

1990

Mary L. Pickard, and State of Utah v. Keith F. Pickard : Brief of Appellant

Utah Court of Appeals

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Frank H. Butterfield; Ray E. Gammon; assisant attorney general; attorneys for plaintiff.

Keith F. Pickard; defendant pro se.

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 900398-CA

IN THE UTAH COURT OF APPEALS

MARY L. PICKARD, and
STATE OF UTAH, by and through
Utah State Department of Human
Services

Plaintiffs and Respondents,

v.

KEITH F. PICKARD,
Defendant and Appellant.

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BRIEF OF THE APPELLANT

Court of Appeals No.
900398-CA

**APPEAL
FROM THE FOURTH DISTRICT COURT OF UTAH COUNTY,
JUDGE CULLEN Y. CHRISTENSEN**

Opposing Counsel:

Mr. Frank H. Butterfield
Attorney for Plaintiff
140 West 800 North, Suite 204
Orem, UT 84058

Mr. Ray E. Gammon
Assistant Utah Attorney General
Utah Department of Human Services
150 East Center
Provo, UT 84601

Party Filing Brief:

Keith F. Pickard
Pro Se
P.O. Box 371
Provo, UT 84603

Argument Priority Classification: 16

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<u>Ostler v. Ostler</u> , (789 P.2d 713, (Utah Ct. App. 1990))	9, 16, 17

CONSTITUTIONAL PROVISIONS CITED:

United States Constitution, Amendment 14, Section 1	3, 12, 24
Utah Constitution, Article VIII, Section 10	3, 12, 26

UTAH STATUTES CITED:

Utah Code Annotated § 30-3-10.6.	3, 11, 24
Utah Code Annotated § 78-45-3	3, 4, 10, 12, 18, 19, 26
Utah Code Annotated § 78-45-4	3, 4, 10, 12, 18, 19, 24
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JURISDICTION:

Jurisdiction is granted to the Utah Court of Appeals by the Utah Rules of Appellate Procedure, Rule 3(a) which states in pertinent part:

"As provided and defined by law, an appeal may be taken from the final orders and judgments of a district court, juvenile court, or circuit court to the Court of Appeals by filing a notice of appeal with the clerk of the particular court from which the appeal is taken within the time allowed by Rule 4."

Pursuant to Title II, Rule 3 of the Rules of the Utah Court of Appeals, this appeal is taken from the Fourth Judicial District Court of Utah County, Utah to the Utah Court of Appeals.

STATEMENT OF THE ISSUES:

This appeal revolves around four central issues:

1) Whether the Court committed Reversible error by failing to make findings to rebut the Uniform Child Support Guidelines as required by U.C.A. § 78-45-7, by failing to follow the Uniform Child Support Guidelines in absence of findings to rebut the guidelines as required by U.C.A. § 78-45-7, and by failing to follow other mandatory requirements of U.C.A. § 78-45 as they relate to imputation of income and Plaintiff's responsibility to support the parties' minor child;

2) Whether the evidence supported a finding that the Defendant was willfully underemployed and whether the Court abused its discretion by failing to make child support retroactive when the trial delay was not the fault of the Defendant but the fault of the Court, and by imputing income to Defendant based upon the arrearages incurred during the Court-caused delay;

3) Whether the Court denied the Defendant his Constitutional right of equal protection of the law by requiring him to provide for the support of the parties' minor child rather than requiring both parties to do so as required by U.C.A. § 78-45-3 and U.C.A. § 78-45-4, and by allowing Plaintiff an opportunity to complete her education while denying Defendant the same opportunity to do so;

4) Whether the Court practiced law from the bench in violation of the Utah State Constitution when he gave legal advice to Plaintiff.

DETERMINATIVE STATUTES:

The following statutes are determinative in this appeal:

United States Constitution, Amendment 14, Section 1

Utah Constitution, Article VIII, Section 10

Utah Code Annotated § 30-3-10.6 (2)

Utah Code Annotated § 78-45-3

Utah Code Annotated § 78-45-4

Utah Code Annotated § 78-45-7

Utah Code Annotated § 78-45-7 (2)

Utah Code Annotated § 78-45-7 (3)

Utah Code Annotated § 78-45-7.2 (1)

Utah Code Annotated § 78-45-7.2 (2)

Utah Code Annotated § 78-45-7.2 (3)

Utah Code Annotated § 78-45-7.5 (1)

Utah Code Annotated § 78-45-7.5 (2)

Utah Code Annotated § 78-45-7.5 (3)

Utah Code Annotated § 78-45-7.5 (5)

Utah Code Annotated § 78-45-7.5 (7)(c)

Utah Code Annotated § 78-45-7.5 (7)(d)(iii)

Utah Code Annotated § 78-45-7.7

Utah Code Annotated § 78-45-7.14

STATEMENT OF THE CASE:

STATEMENT OF NATURE:

This appeal is from a final decree of the Fourth Judicial District Court of Utah County, Utah, signed and filed June 25, 1990, modifying a prior Decree of Divorce.

COURSE OF PROCEEDINGS:

1) Plaintiff initiated the original cause of action by filing a complaint for divorce on August 24, 1987, Civil No. CV 87-1946. Defendant responded by filing a complaint for divorce, Civil No. CV 87-2002. The two causes of action were consolidated by the Trial Court in October of 1987.

2) The Defendant was granted a divorce from Plaintiff by a Decree of Divorce signed by the Honorable Cullen Y. Christensen and entered with the Clerk of the Court on November 30, 1988

3) Trial on the original cause of action was held in the Fourth Judicial District Court of Utah County on Thursday, February 2, 1989, and Monday, February 6, 1989, and concluded on Thursday, February 9, 1989.

4) The Trial Court entered a Memorandum Decision with the Clerk of the Court on April 25, 1989.

5) Custody determination and property settlement were made, and Plaintiff was granted a divorce from Defendant by a Decree of Divorce signed by the Honorable Cullen Y. Christensen and entered with the Clerk of the Court on May 16, 1989.

6) The Defendant petitioned the Court for a Modification of the Divorce Decree on September 25, 1989, which was heard on June 20, 1990. The Court entered the order from which this appeal is taken on June 25, 1990.

7) The Defendant filed Notice of Appeal on July 20, 1990 with the clerk of the trial court. The Defendant then filed a Docketing Statement for this matter with the Clerk of the Court of Appeals on August 9, 1990.

DISPOSITION AT TRIAL COURT:

This appeal is from a final decree of the Fourth Judicial District Court of Utah County, Utah.

MATERIAL FACTS:

The Defendant was divorced from the Plaintiff by a Decree of Divorce signed and entered with the Clerk of the Court on November 30, 1988. Property settlement and custody determination were finalized in a decree signed and entered with the

Clerk of the Court on May 16, 1989. In this decree, Plaintiff was allotted alimony in excess of \$200 per month. The Defendant was ordered to pay child support of \$174, as per the Uniform Child Support Guidelines. In conjunction with this second decree, Judge Cullen Y. Christensen saw fit to grant Plaintiff a decree of divorce from the Defendant in addition to the court's prior divorce order.¹

From the time of the initial filing of the divorce action, the Defendant has voluntarily paid all child support and separate maintenance ordered by the court. On June 17, 1989, Defendant was laid-off from his job due to organizational changes.² At this time, the defendant became unable to maintain his child support, alimony, payments on marital debts, and living expenses.³ In early July of 1989, in light of these circumstances, defendant requested Attorney Craig M. Snyder, to initiate proceedings for a modification. The defendant vigorously sought employment during this time.⁴

On July 5, 1989, Defendant was offered a temporary full-time position with the staff at BYU's Law Library. However, this position would become part time with the initiation of the new school year.⁵ At this time the defendant made the

¹ *Record*, page 168, "Decree of Divorce;" and page 218, "Memorandum Decision."

