neither approved by the court nor reduced to a formal court order. (R. 83; Transcript of Trial, September 14, 1989, page 44, line 19 through page 45, line 1).

5. The "in-kind" child support agreement was prepared by an attorney who formerly represented Mr. Adams. (Transcript of Trial, September 14, 1989, page 40, lines 10-13; page 44, lines 13-18; R. 22).

6. Mr. Adams received the advice of that attorney regarding the procedure to follow in modifying his child support obligation. (Transcript of Trial, September 14, 1989, page 44, lines 19-22).

7. At the time the "in-kind" child support agreement was filed, Mr. Adams knew that by merely filing that agreement with the clerk's office, he had not obtained a formal modification of his child support obligation. (Transcript of Trial, September 14, 1989, page 41, lines 12-15; page 44, line 23 through page 45, line 1).

8. The attorney who prepared the agreement advised Mr. Adams that "down the road it might be better" if Mr. Adams would petition the court to modify the decree. (Transcript of Trial, September 14, 1989, page 44, lines 19-22).

9. In March 1989, Mrs. Adams applied for public assistance with the Department. (R. 83). The district court found that she provided a copy of the "in-kind" child support

agreement to the welfare office, and that the Department is charged with knowledge of its existence from that point forward. (R. 83, 85)

10. The Department then took steps to collect cash child support from Howard Adams as provided in the divorce decree. (Transcript of Trial, September 14, 1989, page 11, lines 13-16). Mr. Adams protested this action, claiming that his "in-kind" child support agreement with Mrs. Adams excused him from paying cash child support. (Transcript of Trial, September 14, 1989, page 40, lines 5-13). The Department's position was that the agreement signed by Mr. and Mrs. Adams was not binding on the Department and that the Department was obliged to enforce the child support provisions of the original divorce decree until they were formally modified. The Department was therefore unwilling to discontinue its efforts to collect cash support from Mr. Adams. (Transcript of Trial, September 14, 1989, page 40, lines 14-23).

11. Mr. Adams then obtained the issuance of an order to show cause against the Department, through its Office of Recovery Services, seeking relief which is described in the Statement of the Case above. (R. 25-30).

12. Thereafter, proceedings were held before the commissioner, and then the district judge, as is described in the Statement of the Case above.

13. Sometime between August 8, 1989 and September 14, 1989, and before these proceedings were concluded before the district court, the Department sent a notice to Mr. Adams

advising him that the Department would intercept \$800.00 from his next tax refund, and apply it to child support arrearages. When he received the notice, Mr. Adams called the Department's investigator assigned to his case. The investigator told him that until the proceedings were concluded, his hands were tied. At the trial, the investigator was unable to explain why he felt he could not do anything about the situation until after the proceedings were concluded. (Transcript of Trial, September 14, 1989, page 28, line 13 through page 30, line 1; page 42, lines 13-24).

14. In the course of the proceedings before the district court on September 14, 1989, the court repeatedly suggested that the Department should have simply reduced the amount of Mrs. Adams' AFDC grant by the amount of the rental value of the home, instead of trying to collect cash child support from Howard Adams. (Transcript of Trial, September 14, 1989, page 61, line 18 through 62, line 2; page 62, line 23; page 69, lines 21-24; page 71, line 20 through page 72, line 1). Counsel for the Department advised the court that the law does not allow the value of "in kind" child support to be subtracted from the amount of the monthly grant an AFDC recipient receives. He offered to provide the Court with copies of legal authorities to that effect. The Court declined the offer and ruled from the bench without allowing the Department's attorney to present any authorities on that point. (Transcript of Trial, September 14, 1989, page 63, line 20 through page 64, line 6).

15. The district court's written conclusions of law say that "it seems like a simple matter to apply any rent credit received as an offset on [Mrs. Adams'] grant. . . ." The Court indicated that the Department's failure to do so was unreasonable. This finding of unreasonableness was part of the basis for the Court's award of attorney's fees against the Department. (R. 84-85).

SUMMARY OF ARGUMENTS

Mr. and Mrs. Adams were divorced in 1979, and he was ordered to pay \$200.00 per month for the support of the children. Later, in 1988, Mr. and Mrs. Adams made an agreement between themselves which provided that Mr. Adams could be relieved of his court-ordered cash child support obligation as long as he would allow Mrs. Adams and the children to reside rent-free in a home he owned. The "in-kind" child support agreement was prepared by an attorney who formerly represented Mr. Adams. Mr. Adams filed the agreement with the clerk's office.

At that time, Mr. Adams was advised by his attorney that the "in-kind" child support agreement did not modify his child support obligation as ordered in the divorce decree. The attorney advised Mr. Adams that "down the road it might be better" if he would go through the steps of petitioning the court to modify the decree. (As the ensuing events have shown, those words were prophetic.)

Even though Mr. Adams knew that by filing the "in-kind" child support agreement, he had not obtained a modification of

his child support obligation as ordered by the court, he chose not to petition the court to modify the divorce decree.

Later, Mrs. Adams applied for and began receiving AFDC from the Department of Social Services. In accordance with standard procedure, the Department reviewed the divorce decree, ascertained Mr. Adams' court-ordered support obligation, and took steps to begin income withholding as a means of collecting it. Mr. Adams commenced order to show cause proceedings to stop the Department from collecting child support from him, and to bind the Department to the terms of his agreement with Mrs. Adams.

The district court found that the Department had been provided a copy of the "in-kind" child support agreement, and was chargeable with knowledge of that agreement. It found that the Department should be bound by the terms of the agreement. It concluded that the Department was in "bad faith from beginning to end" and must pay Mr. Adams' attorney's fees. The ruling of the district court was clearly erroneous and should be reversed, for these reasons:

Mr. and Mrs. Adams had no power to bind the court or any third party to the terms of their agreement. Their agreement had no legal effect on Mr. Adams' court-ordered child support obligation.

The agreement purports to relieve Mr. Adams of his child support as ordered in the divorce decree, and prejudices the rights of the Department to collect child support as a means of recouping the public assistance provided to the children. The court found that the Department should be charged with knowledge

of the agreement from the outset of its collection efforts, and this played a significant role in the court's decision. Utah law, however, provides that such agreements may not reduce or terminate the Department's right to collect support, unless the Department has consented to them, so it is irrelevant whether or not the Department knew of the agreement.

The effect of the court's ruling was to modify the decree to conform to the "in-kind" child support agreement, without properly considering the statutory interests of the Department to recover public assistance provided. It was an impermissible retroactive modification of the decree and improperly credited "in-kind" child support against Mr. Adams' cash child support obligation.

The district court seemed to think that the Department should simply reduce Mrs. Adams welfare grant by the value of the "in-kind" support she was receiving. When the Department's attorney explained that such a procedure is not legally permissible, and offered to submit authorities to that effect, the district court would not hear him.

The district court's ruling that the Department has acted in bad faith is unsupported by the facts, and is clearly erroneous both in law and fact. The judgment for attorney's fees against the Department also appears to have been improperly motivated by preconceptions the court expressed regarding the Department.

The judgment and order of the district court should be reversed.

ARGUMENT

I. Only the court can modify a divorce decree, and it must do so by means of a court order; until an order modifying the divorce decree is entered by the court, the original terms of the divorce decree remain operative regardless of any separate agreement between the parties.

The Utah divorce statute provides that "the court has continuing jurisdiction to make subsequent changes or new orders for . . . the custody of the children and their support. . . ." Utah Code Ann. §30-3-5(3) (1953), as amended. This power to modify child support orders is given only to the court. It is not given to the parties. It is not given to their attorneys. Even an administrative law judge may not modify an existing court order for child support. Karren v. State Department of Social Services, 716 P.2d 810 (Utah 1986); Starks v. State Department of Social Services, 750 P.2d 199 (Utah App. 1988). As the Supreme Court stated in the Karren case at page 813, "The power to modify a [child support] decree is retained by the courts under section 30-3-5." (Emphasis added.)

Unless the court modifies a support order, based upon a substantial change in the circumstances of the parties, the original support order remains binding and effective. Any attempt to change a court-ordered child support obligation by some means other than a court-ordered modification is void and the courts cannot properly enforce it. Karren v. State Department of Social Services, supra; Starks v. State Department of Social Services, supra.

The procedure for seeking a court order modifying the provisions of a divorce decree is spelled out in Rule 6-404 of the Code of Judicial Administration. That rule provides that proceedings to modify a divorce decree "shall be commenced by the filing of a petition to modify in the original divorce action." (In July 1988, when Mr. and Mrs. Adams filed their agreement with the clerk's office in Davis County, the Code of Judicial Administration was not yet in effect. But Rule 14 of the Rules of Practice of the Second Judicial District, which was in effect at that time, also provided that proceedings to modify a divorce decree "shall be commenced by the filing of a Petition to Modify in the original divorce action." Utah Court Rules Annotated, 1988, at page 615.)

The parties to a divorce proceeding can, of course, stipulate to the modification of a child support obligation. As the foregoing authorities clearly show, however, they must petition the court to approve their stipulation and to enter a formal order modifying the terms of the original child support order. The parties themselves do not have the power to bind the court by their private stipulation between themselves. Klein v. Klein, 544 P.2d 472, at 476 (Utah 1975) Until an order of modification is entered, the terms of the original child support order stand unchanged. As the Utah Supreme Court has stated,

Future child support effectively cannot be the subject of bargain and sale. Among other things, the State is an interested party in such matters since a child's welfare is at stake, and any modification of a child support award must be approved by the court. Price v. Price, 4 Utah 2d 153, 289 P.2d 1044 (Utah 1955).

II. A mere agreement between the parents of children for whom public assistance is being provided, which purports to relieve the non-custodial parent of a court-ordered child support obligation, is ineffective against the right of the Department to collect the court-ordered child support from that parent, regardless of whether that agreement is entered into before or after such public assistance commences.

The foregoing discussion about the inability of the parties to a divorce proceeding to bind the court and third parties by merely entering into an agreement and filing it with the clerk's office takes on an added dimension when the third party sought to be bound is the Department. This is because when the Department expends taxpayer funds through the AFDC program to support needy children, the Department has an independent right to recover those funds from non-custodial parents having the obligation to support those children. As the Legislature has stated,

It is declared to be the public policy of this state that [the Public Support of Children Act] be liberally construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving or avoiding, at least in part, the burden often borne by the general citizenry through public assistance programs. Utah Code Ann. §62A-11-302 (1953), as amended.

The Department's independent right to recover support is based in part upon the assignment of support rights which is made to the Department when a custodial parent applies for AFDC. Utah Code Ann. §62A-9-121 (1953), as amended. This right is also based on the statutory status of the Department as a real party

in interest, entitled to pursue judicial proceedings to "establish, modify, and enforce a court order in the name of the state, any department of the state, the [Office of Recovery Services], or an obligee to collect support. Utah Code Ann. §62A-11-106 (1953), as amended. See also Utah Code Ann. §78-45-9(1) (Supp. 1989).

The Department's right to recover support from a non-custodial parent whose children are receiving public assistance may not be prejudiced or compromised by the custodial parent. Among other things, the law provides as follows with respect to obligees whose children are receiving public assistance:

(1)(d) The obligee may not enter into any agreement with an obligor that relieves him of any duty or responsibility of support or purports to settle past, present, or future obligations either as settlement or prepayment without the office's written consent.

(2) The office's right to recover is not reduced or terminated by an agreement entered into in violation of Subsection (1)(d), whether that agreement is entered into either before or after public assistance is furnished on behalf of a dependent child. Utah Code Ann. §62A-11-307.2 (1953), as amended. (Emphasis added).

The above language from Section 62A-11-307.2 became law on April 24, 1989. It replaced and clarified an earlier enactment, namely, Utah Code Ann. §62A-11-304(4), which read as follows:

No agreement between any obligee and any obligor that relieves an obligor of any duty or responsibility of support, or purports to settle past, present or future support obligations, either as settlement or prepayment, reduces or terminates the rights of the office to recover from that obligor for support provided, unless the

office has consented to the agreement in writing. (Emphasis added).

Section 62A-11-304(4) became effective on January 19, 1988.

Prior to that date, a virtually identical provision was found at Utah Code Ann. §78-45b-3(4) (1953), as amended.

It is clear that since before 1988 (when the agreement between Mr. and Mrs. Adams was signed and filed with the clerk's office), Utah statute law has protected the Department from attempts by parents to defeat the Department's right to recover public assistance. Each revision to the statute has clarified the intent of the Legislature to insulate the Department from the effect of child support compromise and settlement agreements to which it did not give its written consent.

The Department submits that the current Section 62A-11-~~307.2(2)~~
~~307(2)~~, which clarifies that such agreements have no effect on the Department's right of recovery, regardless of whether those agreements are entered into either before or after public assistance is furnished, governs the disposition of this case even though Mr. and Mrs. Adams' agreement was filed prior to the effective date of the statute. This is because Section 62A-11-~~307.2(2)~~
~~307.2~~ is merely a clarification by the Legislature of that which was implicit in the earlier statute, and the newer enactment should govern. Camp v. Office of Recovery Services, 779 P.2d 242 (Utah App. 1989)

Even if this court were to determine, however, that the former statute should govern, the result should be no different. This is because Section 62A-11-304(4) provided that "no agreement" between any obligor and obligee to settle child

support obligations can affect the office's right to recover support. There is no requirement that the agreement must have been entered into after public assistance was furnished; to the contrary, the words "no agreement" permit no such limitation regarding the date of the agreement.

One important feature of the statutes cited above is that they provide that the Department is not bound by such an agreement between the parties unless it has consented to the agreement in writing. Whether or not the Department is aware of the agreement is wholly irrelevant. Indeed, it would be unjust to bind the Department to agreements between husbands and wives which prejudice its rights, simply because it has become aware of them. In holding that the Department was bound by the terms of the "in-kind" child support agreement between Mr. and Mrs. Adams, the district court was strongly influenced by the fact that the Department was aware of the existence of this agreement. (R. 79-85). The district court departed from the statute in so doing and committed reversible error.

It should be noted that if the husband and wife in a divorce case enter into an agreement which is not approved and ordered by the court, but which purports to modify court ordered rights and obligations between them, and one of them relies on that agreement to his detriment, an issue might arise regarding whether the other spouse should be estopped from enforcing the terms of the court order. That is not an issue in this case, because the husband is not trying to bind the wife to their agreement, but is instead trying to bind the Department, which was a stranger to their agreement.

That issue goes beyond the scope of this brief, and the Department takes no position on that subject. The Department simply notes that regardless of whether Mr. and Mrs. Adams might have a basis for holding each other to the terms of their agreement, the foregoing authorities show that (1) their mere agreement does not change the terms of the divorce decree, (2) third parties are entitled to rely on the efficacy of the divorce decree, and the (3) Department's right to recover support is not reduced or terminated by the agreement.

The discussion in this section of the brief is limited, of course, to situations where the husband and wife have made such an agreement, and no court order has ever been entered adopting the agreement. The Department acknowledges that if the court enters an order adopting the terms of such an agreement, the Department is bound by the terms of that order. The Department may have the right to ask the court to set aside the order, or it may appeal the order, but once the order is entered, and until such time as the order is set aside, reversed, or modified, it constitutes the order of the court and must be followed by the Department.