² *Record*, page 328, "Transcript of Hearing," p. 18, line 5.

³ *Record*, page 328, "Transcript of Hearing," p. 36, line 24; and page 309, Tables, "Order Modifying Decree of Divorce."

⁴ *Record*, page 328, "Transcript of Hearing," p. 18, line 21.

⁵ *Record*, page 328, "Transcript of Hearing," p. 19, line 12.

determination that it would be necessary to complete his degree, before any career advancement could be possible.⁶

Mr. Snyder filed Defendant's Petition for Modification on September 25, 1989.⁷ The modification was to be heard by Judge Christensen. This matter was docketed for pre-trial or trial hearing on multiple occasions, including the eventual hearing on June 20, 1990.⁸

Due to Judge Christensen's illness, injuries, and subsequent recuperation, the matter was repeatedly postponed. The hearing was further delayed when a pro tempore judge refused to hear the case citing the complexity of the issues.⁹ In the interim, Defendant was again involuntarily released from employment, this time from the Law Library on April 26, 1990.¹⁰ Diligent effort was made by Defendant to secure employment from that time until the time of the trial.¹¹ On June 20, 1989, the case was eventually heard by Judge Christensen, who delivered his decision

⁶ *Record*, page 328, "Transcript of Hearing," p. 19, line 18.

⁷ *Record*, page 271, "Petition for Modification of Decree of Divorce."

⁸ *Record*, page 328 line 7 through line 20, "Transcript of Hearing," p. 61. (See also: page 271, "Petition for Modification of Decree of Divorce;" page 292, "Request for Trial Setting;" page 297, "Notice of Pre-Trial;" page 298, "Trial Date Scheduled;" page 299, "Minute Entry" by Judge Allen B. Sorensen; and page 300, "Trial.")

⁹ *Record*, page 299, "Minute Entry" by Judge Allen Sorensen.

¹⁰ *Record*, page 328, "Transcript of Hearing," p. 20, line 9.

¹¹ *Record*, page 328, "Transcript of Hearing," p. 36, line 22.

from the bench.¹² The written Order Modifying Decree of Divorce, including the Findings of Fact and Conclusions of Law, was signed and entered with the Clerk of the Court on June 25, 1990.¹³

Defendant brings this appeal requesting the decision be reversed and remanded for rehearing asserting that the trial court's decision reflects manifest error, abuse of discretion, and violation of Defendant's Constitutional right to equal protection of the law.

SUMMARY OF THE ARGUMENT:

Defendant brings this appeal based upon four issues: 1) Reversible Error, 2) Abuse of Discretion, 3) Denial of Defendant's Constitutional Rights, and 4) the Practice of Law by the Court.

REVERSIBLE ERROR:

The Trial Court committed several reversible errors in this case. First and foremost, the Court failed to follow or properly enter findings to rebut the legislative presumptions found in Utah State Law under Sections 78-45-7 and 7.2. Pursuant to this statute, the Court is required to use both parties' financial positions in determining a support award pursuant to statute and recent case law, which this

¹² *Record*, page 328, "Transcript of Hearing," p. 56, line 19.

¹³ *Record*, page 311, "Order Modifying Decree of Divorce."

Court failed do. Both Parties were unemployed at the time of the trial. Both parties had been working from the time of the Petition for Modification until some time shortly before the date of the actual hearing. But the Court only used the Defendant's (imputed) income in determination of the support award. As such, the Court constructively refused to follow the Utah Code.

U.C.A. § 78-45-7.2 requires the Court to apply the guidelines unless the evidence rebuts the presumptions in the statute. The Court, however, by failing to find evidence to rebut U.C.A. § 78-45-7.2, became subject to U.C.A. § 78-45-7 (3). The Court found that there was a material change of circumstances, constructively rebutted the guidelines but then failed to present specific findings of fact as required by the statute. Specifically, the Court failed to address:

- a) the standard of living and situation of the parties;
- b) the relative wealth and income of the parties;
- c) the ability of the obligor to earn;
- d) the ability of the obligee to earn;
- e) the needs of the obligee, the obligor, and the child;
- f) the age of the parties;
- g) the responsibility of the obligor for the support of others.¹⁴

In several cases on point heard this year, the Utah Court of Appeals held that such an omission constituted reversible error. First, in Jefferies v. Jefferies, (752 P.2d 909 (Utah App. 1988)) and then again in Ostler v. Ostler (789 P.2d 713, Utah App.

¹⁴ Utah Code Annotated, Section 78-45-7 (3).

1990) the Court of Appeals stated that because these factors "constitute material issues," that "failure to enter specific findings on each of the factors is generally reversible error."¹⁵ The Court of Appeals later supported the Ostler Court's decision in Durfee (Wolf) v. Durfee (140 Utah Adv. Rep. 42 (Utah Ct. App. August 9, 1990)) and again in Allred v. Allred (141 Utah Adv. Rep. 14 (Utah Ct. App. August 13, 1990)) by reversing and remanding both cases due to the trial courts' failure to enter specific findings on each of the above issues after a material change in circumstances had been found.¹⁶

Additionally, the Court committed reversible error by imputing income to the Defendant when such imputation is in direct violation of Utah statute. U.C.A. § 78-45-7.5 (7) (d) states in pertinent part that

"Income may not be imputed if any of the following conditions exist:

(iii) a parent is engaged in career or occupational training to establish basic job skills;"¹⁷

The Court also committed reversible error by failing to follow Utah Statute and failing to recognize in any way the Plaintiff's responsibility to support the parties' child, pursuant to U.C.A. § 78-45-4. This is not to the exclusion of the Defendant's responsibility under U.C.A. § 78-45-3, but rather to the combination of

¹⁵ *Jefferies v. Jefferies*, 752 P.2d at 911; See also *Ostler v. Ostler*, 789 P.2d, at 715.

¹⁶ See also: *Layton v. Layton*, 777 P.2d 504 (Utah Ct. App. 1989) (Remanded on lack of sufficient findings), *Bake v. Bake*, 772 P.2d 461 (Utah Ct. App. 1989) (Similarly remanded on lack of sufficient findings), and *Johnson v. Johnson*, 771 P.2d 696 (Utah Ct. App. 1989) (Also remanded on lack of sufficient findings).

¹⁷ Utah Code Annotated § 78-45-7.5 (7) (d) (iii)

responsibility in equal part of the parties. The parties share the responsibility co-equally, without regard to custody or gender.¹⁸ The Court is also directed to require of both parties employment history and other financial data in determining a just award.¹⁹ Instead, the Court based its findings solely on the Defendant's imputed income, even after being informed by Counsel as to the need for equality in this matter.²⁰

ABUSE OF DISCRETION:

The Court abused its discretion by finding that the Defendant was willfully underemployed. Such a finding, however, is completely unsupported by the evidence presented at trial. The only evidence presented at trial was Defendant's testimony regarding his search for employment during his two periods of unemployment. The Defendant believed that to continue his basic educational pursuits was sanctioned by the Court due to the fact that it had openly supported Plaintiff's efforts in doing so, and that the original decree made mention of that intention and was silent as to any objection to doing so.²¹ Furthermore, the

¹⁸ *Allred v. Allred*, 141 Utah Adv. Rep. at 16 (quoting 98 A.L.R.3d 1146, 1150 (1989)).