III. The "in-kind" child support agreement was not the equivalent of a court order modifying Mr. Adams' child support obligation, and the Department was entitled to collect child support pursuant to the terms of the divorce decree.

In this case, the district court's judgment and order expressly sustains the domestic relations commissioner's

determination that the "in-kind" child support agreement between Mr. and Mrs. Adams "was sufficient to be deemed as if an Order had been drafted by the Court." (R. 77, 80). (Emphasis added.) The findings of fact signed by the judge also say that the parties "entered into a Stipulation and Agreement amending the Decree. . . ." (Emphasis added.) (R. 83). These rulings by the court appears to ratify the agreement as being an actual court order.

The district court, however, stated elsewhere in its findings of fact that although the agreement was filed by Mr. Adams with the desire to amend the divorce decree, the decree "was not however formally modified." (R. 83). And in its oral ruling following the trial on September 14, 1989, the court seemed to indicate that it was modifying the divorce decree that day, and allowing the modification to relate back to the date of the agreement so as to give Mr. Adams full credit for all in-kind child support he had paid to date, leaving him current in his child support obligation as of the date of the trial. (Transcript of Trial, September 14, 1989, page 68, lines 4-14).

It is also possible to interpret the district court's ruling as a modification of the decree as of the date of the trial, accompanied by a determination that Mr. Adams' "in-kind" payments up to that point would be applied to give him full credit against his original child support obligation of \$200.00 per month. (Transcript of Trial, September 14, 1989, page 68, lines 4-14).

Whichever reasoning was adopted by the district court, it committed reversible error. The remainder of this section of the

brief will show why the court erred if its ruling was a ratification that the "in-kind" child support agreement is deemed a court order modifying the divorce decree. The next two sections of the brief will cover those other lines of reasoning which it appears the court may have used.

If the district court's ruling was to ratify the "in-kind" child support agreement as a court order modifying Mr. Adams' child support obligation, then it erred, because the agreement of the parties plainly did not constitute a court order and is not entitled to be treated as such.

First, based on the authorities set forth in the preceding sections, a mere agreement between the parties to a divorce is not entitled to be treated as a court order, and the "in-kind" child support agreement, to which the Department never consented, could have no effect on the Department's right to collect \$200.00 per month in ongoing child support from Mr. Adams as originally ordered by Judge Thornley K. Swan in the divorce decree.

Second, the procedure for seeking a court order was not followed. Rule 7(b)(1) of the Utah Rules of Civil Procedure provides that "[a]n application to the court for an order shall be by motion. . . ." The Code of Judicial Administration, and the predecessor local rules, *supra*, specifically provide that a party seeking an order modifying a divorce decree must file a petition to modify. No motion or petition to modify was filed by either Mr. or Mrs. Adams seeking court approval of their agreement. Their agreement itself does not contain any language that could even be construed as a request for court approval.

Third, the "in-kind" child support agreement contains no manifestation of judicial action. Rule 7(b)(2) of the Utah Rules of Civil Procedure defines "Order" as follows: "An order includes every direction of the court including a minute order made and entered in writing." (Emphasis added.) An "order" of a court is a decision made by the court settling a question in a case. 56 AmJur 2d 4, Orders §3. The Adams agreement has none of the characteristics of a court order. It purports to a contractual agreement between Mr. and Mrs. Adams, and nothing more. For example, its provision allowing either Mr. or Mrs. Adams to cancel the agreement without cause, by simply giving thirty days notice to the other, is very common in a typical contract, but is not characteristic of a court order. The district court's ruling that the Adams agreement should be treated as a court order stretches the definition of "court order" beyond the breaking point.

Fourth, the "in-kind" child support agreement was not signed by the judge. If it really was an order modifying the divorce decree, then it would have been an appealable order. As such, it would be a "judgment" under Utah law. Rule 54(a), Utah Rules of Civil Procedure. Under Utah law, ". . . all judgments shall be signed by the judge." Rule 58A(b), Utah Rules of Civil Procedure. (Emphasis added.) In the case of Wisden v. City of Salina, 696 P.2d 1205 (Utah 1985), the Utah Supreme Court held that an unsigned minute entry does not constitute a judgment, because it is not signed by the judge. In that case, at least, there was a minute entry indicating some manifestation of

judicial action, and even that was not enough without the judge's signature. In this case, not only is there no signature of the judge on the agreement, but there is no manifestation whatever of judicial action. The agreement should therefore have not been treated as an order modifying the divorce decree.

Fifth, Mr. Adams cannot argue that he was acting as his own attorney when the agreement was prepared and filed, and that he should be held to a lesser standard of compliance with the Rules of Civil Procedure. Even if such an argument that pro se litigants should be held to a lesser standard were valid, it would not apply in this case because the undisputed facts of this case show that the agreement was prepared by Mr. Adams' former attorney, that Mr. Adams received the advice of that attorney regarding the procedure to follow in modifying his child support obligation, that at the time the agreement was filed, Mr. Adams knew that by merely filing that agreement with the clerk's office, he had not obtained a formal modification of his child support obligation, and that the attorney who prepared the agreement advised Mr. Adams that it would be "better" if Mr. Adams would petition the court to modify the decree. (Transcript of Trial, September 14, 1989, page 40, lines 10-13; page 41, lines 12-15; page 44, line 13 through page 45, line 1.)

Finally, the district court, in giving effect to the "in kind" child support agreement, virtually ignored the interests of the Department and the taxpaying citizenry of Utah who were providing support for the children of Mr. and Mrs. Adams. "In-kind" child support arrangements are detrimental to the interests

of the Department because even though it is providing a monthly welfare check to the custodial parent, it is unable to recoup any of its public assistance costs from the father, who is satisfying his support obligation by making in-kind payments to the custodial parent. This gives the custodial parent a double benefit and leaves the Department without a remedy.

When counsel for the Department tried to get the court to take these interests into consideration, the district court made short shrift of his arguments. The following interchange took place when counsel for the Department tried to explain that the State has an interest in opposing in-kind child support arrangements involving public assistance recipients.

MR. PERRY: . . . [T]he State has an interest.

THE COURT: What's the interest of the State that would stop it?

MR. PERRY: The interest of the State is that they're now providing public assistance for those minor children.

THE COURT: So what?

(R. 60, lines 9-15)

To justify its determination to allow in-kind child support in this case, the court concluded that the Department should protect its interests by reducing the public assistance grants of custodial parents who receive in-kind child support. When counsel for the Department told the court that the law does not allow such a procedure, and offered to introduce legal authorities to that effect, the court would not hear him. That issue is covered in Point Six below.

Apart from the interests of the Department, such "in-kind" arrangements, in which a dwelling is provided in lieu of cash child support, are viewed with a certain degree of skepticism by the courts. This is because it may be in the best interests of the children to require cash support for them, instead of providing a particular dwelling for them. Also, when the obligor is the owner of the home being provided for the children (as in this case), such arrangements must be carefully scrutinized by the court. In the case of DeBry v. DeBry, a wife had stipulated to such an arrangement with her husband, and it was made part of the original divorce decree. Later, the wife petitioned the trial court to set aside her stipulation because it resulted in an unfair situation. The trial court denied her request. On appeal, the Utah Supreme Court reversed the trial court, and stated as follows:

. . . [I]n following the stipulation the court may have abused his discretion, for in awarding the mortgaged home to the husband he permitted his equity therein to be augmented with money which should have been made available for the support of the children. No provision is made for the husband to make any contribution to the support of the children except to furnish a roof over their heads. By the decree the husband increases his own wealth each time he makes a mortgage payment in lieu of support payment.