¹⁹ Utah Code Annotated, Section 78-45-7.5 (5) (b), (1989). Defendant voluntarily submitted this information.

²⁰ *Record*, page 328, "Transcript of Hearing," pp. 56, line 5, through 57, line 9.

²¹ *Record*, page 227, paragraph 8, "Memorandum Decision."

Defendant testified that he searched diligently for employment both in June of 1989 and again in Spring of 1990 and no evidence was ever presented to the contrary.²²

The Court also abused its discretion by imputing income based upon its erroneous finding that Defendant was willfully underemployed and upon arrearages incurred by the Defendant prior to the trial. Had the Court heard the case in a timely manner, the arrearages would have been relatively insignificant. Indeed, the Defendant would have been only \$335 in arrears of Child Support, instead of \$1,562.89 as claimed by Plaintiff and supported by the Court.²³ Public policy and due process considerations suggest that the Defendant's case should not be jeopardized or in any way prejudiced by actions of the Court or any third party.

The Court abused its discretion by failing to make its order for modified support retroactive to the date of filing of the petition for modification, pursuant to U.C.A. § 30-3-10.6. The Court's refusal to make the order retroactive is based solely upon the erroneous finding that Defendant has not been diligent in paying support and is supported in its entirety by the level of arrearages.²⁴ Again, had the Defendant been given an opportunity to have his petition heard within a reasonable period of time, such arrearages would be negligible. The purpose of the policy of retroactivity under the statute is to provide the petitioner with a position as though

²² *Record*, page 328, "Transcript of Hearing," p. 18, line 21, p. 21, line 9, and p. 36, line 22.

²³ *Record*, page 309, "Findings of Fact and Conclusions of Law", Table of support.

²⁴ *Record*, page 328,, "Transcript of Hearing," pp. 60, line 25,through page 61, line 20 (See also *Record*, page 328, "Transcript of Hearing," p. 69, line 9.)

the case had been heard upon the filing of the petition, thus removing any bias created by the Court's delay, whether or not that delay was reasonable.

DENIAL OF CONSTITUTIONAL RIGHTS:

The Court denied Defendant's rights under the Utah and the United States Constitutions. First, the Court refused to allow equal educational opportunity to the parties. The Court has allowed the Plaintiff to continue her educational pursuits but has effectively denied the Defendant's desire to do likewise.²⁵ The Court also refused to apply statutes equally. U.C.A. § 78-45-3 and § 78-45-4 succinctly declare both father and mother to be equally responsible in the support of their children. The Court, however, required only the Defendant (father) to provide for his child. Even upon recommendation of Counsel to consider Plaintiff's financial potential in addition to the Defendant's, the Court refused to consider anything but the Defendant's (imputed) income. Such a position is clearly a denial of equal protection of the law pursuant to the U.S. Constitution, Amendment 14 Section 1, and is therefore reversible error.

PRACTICE OF LAW FROM THE BENCH:

Finally, the Court violated the Utah State Constitution by advising and encouraging Plaintiff on four separate occasions to submit proper filings in the

²⁵ *Record*, page 328, "Transcript of Hearing," p. 57, line 2.

future regarding reinstatement of alimony.²⁶ The Court went so far as to determine what level of alimony would be awarded upon such filing. Such action constitutes the practice of law and is contrary to the Utah Constitution, Article VII, Section 10.

CONCLUSION:

Based, therefore on the manifest, reversible error of the Court, the Court's abuse of Discretion, the manifest denial of the Defendant's Constitutional rights, and the Court's practice of law from the bench, Defendant prays the Utah Court of Appeals to reverse the decision of the Trial Court, and remand the matter back to district court for a fair and impartial hearing.

ARGUMENT:

Defendant brings this appeal based upon four issues: 1) Reversible Error, 2) Abuse of Discretion, 3) Denial of Defendant's Constitutional Rights, and 4) The Practice of Law by the Court from the bench.

²⁶ *Record*, page 328, "Transcript of Hearing," p. 7, line 13, p. 61, line 13, p. 62, line 10, and p. 63, line 10.

REVERSIBLE ERROR:

FAILURE TO FOLLOW OR REBUT CHILD SUPPORT GUIDELINES.

The Trial Court committed several reversible errors in this case. First and foremost, the Court failed to follow or properly enter findings to rebut the legislative presumptions found in Utah State Law under Sections 78-45-7 and 7.2. U.C.A. § 78-45-7.2 states in pertinent part:

"The guidelines apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989."²⁷

These guidelines provide that a proportionate contribution toward support must be made by each parent. In Allred v. Allred, (141 Utah Adv. Rep. 14, (Utah Ct. App. August 1989).), the Court held that the guidelines must be followed unless the trial court found them to be improper. If the trial court finds the guidelines to be improper then it is required to make specific findings as to why it did not follow them.²⁸ Thus the Court is required to use both parties' financial positions in determining a support award. (See U.C.A. § 78-45-7.7 and 7.14) In this case, the trial court failed to do so. Both parties had worked until just prior to trial on modification. However, the trial court only imputed income to the Defendant and

²⁷ Utah Code Annotated § 78-45-7.2 (1)(a).

²⁸ *Allred v. Allred*, 141 Utah Adv. Rep, at page 16, and footnote 3, page 17.

none to the Plaintiff.²⁹ As such, the Court did not follow the guidelines. It was then required to make specific findings which it did not do.

U.C.A. § 78-45-7.2 requires the Court to apply the guidelines unless rebutted.

It states:

"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 and the award amounts resulting from the application of the guidelines are presumed to be correct, unless rebutted under the provisions of this section."³⁰

When a court fails to follow the guidelines, it becomes subject to U.C.A. § 78-45-7 which states:

"Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee."³¹

It further states:

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

a) the standard of living and situation of the parties;

²⁹ *Record*, page 306, lines 13 through 22, "Findings of Fact and Conclusions of Law."

³⁰ Utah Code Annotated § 78-45-7.2 (2) (a) and (b).

³¹ Utah Code Annotated § 78-45-7 (1).

- b) the relative wealth and income of the parties;
- c) the ability of the obligor to earn;
- d) the ability of the obligee to earn;
- e) the needs of the obligee, the obligor, and the child;
- f) the age of the parties;
- g) the responsibility of the obligor for the support of others.³²

The Court found that there was a material change of circumstance, did not follow the guidelines, and failed to make findings of fact as required by the statute when it chose to disregard the guidelines. For example, it did not make findings as to the:

- a) the standard of living and situation of the parties;
- b) the ability of the obligor to earn;
- c) the ability of the obligee to earn;
- d) the needs of the obligee, the obligor, and the child;
- e) the age of the parties.

In several cases on point, the Utah Court of Appeals held that such an omission constituted reversible error. In Jefferies v. Jefferies (752 P.2d 909 (Utah Ct.App. 1988)), the Utah Court of Appeals held that the above factors "constitute material issues upon which the trial court must enter findings of fact."³³ The

³² Utah Code Annotated, Section 78-45-7 (3).

³³ *Jefferies v. Jefferies*, 752 P.2d at 911.

Jefferies Court went on to state that "the failure to enter specific findings on each of the factors is generally reversible error."³⁴

In Ostler v. Ostler (789 P.2d 713, (Utah App. 1990)) the Utah Court of Appeals found again that failure to enter specific findings on each of the elements of U.C.A. § 78-45-7 constituted reversible error.³⁵ In the Ostler case, the factual pattern differed from the present case only in that the material change of circumstances was stipulated to instead of made by a finding of the Court. Additionally, the father's income was found to have increased instead of decreased as in the instant case.

In all other aspects Ostler and Jefferies were similar factually as the instant case. In Ostler, the trial court had made findings regarding the changes in income which were more specific than the findings in the instant case. The Ostler Court found that even with more specific findings, the findings of the trial court were still too ambiguous to be useful.³⁶ The net result was that the Ostler trial court had made an award but it did not fit the guidelines as specified in U.C.A. § 78-45-7.7 and 7.14, and the guidelines were thus not rebutted as permitted by U.C.A. § 78-45-7 (3). The Ostler court stated:

"While the trial court made findings of fact, we cannot determine to what extent these factors were applied."³⁷

³⁴ *Id.*

³⁵ *Ostler v. Ostler*, 789 P.2d at 715, (quoting *Jefferies v. Jefferies*, 752 P.2d at 911).

³⁶ *Ostler v. Ostler*, 789 P.2d at 715.

³⁷ *Ostler v. Ostler*, 789 P.2d at 715.

In the instant case, however, no findings of fact are made with regard to *any* of the required factors.

The Court of Appeals later cited the Ostler Court's decision in Durfee (Wolf) v. Durfee (140 Utah Adv. Rep. 42 (August 9, 1990)). The Appellant's counterpetition was denied on every point except for the court's failure to enter specific findings regarding these issues. The Durfee Court cited Ostler:

" 'The [trial court's] apportionment of financial responsibility between the parties will not be upset on appeal unless the evidence clearly preponderates to the contrary or we determine that the court has abused its discretion.' ³⁸ We find that the trial court abused its discretion in failing to enter sufficient findings of fact to support the child support awarded." ³⁹

The Utah Court of Appeals again approved the Ostler decision in Allred v. Allred (141 Utah Adv. Rep. 14 (August 13, 1990).) when it overturned the trial court's child support award based upon the trial court's failure to present findings on the seven factors. The Allred Court noted that the trial judge had actually made findings regarding some of the required factors, but that because the findings were incomplete, "the findings as a whole [were] insufficient."⁴⁰

³⁸ *Ostler v. Ostler*, 789 P.2d at 715 (citations omitted).

³⁹ *Durfee (Wolf) v. Durfee*, 140 Utah Adv. Rep. at 43.

⁴⁰ *Allred v. Allred*, 141 Utah Adv. Rep., at page 5.

The Allred Court was specific with regard to explaining how apportionment of responsibility is to take place. Quoting 98 A.L.R.3d 1146, 1150 (1980), the Allred Court noted:

"The trend of the law today is 'toward equal rights and responsibilities for women...requiring that the wife contribute child support if she is financially able in an amount approximately proportional to her financial ability.' (Propriety of Decree in Proceeding Between Divorce Parents to Determine Mother's Duty to Pay Support for Children in Custody of Father). Although apparently never addressing this precise issue before, Utah appellate courts have recognized that 'both parents have an obligation to support their children.' Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985) (per curiam). This notion of equal responsibility is also apparent as a matter of statutory law in Utah. (U.C.A. § 78-45-3, -4. Utah statutes draw no distinction in terms of support duty between custodial and non-custodial parents nor between fathers and mothers. The duty of both is the same."⁴¹

The Allred Court went on to say that U.C.A. § 78-45-7.7 (1990) required the same analysis as set out in 98 A.L.R.3d. 1146, 1150 (1980).

The status of the law, therefore, is quite clear. Failure to present specific findings regarding :

- a) the standard of living and situation of the parties;
- b) the relative wealth and income of the parties;

⁴¹ *Allred v. Allred*, 141 Utah Adv. Rep., note #3, at 17.

- c) the ability of the obligor to earn;
- d) the ability of the obligee to earn;
- e) the needs of the obligee, the obligor, and the child;
- f) the age of the parties;
- g) the responsibility of the obligor for the support of others.

constitutes reversible error.⁴²

IMPROPER IMPUTATION OF INCOME.

The Court committed reversible error by imputing income to the Defendant when such imputation is in direct violation of Utah statute. U.C.A. § 78-45-7.5 (7)

(d) states in pertinent part that :

"Income may not be imputed if any of the following conditions exist:
(iii) a parent is engaged in career or occupational training
to establish basic job skills;"⁴³

The Plaintiff is pursuing basic college level education. Likewise, the Defendant desires to do the same. Both parties are attempting to develop basic occupational training to establish basic skills in their area according to their desires and abilities. The purpose of the provision to restrain the court from imputing income is simply to afford individuals the opportunity to better their position so as to more adequately support their families and children and not be a burden on

⁴² *Allred v. Allred*, 141 Utah Adv. Rep., at 15.

⁴³ Utah Code Annotated § 78-45-7.5 (7) (d) (iii)

society. But the Court in this case did not recognize this fact. It either had to impute income to both or to neither.

FAILURE TO ENFORCE THE LAW:

The Court also committed reversible error by failing to recognize in any way that the Plaintiff has a responsibility to support the parties' child as well as Defendant. (See U.C.A. § 78-45-4) This is not to the exclusion of the Defendant's responsibility under U.C.A. § 78-45-3, but rather is in addition to Defendant's responsibility. The Court must require of both parties evidence of employment history and other financial data before making a just award.⁴⁴ Instead, the Court based its findings solely on the Defendant's imputed income, even after being informed by Counsel as to the need for equality in this matter.⁴⁵

ABUSE OF DISCRETION:

IMPROPER FINDING OF WILLFUL UNDEREMPLOYMENT:

The Court abused its discretion by finding that the Defendant was willfully underemployed and/or unemployed. Such a finding is completely unsupported by the evidence presented at trial. The only evidence presented at trial was

⁴⁴ Utah Code Annotated, Section 78-45-7.5 (5) (b), (1989).

⁴⁵ *Record*, page 328, "Transcript of Hearing," p. 56, line 5 , through p. 57, line 9.

Defendant's testimony regarding his search for employment during his two periods of unemployment. In direct examination regarding the first period of unemployment, the Defendant was asked:

"After, following June 17th of 1989, how long was it before you obtained other employment?"

The Defendant responded:

"[It] would have been about three weeks. I looked first for full time employment, could not find any, and so was hired-on part-time at the BYU Law Library, though I was allowed to work extra hours for the first couple of months."⁴⁶

In further direct examination, this time regarding the second period of unemployment, the Defendant was asked:

"Now, following April the 27th of 1990, what have you done with regard to employment and your schooling?"

To which the Defendant responded:

"...since then, not having been employed, I have been in school full time, still I have been, during the off hours, looking for part-time employment, *preferably* at BYU so I can maintain close proximity to job and work, or work and school rather, so that I can facilitate going to classes and the like."⁴⁷

In cross examination, the Defendant was also asked:

"What or when was the last time you looked for work?"