Where little children are involved, the court is not obligated to adopt or follow a stipulation of the parties which would not adequately provide for the care and welfare of the children. In a divorce suit the primary concern of the court is the welfare of the minor children, and the court should carefully scrutinize any agreement between the parties which might tend to affect adversely that welfare. 27 Utah 2d 337, 496 P.2d 92 (Utah 1972)

The record does not disclose whether the home provided by Mr. Adams is subject to a mortgage. But it should make no difference. When a home is owned by an obligor free and clear of any mortgage, the unfairness of the situation still exists because aside from paying property taxes and the cost of major repairs to the premises, he is not having to actually pay any money and is still receiving a full credit for paying child support.

Based on the foregoing reasoning, then, the Department respectfully submits that the district court erred in ratifying the "in-kind" child support agreement signed by Mr. and Mrs. Adams as a court order and in ruling that the Department was barred by said agreement from enforcing the child support provisions of the divorce decree signed by Judge Swan.

IV. If the district court's decision was to grant a modification at trial, relating it back to the date the Adams agreement was filed, the court committed reversible error by allowing an impermissible retroactive modification of a child support order, and by failing to properly consider the interests of the Department.

Instead of giving "order" effect to the agreement of Mr. and Mrs. Adams, it is possible that the district court intended to grant, on the date of the trial, a modification of Mr. Adams' child support obligation which related back to the date the agreement was filed with the court. This would be clear error.

First, retroactive modifications of child support orders are not allowed in Utah. Utah Code Ann. 30-3-10.6 (Supp. 1989); Seeley v. Park, 532 P.2d 684 (Utah 1975). They may relate back to the date a petition to modify is filed, but there was no petition to modify the child support order in this case. Utah Code Ann. 30-3-10.6 (Supp. 1989). It would be incorrect to construe the "in-kind" child support agreement as a petition to modify the decree because the agreement purports to be nothing more than a contract between Mr. and Mrs. Adams, cancellable on 30-days notice, and it contains no language requesting court approval. This conclusion is bolstered by Mr. Adams' own testimony at trial that at the time he filed the agreement, he knew it would not modify the child support order unless he also petitioned the court for a modification. (Transcript of Trial, September 14, 1989, page 44, line 19 through page 45, line 1).

Second, the district court failed to properly take into account the Department's interests, discussed extensively in the preceding sections, in receiving reimbursement of public assistance.

(It should also be noted that Utah law provides a rebuttable presumption that the amount of child support specified for a particular case under the child support guidelines is the correct amount of child support. Utah Code Ann. §78-45-7.2(2). If the court feels that it would be "unjust, inappropriate, or not in the best interest of a child" to apply the guidelines in a particular case to use the guidelines in a case, then it must make a specific finding to that effect. No such finding exists

in this case, yet the district court clearly departed from the child support guidelines.)

V. When a child support obligor is required by specific court order to pay a specific dollar amount of child support, he may not satisfy that obligation by providing a dwelling for the children to live in, particularly when the children are receiving public assistance and the party entitled to receive that child support is the Department of Social Services.

The record also can be read to indicate that instead of relating the modification back to the date the agreement was filed, the court made the modification fully effective at the date of trial, and credited Mr. Adams' in-kind payments up to that point against his original \$200.00 per month child support obligation. (Transcript of Trial, September 14, 1989, page 68, lines 4-14). If the court so ruled, it committed reversible error.

Child support obligations must be paid according to the terms of the underlying decree of divorce. A party who believes a change of circumstances justifies a change in the decree must petition the court for modification of the decree, rather than resorting to "self-help." This principle makes good sense, because otherwise, no one could rely on the efficacy of divorce decrees. Our system of family law would be undermined by parties who attempted to change their court-ordered rights and obligations without formally modifying those rights and obligations on the record. In the case of Ross v. Ross, 592 P.2d

600 (Utah 1979), the husband sought to credit "in-kind" child support payments against his cash child support obligation. The Supreme Court held that he was ". . . not entitled, however to credit for expenditures made on behalf of the children or [the wife] which do not specifically conform to the terms of the decree." 592 P.2d 500, at 603. (The court went on to say that if the wife were to consent to such an arrangement, then he could hold her to her agreement. But there is no authority to bind third parties, such as the Department, to such an agreement between the husband and wife.)

Utah law further bolsters this principle by providing that if child support installments are not paid on time they become final, unalterable judgments against the obligor. Retroactive modification of a child support order is not permissible, except that a modification order may relate back to the date notice of a petition for modification is given to the opposing party. Utah Code Ann. §30-3-10.6 (Supp. 1989). See also Seeley v. Park, supra.

For these reasons, it was improper for the district court to give Mr. Adams retroactive credit against his \$200.00 per month child support obligation, simply because he had provided his children with a dwelling whose rental value exceeded \$200.00 per month. Allowing Mr. Adams to receive child support credit because he provided the dwelling did not comply with the terms of the child support order which was in effect at the time. Giving the retroactive credit for in-kind support is no different in its effect from retroactively modifying the decree, which also should

not have happened in this case for the reasons discussed in the preceding section.

Giving retroactive credit for in-kind support becomes even more problematical when the children are receiving public assistance, and the support is owed to the Department. As is discussed above, such "in-kind" arrangements totally ignore the interests of the Department. They make it impossible for the Department to obtain reimbursement of public assistance provided to the children.

Accordingly, it was reversible error if the district court's judgment and order gave retroactive credit to Mr. Adams for in-kind child support paid. The Department is entitled to collect child support from Mr. Adams as per the terms of the original divorce decree, for time periods that public assistance was provided.

VI. Regardless of what the basis was for the district court's decision to allow a modification of Mr. Adams child support obligation, it erred in not permitting counsel for the Department to present authorities on a central issue.

In addition to failing to properly consider the interests of the Department in ruling on the merits of Mr. Adams' request for a modification, the district court erred in not allowing counsel for the Department to present authorities showing that public assistance grants may not be reduced by the value of in-kind child support received. This was a reversible error, depriving the Department of the opportunity to fully present its case to the court.

Although the presentation of those authorities now, when the case is on appeal, is of secondary importance, it is appropriate to highlight here the legal authorities which prevent the Department from reducing a welfare grant by the value of in-kind child support received.

In calculating the amount of welfare grant to which a recipient is entitled, the Department must determine the income of the family as defined in the rules and regulations governing the welfare program. The Utah Administrative Code lists a variety of types of income which may not be counted as income in determining the amount of a welfare grant, and states that "Unearned income in-kind is excluded." R. 810-213-303.1(8), Utah Administrative Code (Revised as of August 25, 1989). A copy of this rule is found in the addendum of this brief.

Child support is a form of unearned income. R. 810-213-303.1(18)(a), Utah Administrative Code (Revised as of August 25, 1989). (See addendum). Accordingly, all in-kind child support is not countable as income in any way for purposes of calculating the amount of a welfare grant. Accordingly, the Department may not reduce a welfare grant by the value of in-kind child support received by the custodial parent.

The rules cited above have been duly adopted pursuant to the provisions of the Utah Administrative Rulemaking Act (Utah Code Ann. §63-46a-1, (1953) as amended, et seq.) They have the effect of law. Utah Code Ann. §63-46a-2(13)(a). Accordingly, if the Department were to follow the district court's suggestion, and reduce a custodial parent's welfare grant by the value of in-kind

child support received, the Department would violate Utah law by so doing. Even though the arrangement seemed reasonable to the district court, it still is contrary to the law.

It should also be noted that federal regulations prevent the State from singling out in-kind child support, treating it as "countable income," and thereby reducing a welfare grant. Those regulations, which have the force of federal law, set out the general rule that in determining the need and amount of assistance a recipient is entitled to, a State must take all types of income into consideration in the same way, unless otherwise specifically authorized by federal statute. 45 CFR §233.20(1)(i) No federal statute authorizes States to treat in-kind child support differently from other types of unearned in-kind income, so the State must treat both of these items in the same way. Thus if Utah wanted to count in-kind child support as countable income, it would also have to count other forms of unearned in-kind income, such as food, clothing and supplies from churches and other charitable organizations. Utah has chosen not to include any of these items as countable income.

There can be little doubt that a major reason why the district court felt justified in changing Mr. Adams' child support obligation to an "in-kind" arrangement was that the court was confident that the Department could, and should, reduce Mrs. Adams welfare grant by the rental value of the home being provided for her and the children. This is evidenced, for example, in the conclusions of law, where the court stated as follows:

4. That it seems like a simple matter to apply any rent credit received as an offset on Plaintiff's grant. . . . (R. 84).

The transcript of the trial on September 14, 1989 also contains numerous statements by the court to the effect that the best thing for all parties concerned would be to allow the in-kind child support payments, and reduce Mrs. Adams' welfare grant accordingly. Consider, for example, the following interchange between the court and the Department's attorney:

THE COURT: Knowing that the value of the property or rental value is more than the \$200 child support, why couldn't the State have just told their client that they will reduce the grant by \$200?

MR. HUMMEL: Well, because the federal statutes will not allow the State to do that.

THE COURT: Why not?

MR. HUMMEL: Because the statute says--

THE COURT: Is there something unreasonable about it? (Transcript of Trial, September 14, 1989, page 61, line 18 through page 62, line 2)

See also similar statements by the court on pages 62, 63, 69, and 71 of the Transcript of Trial, September 14, 1989.

Principles of fundamental fairness and due process require that a party be given the opportunity to present legal authorities to the court which support its position. This is particularly important when the issue is one upon which the court is largely basing its decision. Normally, ample time is given the parties at the hearing to present their authorities. In appropriate circumstances, it is common for trial courts to give counsel the opportunity to submit supplemental briefs after trial to assist in resolving important issues.

Utah statute also requires the courts of this State to receive the Utah Administrative Code as an authorized compilation of the law of Utah. Utah Code Ann. §63-46a-16 (1953), as amended. This is another reason why the court should have allowed the Department's attorney to submit the authorities which are highlighted above.

In this case, however, the court would not allow counsel for the Department the opportunity to present authorities in support of the Department's position on this issue. The Department respectfully submits that the district court, by its statements to counsel for the Department, instead made it clear that the court had no interest in the Department's statutory and regulatory authorities on this point. The interchange quoted immediately above, in which the court interrupted counsel when counsel was preparing to explain why grant reduction is not allowed, is an example of this. Most notable is the following interchange between the court and the Department's counsel:

MR. HUMMEL: And I can provide you -- submit copies of the federal regulations.

THE COURT: I don't need them.

MR. HUMMEL: That covers that matter if the Court would like. . . .

THE COURT: If you stacked all the federal regulations having referred to just child support and related matters, how high would the regulations stack?

MR. HUMMEL: I don't know.

THE COURT: I don't either, but several feet. I know that. . . . (Transcript of Trial, September 14, 1989, page 63, line 20 through page 64, line 5)

If the court had given the Department the opportunity to present its authorities on this point, the district court might not have felt that it could rule the way it did. The Department respectfully submits that the court's refusal to allow its counsel to present those authorities was arbitrary and capricious and constituted reversible error.

VII. The facts and the law of this case demonstrate that the Department has acted reasonably and in good faith; the district court's ruling that the Department acted unreasonably and in bad faith, and that the Department should suffer a judgment for attorney's fees, is neither legally nor factually supportable, and was clearly erroneous.

The district court stated that its legal basis for entering judgment for attorney's fees against the Department was "bad faith" and "unreasonableness" on the part of the Department. (R. 85; Transcript of Trial, September 14, 1989, page 72, lines 17-22). The Department respectfully submits, however, that there was no legal or factual basis for requiring it to pay attorney's fees to Mr. Adams, and that the district court's order to that effect was clearly erroneous.

The Department has been unable to find any case or statutory authorities specifically allowing an award of attorney's fees when the court finds the actions of one of the parties to be in "bad faith" and "unreasonable." Section 78-27-56, Utah Code Annotated (Supp. 1989), however, provides for an award of attorney's fees in civil actions where an action is filed, or a

defense is raised, without merit and without good faith. It appears that the district court relied on this statute in making the award. That reads, in pertinent part, as follows:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith. . . .

This statute provides for an award of attorney's fees to a prevailing party to a civil action under the following circumstances:

A. The losing party brought an action, or asserted a defense to an action, and

B. The action, or defense, was without merit. This has been defined as "frivolous" or "of little weight or importance having no basis in law or fact." Cady v. Johnson, 671 P.2d 149, at 151 (Utah 1983) (Emphasis added), and

C. The action, or defense, was not brought, or asserted, in good faith. In Cady v. Johnson, supra, the Utah Supreme Court approved the following definition of "good faith":

(1) An honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay or defraud others.

To establish lack of good faith, one must prove that one or more of these factors is lacking.
(Cady v. Johnson, at 151.)

With this statutory backdrop, it is now appropriate to examine the facts which could be relevant to the attorney's fees issue, and to consider whether they justify the award in this

case (keeping in mind that Mr. Adams, as the moving party, had the burden of proof). The following is a summary of the facts the district court might have found relevant to this issue, if the district court believed all of the evidence presented by Mr. Adams, and resolved any disputed testimony in favor of Mr. Adams:

1. When Mrs. Adams applied for public assistance, she supplied the Department with a copy of her divorce decree and a copy of her agreement with Mr. Adams for "in-kind" child support. (Transcript of Trial, September 14, 1989, page 21, lines 4-12).

2. The divorce decree required Mr. Adams to pay child support in the amount of \$200.00 per month. (R. 13-14).

3. The "in-kind" child support agreement had never been formally modified. (R. 83).

4. The Department believed it was entitled to collect child support from Mr. Adams in the amount ordered in the divorce decree and took steps to do so. It send an advance notice to Mr. Adams of its intention to withhold income. (Transcript of Trial, September 14, 1989, page 11, lines 13-16; page 40, lines 14-23).

5. Mr. Adams then called the Department and talked with the investigator working the case about the "in-kind" child support agreement that he and Mrs. Adams had signed and filed with the clerk's office. Presumably, Mr. Adams asked the investigator to honor the terms of that agreement, and drop efforts to collect the support ordered in the divorce decree (Transcript of Trial, September 14, 1989, page 40, lines 5-13).

6. The investigator asked Mr. Adams if the agreement had been reduced to an order. Mr. Adams said that it had not been reduced to an order, but was an agreement between himself and his former wife. (Transcript of Trial, September 14, 1989, page 40, lines 7-10).

7. The investigator then told Mr. Adams that since the "in-kind" arrangement had not been ordered by the court, and was just an agreement between Mr. and Mrs. Adams, the Department was not bound by it and would have to proceed to collect child support from him as ordered in the divorce decree. (Transcript of Trial, September 14, 1989, page 40, lines 14-23).

8. Mr. Adams then retained counsel and served the Department with the order to show cause. (R. 27).

9. The Department ceased all income withholding procedures against Mr. Adams, but continued to take the position that it was not bound by the "in-kind" agreement and that it was desirous of collecting child support as ordered in the divorce decree. (Transcript of Trial, September 14, 1989, page 14, line 14 through page 15, line 3; page 40, lines 20-23).