⁴⁶ *Record*, page 328, "Transcript of Hearing," p. 18, line 19.

⁴⁷ *Record*, page 328, "Transcript of Hearing," p. 21, line 1. (Emphasis added)

The Defendant answered:

"It would have been last Friday. I went into the [campus] employment office and then, well, in fact last night I talked to a friend of mine who is a contractor, and I called him to see if he had any additional work that he needed.

Counsel then asked:

"What type of work are you looking for, Mr. Pickard?"

The Defendant answered:

"Right now, I'm looking for something preferably with a construction emphasis, *though I am not limiting it to that*, simply because I need some hands-on experience in my field."⁴⁸

The Defendant therefore made two references to the fact that he was not limiting his search to include only BYU employment and testified to the fact that he had made at least one successful contact outside BYU within the past week. The trial judge, however, disregarded this fact, interpreting the testimony to reflect upon Defendant's efforts as a whole. The Defendant, however, at no time suggested that he was unwilling to work or to find suitable employment.

Furthermore, the Court, in its original decision, acknowledged the fact that Plaintiff was enrolled in college at Utah Valley Community College and expected to complete her degree in the Spring of 1990. Evidence showed that the State of Utah

⁴⁸ *Record*, page 328, "Transcript of Hearing," p. 36, line 22 to p. 37, line 6. (Emphasis added.)

had funded Plaintiff's education,⁴⁹ beginning in 1983 until 1989 in an amount exceeding \$17,000.00.⁵⁰ In 1989, the Court found that Defendant intended to pursue the final portion of his education,⁵¹ however, the Court did not address whether it was proper or improper for Defendant to continue his education, while apparently approving Plaintiff's educational pursuits.

The Defendant testified that he searched diligently for employment both in and outside of BYU's employment office, and that though he preferred to work in the construction (or related) industry, he was not limiting his search to construction alone.⁵² He testified that in June of 1989 and again in Spring of 1990 the job market was tight and that no significant offers had been made and that he did his best to find adequate employment and continue paying support, and no evidence to the contrary was presented.⁵³ Defendant testified that upon obtaining subsequent

⁴⁹ *Record*, page 321, "Defendant's Exhibit No. 18."

⁵⁰ *Record*, page 227, "Memorandum Decision."

⁵¹ *Record*, page 227, paragraph 8, "Memorandum Decision," p. 10.

⁵² *Record*, page 328, "Transcript of Hearing," p. 37, line 2.

⁵³ *Record*, page 328, "Transcript of Hearing," p. 18, line 21; p. 21, line 9; and p. 36, line 22.

employment, Defendant was willing but unable to comply completely with the support order due to his greatly reduced earnings and capability to pay.⁵⁴

There was no evidence to support the position of willful unemployment or that to temporarily limit work in order to better one's position is out of line with what the Court and the State of Utah had actively encouraged Plaintiff to do.

IMPROPER IMPUTATION OF INCOME TO DEFENDANT:

The Court also abused its discretion by imputing income based upon its erroneous finding that Defendant was willfully underemployed and upon arrearages incurred by the Defendant prior to the trial. Had the Court heard the case in a timely manner, the arrearages would have been relatively insignificant. Indeed, the Defendant would have been only \$335 in arrears of Child Support, instead of \$1,562.89 as claimed by Plaintiff and supported by the Court.⁵⁵

The Court, however, placed great emphasis on the fact that Defendant had become \$1,600 behind in his payments. The Court stated:

"I have concern about looking at your schedule. This man has paid very little over the period of time [since June, 1989]."⁵⁶

⁵⁴ See generally, *Record*, page 328, "Transcript of Hearing," pp. 17 - 25, and p. 38, line 13 to p. 40, line 10..

⁵⁵ *Record*, page 309, "Findings of Fact and Conclusions of Law", Table of support.

⁵⁶ *Record*, page 328, "Transcript of Hearing," p.61, line 1.

Imputation of income, however, is not allowed. As noted above, U.C.A. § 78-45-7.5 (d)(iii) prohibits imputation of income when a parent is engaged in basic occupational training. Both parties have received equivalent levels of education and have both been gainfully employed.⁵⁷

The argument could be pursued that skills obtained in a college setting may be beyond the scope of this statute. The statute, however, specifically allows for both career and occupational training to establish basic skills of one's chosen occupation. Furthermore, the Court has allowed Plaintiff to continue her college education, presumably on the basis that she is obtaining a basic college education to better her position. For the Court to now determine that Defendant is not allowed to do the same is simply unjust and violates the equal protection clause of the U.S. and Utah Constitutions.

Public policy and due process considerations suggest that the Defendant's case should not be jeopardized or in any way prejudiced by delay of the Court and that interpretation and application of the law must be evenhanded.⁵⁸

⁵⁷ *Record*, page 328, "Transcript of Hearing," p. 58, line 7.

⁵⁸ U.S. Constitution, Amendment 14, Section 1, which is also applicable to the states via case law, and Utah Constitution, Article 1, Section 7.

FAILURE TO MAKE MODIFIED ORDER RETROACTIVE:

U.C.A. § 30-3-10.6 states in pertinent part:

"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."⁵⁹

No case has squarely addressed this issue to date, though it is reasonable to believe that the statute is intended for cases such as the instant case as follows:

Defendant filed the Petition for Modification on September 25, 1989. Due to the illness, injury and necessary recuperation of Judge Cullen Y. Christensen, the pre-trial conference was not scheduled until March of 1990.⁶⁰ During this time, the Defendant found his financial situation deteriorating to the point that, although barely able to pay for minimal immediate living expenses, he was unable to meet any other obligations, thus also temporarily unable to meet the support order.⁶¹

Judge Christensen's recuperation prevented his attendance at the subsequent hearing set for March 30, 1990, nor was he able to attend the trial scheduled for May 10, 1990, at which time Judge Sorensen, temporarily assigned to hear Judge Christensen's cases, refused to hear the case due to its complexity. The eventual

⁵⁹ U.C.A. § 30-3-10.6 (2) (1989)

⁶⁰ *Record*, page 288, "Notice of Pre-Trial Settlement Hearing."

⁶¹ *Record*, page 328, "Transcript of Hearing," p. 38, line 25 through p. 39, line 8.

trial date was set for June 20, 1990, a full nine (9) months from the date of the original petition, and more than a year from the actual change in circumstances.

The Court remarked:

"I understand that, Mr. Snyder, you filed [the petition] in August of 1989 or thereabouts. The Court's finding is, however, he has not applied himself as well as he might. And now to come in and ask the Court to relieve him of that obligation with that position, the Court is not inclined to do so. I'm not going to make it retroactive."⁶²

Had the Defendant been granted trial within a reasonable time, the arrearages claimed by Plaintiff would have been insignificant. The delay alone, unduly prejudiced the Defendant's position.⁶³ The Court's refusal to make the order retroactive is based solely upon the erroneous finding that Defendant has not been diligent in paying support and is supported in its entirety by the level of arrearages.⁶⁴ Certainly, it is not fitting to assess any party with the entire impact of the court's delay, whether or not the court held in that party's favor.

Furthermore, the purpose of the doctrine of retroactivity under the U.C.A. § 30-3-10.6 is precisely to provide the petitioner with a position of no delay, as though the case had been heard upon the filing of the petition, thus removing any bias created by the delay. To support denial of the doctrine of retroactivity with a finding based upon the effects of the delay seems nonsensical. The Court held that, indeed,

⁶² *Record*, page 328, "Transcript of hearing," p. 61, line 11.

⁶³ See *Supra*, note 51.

⁶⁴ *Record*, page 328, "Transcript of Hearing," pp. 60, line 25, through 61, line 20. (See also *Record*, page 328, "Transcript of Hearing," p. 69, line 9.)

a material change of circumstances had occurred, ostensibly due to Defendant's unemployment. The Court held, however, that regardless of Defendant's inability to pay, Defendant would be held to the original support ordered; this conclusion being based in significant part upon the amount of support remaining unpaid. The faulty circular logic becomes apparent.

DENIAL OF CONSTITUTIONAL RIGHTS:

UNITED STATES CONSTITUTION, AMENDMENT 14, SECTION 1:

Finally, the Court denied Defendant's rights under the Utah and the United States Constitutions. First, the Court refused to grant equal protection or opportunity to the parties. The Court has allowed the Plaintiff to continue her educational pursuits but has effectively denied the Defendant's request to do likewise.⁶⁵

During the oral decision, the Court commented:

"I think the decision to go to school, while a laudable one, under some circumstances may be very good. But when one has the obligation to support, as does Mr. Pickard, I don't think you are in a position to make those decisions or put yourself in a position, even though ultimately you hope to gain a situation where you may be better off financially and able to pay a greater amount."⁶⁶

Counsel for Defendant then reminded the Court that Defendant testified in the original trial that he had quit school to allow Plaintiff the opportunity to continue

⁶⁵ *Record*, page 328, "Transcript of Hearing," p. 57, line 2.

⁶⁶ *Record*, page 328, "Transcript of Hearing," p. 57, line 3.

her education, that Defendant had intended to complete his schooling and that both parties had been employed for the duration of the marriage. Counsel then made reference to Utah law by stating:

"...I think it is significant that that testimony was offered then and that Mrs. Pickard, if anything, has the same kind of duty of support and earnings. And if she is in fact cured of her emotional disturbances, she has a duty, the same type of duty to be going out and earning support. She has been continuing her education as well."⁶⁷

The Court responded:

"I'm aware of that situation, Mr. Snyder, and recognize that health circumstances often change plans of many people. But the fact remains that this man has a child, has some abilities, he isn't incapable of, he has not physical infirmities, he has good skills, he has some ability to earn and ability to work if you will. Lots of people go to school and work full time to assume their responsibilities."⁶⁸

The Court could have made the same statement about the Plaintiff. In this statement, the Court refused to consider both parties' responsibility to support the parties' child. Quoting 98 A.L.R. 1146 and by citing Utah law, the Allred Court, however, declared that responsibility for support *must* be held co-equal by both parents.⁶⁹

Thus, in spite of the fact that U.C.A. § 78-45-3 and § 78-45-4 clearly and succinctly declares both father and mother to be equally responsible in the support of

⁶⁷ *Id.*, p.59, line 3.

⁶⁸ *Id.*, at line 10.

⁶⁹ See *Supra*, note 30.

their children, the Court required only the Defendant (father) to provide for his child. Such a position is clearly a violation of the equal protection clause, in opposition to public policy set out in U.C.A. § 30-3-10.6, and thus reversible error.

UTAH CONSTITUTION, ARTICLE VIII, SECTION 10:

Additionally, the Court violated the Utah State Constitution, Article VIII, Section 10, by encouraging Plaintiff on four separate occasions to submit proper filings in the future regarding reinstatement of alimony. First, as opening remarks began, Mr. Butterfield attempted to have the issue of reinstatement of alimony subsequent to an alleged annulment of the Plaintiffs re-marriage heard by the Court. Counsel for Defendant objected, stating that it was not reserved in the pre-trial order and that Counsel for Plaintiff had represented to the Court and to Counsel that no such claim would be made.⁷⁰ The Court sustained the objection, and then encouraged Plaintiff to pursue the issue by saying:

"I'm not precluding you however from raising that issue in some subsequent proceedings."

Counsel for Plaintiff responded:

"That's okay with us!"⁷¹

⁷⁰ *Record*, page 328, "Transcript of Hearing," p. 6, line 5.

⁷¹ *Record*, page 328, "Transcript of Hearing," p. 7, line 13.

The Court again recommended Plaintiff take future action by indicating the amount the Court would order as alimony in the event of such future consideration and that it would make such alimony retroactive to the date of her remarriage.⁷² The Court then advised Counsel that the issue might be brought before the Court "by memorandum or appropriate filings." Finally, the Court reaffirmed its assessment of \$100 per month upon proof that the annulment did, in fact, exist.⁷³

Certainly this kind of advice is unnecessary for an accomplished attorney such as Mr. Butterfield, Counsel for Plaintiff. Mr. Butterfield has been a member of the Bar for some time and has gained substantial experience and knowledge as to how to bring a matter before the court. Therefore, the advice relayed to Counsel regarding the necessity and method of future filings is highly improper conduct for any judge, as such action constitutes the practice of law.

"Supreme court justices, district court judges, and judges of all other courts of record while holding office may not practice law..." Utah Constitution, Article VIII, Section 10.

⁷² Record, page 328, "Transcript of Hearing," p.61, line 17.

⁷³ *Record*, page 328, "Transcript of Hearing," p.63, lines 10 through 21.

CONCLUSION:

Based, therefore on the manifest, reversible error of the Court, the Court's abuse of Discretion, the manifest denial of the Defendant's Constitutional rights, and the unlawful practice of law by this Court, Defendant prays the Utah Court of Appeals to overturn the decision of the Trial Court, and remand the matter back to district court for a fair and impartial hearing.

DATED this _____ day of _____, 1990.

Keith F. Pickard, pro se
Defendant and Appellant.

CERTIFICATE OF DELIVERY:

I hereby certify that a true and correct copy of the forgoing was delivered to the following,

postage prepaid, this _____ day of _____, 1990.

Mr. Frank H. Butterfield
Attorney for Plaintiff
140 West 800 North, Suite 204
Orem, UT 84058

Mr. Ray E. Gammon
Assistant Utah Attorney General
Utah Department of Human Services
150 East Center
Provo, UT 84601

Keith F. Pickard
Defendant and Appellant

ADDENDUM

Cases:

Ostler v. Ostler, 789 P.2d 713 (photocopy)

Jefferies v. Jefferies, 752 P.2d 909 (photocopy)

Durfee (Wolf) v. Durfee, 140 Utah Adv. Rep. 42 (photocopy)

Allred v. Allred, 141 Utah Adv. Rep. 14 (photocopy)

Constitutional Provisions:

United States Constitution, Amendment 14, Section 1

Utah Constitution, Article VIII, Section 10

Utah Statutes:

Utah Code Annotated § 30-3-10.6

Utah Code Annotated § 78-45-3

Utah Code Annotated § 78-45-4

Utah Code Annotated § 78-45-7

Utah Code Annotated § 78-45-7.2

Utah Code Annotated § 78-45-7.5

Utah Code Annotated § 78-45-7.7

Utah Code Annotated § 78-45-7.14

Utah Rules:

Rules of the Utah Court of Appeals, Title II, Rule 3

was before him, rather than invoking the doctrine of *res judicata*. Rule 65B(i)(2) is designed to prevent successive petitions for a writ based on identical grounds, a potential abuse of the judicial system.¹ The rule provides that a court should dismiss a petition if "it is apparent . . . that the legality or constitutionality of [the petitioner's] confinement has already been adjudged in [prior habeas corpus or other similar] proceedings."