10. On June 29, 1989, a hearing on the order to show cause was heard before the commissioner, who recommended that Mr. Adams essentially be granted the relief he had prayed for. (R. 79-81).

11. The Department objected to that recommendation and the matter was heard by the district judge in two separate hearings, one on August 8, 1989 and the other on September 14, 1989. The district judge ruled on the matter at the conclusion of the second hearing, sustaining the commissioner's recommendation and

awarding an increased amount of attorney's fees to Mr. Adams.
(R. 41, 45, 76).

12. Since the date it ceased the proceedings for income withholding, the Department has taken no action against Mr. Adams, with the single exception of the notice of tax intercept that was sent to Mr. Adams. (Transcript of Trial, September 14, 1989, page 28, line 13 through page 30, line 1; page 42, lines 13-24).

The Department respectfully submits that the district court's conclusion that the Department must pay Mr. Adams' attorney's fees was clearly erroneous, for the following reasons:

The Department's defense to this order to show cause proceeding is meritorious: In the context of Utah Code Ann. §78-27-56, it seems clear that the "civil action" involved is the order to show cause proceeding initiated by Mr. Adams against the Department. As is shown earlier in this brief, the Department's defense to Mr. Adams' action is meritorious. When the Department first became involved in this matter, it was faced with a situation where there was an existing, unmodified order for \$200.00 per month in child support. There was a separate agreement signed by the husband and wife in which they agreed to an in-kind child support arrangement, but that agreement had never been approved by the court. Since the parties to a divorce clearly cannot modify their decree by a mere agreement between themselves, the Department was completely justified in seeking to enforce the existing order of the court.

Counsel for Mr. Adams suggested at the trial that the Department should have sought to modify, or at least interpret, the divorce decree before collecting the \$200.00 per month child support. (Transcript of Trial, September 14, 1989, page 60, lines 2-5). Such a suggestion makes no sense, because the divorce decree was very clear on this point. Such a suggestion focuses the responsibility for this whole case in the wrong place. If Mr. Adams had simply had his former attorney obtain a formal modification, then this case would never have arisen. By his own testimony, Mr. Adams knew that his divorce decree had not been modified, and that it would have been better if he had petitioned the court for a modification. If any party's position in this case is without merit, it is Mr. Adams', not the Department's.

Since the Department's position is meritorious, there is no basis for awarding attorney's fees under Section 78-27-56.

Even if there were no merit to the Department's position, the Department has acted in good faith in defending this action. There is not one shred of evidence that the Department has asserted any defenses in this proceeding that have not been in good faith. Mr. Adams has not produced any evidence showing that the Department does not honestly believe that it should properly be allowed to collect child support from him. He has produced no evidence of Department intent to take unconscionable advantage of any person. He has also produced no evidence of intent to, or knowledge of, the Department that it is delaying, defrauding, or hindering any person.

Rather than showing any lack of good faith on the part of the Department, the evidence shows that the Department honestly believes in its propriety of its position, that it respects Mr. Adams' opposing position, and that it endeavored to present its defenses and arguments to the district court in a dignified and respectful manner. It was unjust for the district court to find the Department had acted in bad faith when the Department was simply trying to enforce the divorce decree. The Department could have had no idea that the district court would subsequently rule that the Department should have given "court order" effect to, and considered itself legally bound by, a mere agreement between Mr. and Mrs. Adams to which it was not a party. The district court's finding of bad faith was clearly erroneous.

A few brief comments are necessary regarding the tax intercept notices sent out by the Department. These notices are generated by computer each year. They are sent to persons who, according to Department records, owe child support arrearages. They are sent out automatically, without any conscious act by the investigator working each case, unless the investigator, before the notices are mailed out, enters a computer code telling the computer not to send a notice to a particular person. If a person receiving such a notice disputes the claimed child support arrearage, then he may do so. Procedures for so doing are spelled out in the notice. The Department concedes that in light of the commissioner's recommendation, it erred in sending the notice to Mr. Adams, but it submits that such action did not constitute making a claim, or asserting a defense, in a civil

action. It was an extrajudicial action completely. The sending of that letter could not legally subject the Department to an award of attorney's fees under Section 78-27-56. Perhaps if evidence had been introduced proving that such notice had been mailed in wilful disobedience of an order of the court (which was not the case!), the district court might have pursued a contempt citation against the Department. Section 78-27-56, however, would not have been available.

Even if this court were to find that the sending of the advance notice of tax intercept is the type of action that could subject the Department to an attorney's fee award under Section 78-27-56, the attorney's fee award in this case would still need to be reversed because the notice was not sent in bad faith. The elements required to prove lack of good faith, as quoted earlier, necessarily require that the party be conscious that it is doing the thing which is supposedly is being done with a lack of good faith. In this case, however, the notice was mailed automatically to Mr. Adams through a computer generated process. The Department acknowledges that it should have entered the necessary computer code to prevent such a notice from being sent to Mr. Adams. The Department's failure to do this, however, was a negligent oversight. There was no proof that the ORS investigator even knew the notice had been sent until Mr. Adams called him.

The Department respectfully submits that not only was the district court's decision to award the judgment for attorney's fees not supported by the relevant facts and law in this case,

but it appears that the court's decision was strongly influenced by extraneous matters which were not properly before the court, were not supported by evidence in the case, and should not have even been taken into consideration. For example:

(1) The court referred to the Department as a vast, complex bureaucracy that has an endless supply of money and unreasonably pressures people without reason. (Transcript of Trial, September 14, 1989, page 67, lines 2-11).

(2) The court stated that the Office of Recovery Services on a national level is strongly influenced by a "women's lib bias."

(Transcript of Trial, September 14, 1989, page 68, lines 18-20).

(3) The court stated that the State of Utah is in the forefront of pushing a national program, sometimes to meet federal requirements, but sometimes going beyond those requirements in order to "get the most from the federal government." (Transcript of Trial, September 14, 1989, page 68, line 22 through page 69, line 14.)

(4) The court referred to the Office of Recovery Services as a blind bureaucracy that can only see its own point of view and not what's reasonable. This was one of the court's formal written conclusions of law. (R. 84; Transcript of Trial, September 14, 1989, page 70, lines 2-4)

The Department, of course, vigorously disputes these apparent preconceived notions of the district court. It respectfully submits that in light of these extraneous factors which obviously influenced the court's decision, the award of

attorney's fees was not only unsupported by the facts and law of this case, but it was arbitrary and capricious.

The district court's award of attorney's fees is thus not support by either the facts or the law. The Department respectfully submits that the court's ruling on this point is clearly erroneous and should be reversed.

CONCLUSION

Based on the foregoing arguments, the Department respectfully asks this court for the following relief:

1. For an order reversing the judgment of the district court in all its aspects, reinstating the child support provisions of the original divorce decree, and expressly declaring that the Department is authorized to enforce the child support provisions thereof as authorized by law.


2. For an order holding that the "in-kind" child support agreement between Mr. and Mrs. Adams was nothing more than a private agreement between them, that it had no effect on the provisions of their divorce decree, and that the Department is not and has never been bound by that agreement.

3. For an order stating that if the any party desires to modify any provisions of the divorce decree, they shall do so in accordance with applicable procedural rules, including the rule

requiring the filing and service of a petition to modify.

DATED this 23rd day of February, 1990.

R. PAUL VAN DAM
Attorney General


BLAINE R. FERGUSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that I caused four copies of this Brief to be mailed to each of the following persons at the following addresses, postage prepaid, this 23rd day of February, 1990:

Scott W. Holt
Attorney for Defendant/Respondent Howard H. Adams
44 North Main
Layton, UT 84041

Karen Adams (Hill)
Plaintiff
977 North 600 West
Orem, UT 84057

Karen Adams (Hill)
Plaintiff
997 North 600 West
Orem, UT 84057


BLAINE R. FERGUSON
Assistant Attorney General

A D D E N D U M

EXHIBIT "A"	AGREEMENT BETWEEN MR. AND MRS. ADAMS
EXHIBIT "B"	ORDER ON ORDER TO SHOW CAUSE
EXHIBIT "C"	FINDINGS OF FACT AND CONCLUSIONS OF LAW
EXHIBIT "D"	JUDGMENT AND DECREE
EXHIBIT "E"	EXCERPT FROM UTAH ADMINISTRATIVE CODE

CLERK'S OFFICE
DAVIS COUNTY, UTAH

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, THE DISTRICT COURT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH: AK
DEPUTY CLERK

KAREN HATCH ADAMS,
(LISOMBEE),

Plaintiff,

vs

HOWARD H. ADAMS,

Defendant.

:
:
:
:
:
:
:

A G R E E M E N T.

No. ~~29881~~
24881

WHEREAS, the defendant is the owner of a home at Number 165 West 2000 North Street, in Layton, Utah, which home is now being occupied by the plaintiff as a dwelling for herself and her family; and

WHEREAS, the defendant is required to pay child support to the plaintiff monthly; and

WHEREAS, the reasonable monthly rental value of the said home is now in excess of the amount of child support required.

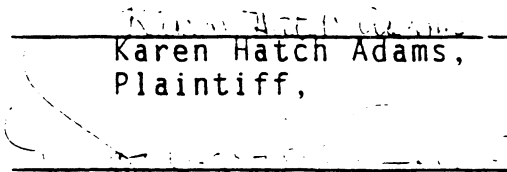
NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the plaintiff may continue to so occupy said home, and will accept such rental value instead of receiving a cash payment of child support each month the home is being so occupied. and that the plaintiff does hereby excuse the defendant from making cash payments of child support during such time.

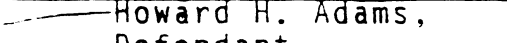
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2. That this agreement may be terminated by either party upon thirty (30) days notice to the other party, and that upon such termination, the plaintiff will surrender the possession of the home to the defendant, and the defendant will then resume payment of cash child support payments, to the plaintiff.

Dated: July 10, 1988.



Karen Hatch Adams,
Plaintiff,



Howard H. Adams,
Defendant.

SCOTT W. HOLT, #1532
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

FILED IN CLERK'S OFFICE

OCT 27 11 11 AM '88

CLERK OF DISTRICT COURT

BY RLB
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY,
STATE OF UTAH

KAREN HATCH ADAMS (LISONBEE),)	
)	ORDER ON ORDER TO SHOW
Plaintiff,)	CAUSE
vs.)	
HOWARD H. ADAMS,)	
)	
Defendant.)	Civil No. 24881

This matter having come on regularly for hearing upon Defendant's Motion on the 29th day of June, 1989, before Maurice Richards, Domestic Commissioner of the above entitled Court.

Plaintiff was present pro se, Defendant was present represented by his attorney, SCOTT W. HOLT, and the State of Utah, Office of Recovery Services was represented by KARL G. PERRY, Assistant Attorney General.

The Court, after having reviewed the file and the parties' stipulation filed on July 27, 1988, and after listening to the parties' counsel's representations and arguments and for good cause thereby appearing, does hereby

ORDER, ADJUDGE AND DECREE:

1. That the parties entered into a Stipulation on the 27th of July, 1988 where in lieu of child support, Defendant would allow

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Plaintiff to reside at the premises located at 165 West 200 North, Layton, Utah, rent free.

2. That the agreement was a reasonable agreement and not an attempt to defraud or evade child support, the rental value being equal or greater than the child support Defendant was required to pay.

3. That Plaintiff went on welfare in March, 1989; that Plaintiff furnished to the State of Utah a copy of the parties' agreement.

4. That the State knew of the parties' agreement, which, although not reduced to a written order, was sufficient to be deemed as if an Order had been drafted by the Court.

5. That the State, after being informed of the parties' agreement proceeded to obtain a judgment and/or garnish Defendant's wages; that Defendant incurred necessarily attorney's fees in this matter in defending the State's action and bringing this action.

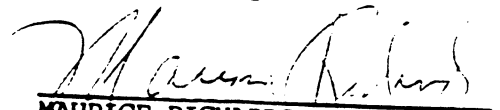
6. That the parties' agreement is approved and its terms are hereby incorporated as if fully set forth herein.

7. That the State is permanently enjoined from attempting to enforce any income withholding in this matter.

8. That Defendant is awarded judgment in the sum of \$150.00 together with costs incurred in this action in the amount of \$6.90 as against the State of Utah, Office of Recovery Services.

DATED this 16 day of ^{October} ~~July~~, 1989.

Recommended by:


MAURICE RICHARDS
Domestic Commissioner

Recommendations approved and accepted this ____ day of July,
1989.

DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

KARL G. PERRY
Attorney for State of Utah
Office of Recovery Services

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Order on Order to Show Cause was mailed to KARL G. PERRY, Attorney for State of Utah, Office of Recovery Services, at 225 South 200 West, P.O. Box 699, Farmington, Utah 84025 and to Plaintiff, Karen Hatch Adams (Lisombee) at 165 West 200 North, Layton, Utah 84041 this 6th day of July, 1989 by depositing same in the U.S. Mail, postage prepaid.



Gayle Hansen

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

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CLERK OF DISTRICT COURT

BY

SCOTT W. HOLT, #1532
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY,
STATE OF UTAH

KAREN HATCH ADAMS (LISOMBEE),)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
HOWARD H. ADAMS,)	
Defendant.)	

75072-88,
Civil No. 24881

This matter having come on regularly for hearing on the 14th day of September, 1989 for further hearing based upon the State of Utah's objection to the recommended Order of the Domestic Commissioner, Maurice Richards, which matter was heard without a jury by the Honorable Douglas L. Cornaby, one of the Judges of the above entitled Court.

The State of Utah was represented by Richard A. Hummel of the Utah State Attorney's Office, Plaintiff was present pro se and the Defendant was present, represented by Scott W. Holt.

The Court, after reviewing the file and record in this matter, hearing the testimony of the parties, their respective witnesses and testimony and the representation and arguments of their respective counsel and for good cause thereby appearing, the Court does hereby make the following Findings of Fact and

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Conclusions of Law:

FINDINGS OF FACT

1. That the Plaintiff and Defendant desired to amend the parties' original decree of divorce to provide that Defendant would not pay child support in lieu of charging rent to Plaintiff.

2. That the parties' entered into a Stipulation and Agreement amending the Decree which was filed with the Clerk's office on the 27th of July, 1988.

3. That the fair market rental value of the house that Plaintiff occupied was worth at least \$300.00-\$350.00 per month.

4. That Defendant was under a duty of support at the rate of \$100.00 per month for each of the two children of the parties.

5. That there was no order accompanying the parties' stipulation which was filed with the Court, but the Court was made aware of what was happening between the parties; the Decree was not however formally modified.

6. That in March or April, 1989 Plaintiff applied for welfare and furnished a copy of the stipulation as part of her application.

7. That on May 5, 1989, this action was filed to estop the State of Utah from garnishing Defendant's wages or entering judgment for child support.

8. That the advance notice of income withholding was received by the Defendant on or about April 19, 1989.

9. That the Defendant had a conversation with Mr. Coombs, prior to the Notice of Withholding being received by Defendant, that

Defendant would be receiving said notice.

10. That Defendant was informed that the Stipulation wasn't binding and that the State intended to go ahead and collect the child support.