This Court recently construed rule 65B(i)(2) in *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989):

A ground for relief from a conviction or sentence that has once been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be readjudicated unless it can be shown that there are "unusual circumstances." For example, a prior adjudication is not a bar to reexamination of a conviction if there has been a retroactive change in the law, *see generally Andrews v. Morris*, 677 P.2d 81 (Utah 1983); a subsequent discovery of suppressed evidence, *see Gallegos v. Turner*, 17 Utah 2d 273, 409 P.2d 386 (1965), or newly discovered evidence, *see State v. Lafferty*, 776 P.2d 631 (Utah 1989). But ordinarily, a ground for setting aside a conviction or sentence may not be relitigated.

Id. at 1036. The list of "unusual circumstances" in *Hurst* is not exhaustive, but this case would not fall into any extension of that category. The double jeopardy claim presented to Judge Rokich in the rule

1. Rule 65B(i)(2) provides in pertinent part:

(2) . . . The complaint shall further state that the legality or constitutionality of his commitment or confinement has not already been adjudged in a prior habeas corpus or other similar proceeding; and if the complainant shall have instituted prior similar proceedings in any court, state or federal, within the state of Utah, he shall so state in his complaint, shall attach a copy of any pleading filed in such court by him to his complaint, and shall set forth the reasons for the denial of relief in such other court. In such case, if it is apparent to the court in which the proceeding under this rule is instituted that the legality or constitutionality of his confinement has already been adjudged in such prior proceedings, the court shall forth-

with dismiss such complaint, giving written notice thereof by mail to the complainant, and no further proceedings shall be had on such complaint.
Utah R.Civ.P. 65B(i)(2).

65B(i) petition was exactly the same as the one denied by Judge Daniels in Candelario's first habeas corpus petition.² Judge Rokich's dismissal was therefore correct, although his reliance on *res judicata* was unnecessary; he could simply have declined reconsideration of the double jeopardy claim under rule 65B(i)(2). The result would have been the same if Judge Rokich had denied the writ under rule 65B(i)(2), however, and his reliance instead on the doctrine of *res judicata* did not affect Candelario's rights.

[3] Judge Rokich's dismissal of Candelario's due process claim was also appropriate. Candelario argues that he did not receive notice of the second hearing on an order to show cause. However, he did not raise this argument at the second probation revocation hearing or in his first habeas petition before Judge Daniels. Candelario first raised the issue of lack of notice in his petition before Judge Rokich. Prior adjudication of a habeas petition does not automatically bar the adjudication of a subsequent petition raising new grounds for relief. *See Johns v. Shulsen*, 784 P.2d 1151 (Utah 1989) (per curiam); *Hurst*, 777 P.2d at 1037. However, rule 65B(i)(4) requires that a petitioner show good cause for not raising all complaints of denial of constitutional rights in the first postconviction proceeding in order to justify consideration of a subsequent petition.³ Candelario has shown no reason why he did not raise the issue of lack of notice at the second revocation hearing or in his first habeas petition.

2. Candelario would have been entitled to appellate review of his double jeopardy claim if he had appealed from Judge Daniels' order.

3. Rule 65B(i)(4) provides:

(4) All claims of the denial of any of complainant's constitutional rights shall be raised in the postconviction proceeding brought under this rule and may not be raised in another subsequent proceeding except for good cause shown therein.
Utah R.Civ.P. 65B(i)(4).

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and he has shown no good cause for relieving him of his waiver in this case.

Judge Rokich's dismissal of the petition is affirmed.

HOWE, Associate C.J., and
ZIMMERMAN and STEWART, JJ.,
concur.

HALL, C.J., concurs in the result.



Margieann W. OSTLER (Wyatt), and
the State of Utah, Plaintiffs
and Appellants,

v.

Raymond Floyd OSTLER, Defendant
and Respondent.

No. 880172-CA.

Court of Appeals of Utah.

March 20, 1990.

Former wife filed petition for modification of divorce decree. Parties stipulated that there was a substantial change of circumstances sufficient to provide a basis for modification of the decree. The Third District Court, Salt Lake County, David S. Young, J., modified amount of support from \$75 per month per child to \$200 per month per child, declined to distribute former husband's retirement account, but awarded wife \$250 in attorney fees. Wife sought review. The Court of Appeals, Bench, J., held that: (1) trial court's failure to make specific findings on statutory factors constituted reversible error, (2) wife articulated no change of circumstances justifying a reevaluation of original property division with regards to husband's retirement account; and (3) wife was entitled to an award of attorney fees incurred on appeal.

Affirmed in part, vacated and remanded in part.

1. Divorce ¶309.1

Trial courts have continuing jurisdiction to make reasonable and necessary changes in child support awards, taking into account not only the needs of the children, but also the ability of the parent to pay. U.C.A.1953, 30-3-5(3).

2. Divorce ¶309.2(2)

A party seeking modification of a child support award must show that a substantial change of circumstances has occurred since the divorce decree, not contemplated within the decree itself.

3. Divorce ¶312.6(1)

Once the trial court has made a determination on modification of a child support award, the Court of Appeals accords its ruling substantial deference.

4. Divorce ¶286(3, 6)

The apportionment of financial responsibility in a divorce proceeding will not be upset on appeal unless the evidence clearly preponderates to the contrary or the Court of Appeals determines that the trial court has abused its discretion.

5. Divorce ¶312.6(8)

The failure of trial court to enter specific findings on each of the statutory factors for an award of prospective support after a material change of circumstances is generally reversible error, particularly where the trial court orders a party to pay support to a child beyond the age of majority. U.C.A.1953, 78-45-7(2) (now (3)).

6. Divorce ¶312.6(8)

Trial court's failure to make specific findings as to each of the relevant statutory factors in proceeding to modify child support, in which support was increased, was reversible error, even though trial court's findings noted a "dramatic" increase in husband's income and a "substantial" decline in wife's health. U.C.A.1953, 78-45-7(2) (now (3)).

7. Divorce ¶286(6)

Trial court's finding, on former wife's petition for modification of divorce decree, that former husband's retirement account was not vested at time of decree, and that value of account at vesting was "sufficiently nominal" such that child support payments made by husband in excess of legal obligation more than compensated wife for value of account, was appropriately described as a conclusion of law, and given no particular deference on review, even though trial court described its reasoning as a "finding of fact."

8. Divorce ¶254(2)

Former wife was not entitled to portion of former husband's retirement account, on former wife's petition for modification of divorce decree, wife did not receive portion in initial decree, and wife's claim of lack of knowledge of retirement benefits did not constitute a change of circumstances justifying reevaluation of original division.

9. Divorce ¶288

Former wife was entitled to award of attorney fees reasonably incurred on appeal of her petition for modification of divorce decree, where wife partially prevailed, and wife was in need of the assistance. U.C.A. 1953, 30-3-3.

Penny Heal Trask, Salt Lake City, for plaintiffs and appellants.

Harold R. Stephens, Salt Lake City, for defendant and respondent.