11. That Defendant had received a Notice from the State that it was going to withhold monies for child support from his tax return and affect his credit, which notice was sent after the last hearing on this matter and after the Court had indicated its position with regards to the parties' stipulation.

12. That this matter is now at a third time before this Court and all through this process, the State has insisted that it was going to collect the child support from Defendant irregardless of what the Court has indicated in this matter.

CONCLUSIONS OF LAW

1. That Defendant was compelled to bringing this action by reason of the State's position in this case.

2. That Defendant does not owe anybody one dime for back support in this matter up to today's hearing date.

3. That the Court asked the attorneys to settle this matter because of the State's objection to the previous award of \$150.00 attorney's fees and who would pay it.

4. That it seems like a simple matter to apply any rent credit received as an offset on Plaintiff's grant; that it appears that the Bureaucracy is so big and blinded that it only sees its point of view and in this case, it hasn't been reasonable and has been blind to fairness and reasonableness of the facts of this case.

5. That the action taken by the State to threaten to collect child support, threaten garnishment and withholding of Defendant's tax return was not based upon good faith and that the action was brought upon bad faith from the beginning to the end with the State being fully aware of the parties' agreement.

6. That the State and the parties have appeared on three difference occasions and have objected to the judgment of the Court and attorney's fees but never offered any relief.

7. That Office of Recovery Services has been unreasonable and because of their bad faith and unreasonableness it is proper that they pay part of Defendant's attorney's fees in this matter in the amount of \$476.00 and costs incurred.

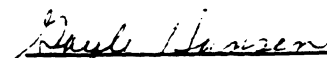
8. That the previous order entered by the Domestic Commissioner is sustained.

DATED this 26 day of October, 1989.


DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Findings of Fact and Conclusions of Law was mailed to the Attorney for the State of Utah, Richard A. Hummel, at 225 South 200 West, P.O. Box 699 Farmington, Utah 84025 and to the Plaintiff, Karen Hatch Adams (Lisombee), at 165 West 2000 North, Layton, Utah 84041 this 5th day of October, 1989 by depositing same in the U.S. Mail, postage prepaid.



FILED IN CLERK'S OFFICE
CLERK

OCT 27 11 10 AM '89

CLERK OF DISTRICT COURT

BY _____

SCOTT W. HOLT, #1532
Attorney at Law
44 North Main
Layton, Utah 84041
Telephone: (801) 546-1264

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY,
STATE OF UTAH

KAREN HATCH ADAMS (LISOMBEE),)	
Plaintiff,)	JUDGMENT AND DECREE
vs.)	
HOWARD H. ADAMS,)	
Defendant.)	Civil No. 24881

This matter having come on regularly for hearing on the 14th day of September, 1989 for further hearing based upon the State of Utah's objection to the recommended Order of the Domestic Commissioner, Maurice Richards, which matter was heard without a jury by the Honorable Douglas L. Cornaby, one of the Judges of the above entitled Court.

The State of Utah was represented by Richard A. Hummel of the Utah State Attorney's Office, Plaintiff was present pro se and the Defendant was present, represented by Scott W. Holt.

The Court, after reviewing the file and record in this matter, hearing the testimony of the parties, their respective witnesses and testimony and the representation and arguments of their respective counsel and based upon the Findings of Fact and Conclusions of Law, and for good cause thereby appearing, it is

JUDGMENT ENTERED

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hereby

ORDERED, ADJUDGED AND DECREED:

1. That the previous order entered herein by the Domestic Commissioner, Maurice Richards, is sustained.

2. That the Defendant is awarded judgment as against the State of Utah, in the amount of \$476.00 together with costs incurred in the amount of \$5.00 for part of Defendant's attorney's fees which he incurred.

DATED this 22 day of November, 1989.


DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Judgment and Decree was mailed to the Attorney for the State of Utah, Richard A. Hummel, at 225 South 200 West, P.O. Box 699 Farmington, Utah 84025 and to the Plaintiff, Karen Hatch Adams (Lisombée), at 165 West 2000 North, Layton, Utah 84041 this 24 day of October, 1989 by depositing same in the U.S. Mail, postage prepaid.


Gayle Hansen

R810-213-300 Need and Amount of Assistance

R810-213-303 Income

The department shall enforce the standards described in 45 CFR 233.20, 233.53, 232.20, and 232.21 which are hereby adopted and incorporated by reference. Amendments required by the Tax Reform Act of 1986 (P.L. 514) and the Family Support Act of 1988 (P.L. 100-485) have been incorporated.

303.1 Current Departmental Practices

1. All bona fide loans are excluded. A bona fide loan is a loan which has been contracted in good faith without fraud or deceit and genuinely endorsed in writing for repayment.
2. Support and maintenance assistance is excluded.
3. The value of food stamp coupons is excluded.
4. The value of special circumstance items is excluded if the items are paid for by donors.
5. The value of governmental rent and housing subsidies is excluded.
6. The income of dependent children is counted when determining eligibility based on gross income and need. It is disregarded when determining payments if the child is:
 - a. In school or training full-time.
 - b. In school and training part-time, if employed less than 100 hours.
 - c. In JTPA.
7. An amount up to \$175 per month per child under age two and \$160 per month per child age two and older is allowed as an earned income deduction for part-time employment.
8. Unearned income in-kind is excluded.
9. Home energy assistance is excluded.
10. Cash gifts for special occasions which do not exceed \$30 per quarter for each person in the assistance unit are excluded. The gift can be divided equally among all members of the assistance unit.
11. \$30 is deducted from rental income unless greater expenses can be proven. Expenses in excess of \$30 can be allowed for:
 - a. Taxes and attorney fees needed to make the income available,
 - b. Upkeep and repair costs necessary to maintain the current value of the property. Only the interest can be deducted on a loan or mortgage made for upkeep or repair.
 - c. If meals are provided to a boarder, the value of a one-person food stamp allotment is deducted.
12. The IV-A state plan provides that assigned support payments retained in violation of 45 CFR 232.12(b)(4) are subject to IV-D recovery.
13. An individual's income is allocated for his own support and others living with him when the individual is not applying for or receiving assistance. Those included for allocation are:
 - a. The following non-sanctioned individuals:
 - (1) the individual who is not in the assistance unit and whose income is being counted, and
 - (2) the individual's non-recipient dependants or others:
 - (a) who are or could be claimed as dependents for determining federal income tax, or
 - (b) whom the individual is legally obligated to support.
14. All applicants and recipients must apply for all benefits for which they are entitled with the exception of Supplemental Security Income (SSI).
15. Shelter, utilities, and other similar needs are not prorated when the AFDC assistance unit lives together with other individuals as a household.
16. All money received on a sales contract from an exempt property or an insurance settlement for destroyed exempt property is counted unless the income is used to purchase replacement property in accordance with 304.1 below.
17. When an ineligible alien is a parent and the children are deprived of

... apply to this section:

a. Unearned income is cash received for which the individual performs no service.

b. A full-time student is a person enrolled for the number of hours defined by the particular institution as fulfilling full-time requirements.

c. A part-time student is a person who is enrolled for at least one-half the number of hours or periods considered by the institution to be customary to complete the course of study within the minimum time period. If no schedule is set by the school, the course of study must be no less than an average of two class periods or two hours per day, whichever is less.

d. School attendance means a person is enrolled in a public or private elementary or secondary school, a university or college, a vocational or technical school or the Job Corps, for the express purpose of equipping himself with skills that will lead to gainful employment.

e. Quarter means any one of the three month periods of January through March, April through June, July through September, October through December.

f. Full-time employment is an average of 100 or more hours of work per month or an average of 23 hours per week.