Before DAVIDSON, BENCH and BILLINGS, JJ.

OPINION

BENCH, Judge.

Appellant appeals from an order entered in district court modifying a decree of divorce. We affirm the order in part, vacate the order in part and remand.

Appellant Margieann Ostler and respondent Raymond Floyd Ostler were divorced in 1978 after an eighteen year marriage. The decree of divorce awarded appellant

child support in the amount of \$75 per month for each of the four children in her custody. The decree also provided for visitation rights, alimony, life and health insurance, attorney fees, and distribution of real property, personal property, and debts. There was no provision for the distribution of respondent's retirement account.

In 1987, appellant filed a petition for modification of the divorce decree. Although respondent had voluntarily increased the amount of his child support payments from \$75 to \$110 per month per child, appellant sought to increase child support to \$230 per month for each of the three remaining minor children. She also sought to distribute respondent's retirement account, and to receive her attorney fees and costs. As a basis for modification of the decree, appellant stated that she was unemployed, on public assistance, and that she was unable to obtain employment due to a speech disability. She also alleged that respondent had remarried and that his income had increased substantially.

Respondent moved to dismiss the petition on the grounds that appellant had failed to include the State of Utah as the real party in interest. Respondent claimed that the State was providing appellant with financial assistance and that the State was also assigned appellant's right to receive child support payments. See Utah Code Ann. § 78-45-9(2) (1987). The court subsequently granted appellant's motion to amend her petition to join the State of Utah as co-plaintiff.

A hearing on the petition was conducted on December 16, 1987. Counsel for the State appeared and stated that respondent was current in his support obligation and indicated that the State's interest was satisfied as long as respondent continued to provide at least the existing level of support. Counsel was then excused.

The parties stipulated that there was a substantial change of circumstances sufficient to provide a basis for modification of the decree. The hearing proceeded by proffer. The district court subsequently issued a memorandum decision modifying

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the amount of support from \$75 per month per child to \$200 per month per child. It remains unclear whether this award was premised on the support of three children or two children.¹ The court declined to distribute respondent's retirement account, but awarded appellant \$250 in attorney fees. Appellant now seeks review of the amount of child support and the denial of retirement benefits. She also requests an award of attorney fees on appeal.

CHILD SUPPORT

[1-4] Trial courts have continuing jurisdiction to make reasonable and necessary changes in child support awards, taking into account "not only the needs of the children, but also the ability of the parent to pay." *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985) (per curiam), Utah Code Ann. § 30-3-5(3) (1989). A party seeking modification of a child support award must show that a substantial change of circumstances has occurred since the divorce decree, not contemplated within the decree itself. *Woodward*, 709 P.2d at 394. Once the trial court has made a determination on modification, we accord its ruling substantial deference. *Id.*, *Proctor v. Proctor*, 773 P.2d 1389, 1390 (Utah Ct. App. 1989). The apportionment of financial responsibility between the parties will not be upset on appeal unless the evidence clearly preponderates to the contrary or we determine that the court has abused its discretion. *Woodward*, 709 P.2d at 394, *Christensen v. Christensen*, 628 P.2d 1297, 1299 (Utah 1981), *Proctor*, 773 P.2d at 390, *Maughan v. Maughan*, 770 P.2d 156, 161 (Utah Ct. App. 1989). However, an award of child support may be "so inordinately low" as to constitute an abuse of discretion. *Martinez v. Martinez*, 754 P.2d 69, 73 (Utah Ct. App. 1988), cert. granted, 765 P.2d 1277 (1988).

The parties in this case stipulated that there had been a substantial change of circumstances since the original decree. The stipulation leaves for resolution whether the district court abused its discretion in

modifying the original support award from \$75 to \$200 per month per child.

[5] In awarding prospective support after a material change of circumstances, the relevant factors to be considered include:

- (a) the standard of living and situation of the parties,
- (b) the relative wealth and income of the parties,
- (c) the ability of the obligor to earn,
- (d) the ability of the obligee to earn,
- (e) the need of the obligee,
- (f) the age of the parties,
- (g) the responsibility of the obligor for the support of others.

Utah Code Ann. § 78-45-7(2) (1987), *Martinez*, 754 P.2d at 73 n.3. Because these factors "constitute material issues upon which the trial court must enter findings of fact," *Jefferies v. Jefferies*, 752 P.2d 909, 911 (Utah Ct. App. 1988), the failure to enter specific findings on each of the factors is generally reversible error, particularly where the court orders a party to pay support to a child beyond the age of majority. *Id.* at 911-12.

[6] While the trial court made findings of fact, we cannot determine to what extent these factors were applied. The findings merely note a 'dramatic' increase in respondent's income and a "substantial" decline in appellant's health, and set the award at \$200 per month per child. The lack of specificity in the findings is further compounded by the court's award of support until each child graduates from high school, regardless of age. We conclude that the failure of the trial court to make specific findings on the statutory factors constitutes reversible error.

Since the case must be remanded for entry of more specific findings, we merely note the apparent inadequacy in the amount of child support awarded. Statutory guidelines now establish base amounts of child support. See Utah Code Ann. § 78-45-7.14 (Supp. 1989). Although not in effect at the time of the trial court's modification order, see Utah Code Ann.

for only two children of the marriage are now below the age of majority.

¹ One of the three minors was nearly eighteen at the time of the modification hearing. There were three minors at the time of the divorce. *Id.* at 717.

§ 78-45-7 2(1)(a) (Supp 1989), these guide lines are useful in determining the adequacy of support. Appellant argues that the disparity between the statutory guidelines and the trial court's award constitutes an abuse of discretion. We are not prepared to go quite so far in the absence of specific findings, but the financial declarations of appellant and respondent contained in the record indicate gross monthly incomes of \$828 and \$4,372, respectively. Cf. *Marinez*, 754 P.2d at 73 (abuse of discretion shown in award of \$300 per month per child, where incomes were \$1,033 and \$8,333, respectively). Appellant is functionally handicapped, on welfare, and receiving food stamps. These facts connote such a sharp contrast in living standards between the parties that \$200 per month per child appears to be inadequate, and thus may constitute an abuse of the court's discretion.

"Child support awards should approximate actual need and, when possible, assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred." *Peterson v Peterson*, 748 P.2d 593, 596 (Utah Ct App 1988). Furthermore, it is public policy in this state 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 welfare programs." Utah Code Ann. § 78-45b-11 (1987). Since we must vacate the order and remand for entry of more specific findings, the award of support should either be justified under these objectives, or modified consistent with the statutory guidelines now in effect.²

RETIREMENT ACCOUNT DISTRIBUTION

As part of appellant's petition for modification, she claimed that respondent's retirement account was undistributed at the time of the divorce and should now be so distributed. Appellant concedes that the decree

makes no mention of the retirement account, but argues that she was not aware of it at the time of the divorce. The district court refused to modify the divorce decree to distribute the retirement account on the grounds that it was not vested at the time of the decree. The court also found that the value of the account at vesting was "sufficiently nominal" such that child support payments made by respondent in excess of his legal obligation more than compensated appellant for the value of the account.

[7] Although the trial court described its reasoning as a "finding of fact," it is more appropriately described as a conclusion of law. See *State ex rel Div of Consumer Protection v Rio Vista Oil, Ltd.*, 786 P.2d 1343, 1346 (Utah 1990) (Appellate court will disregard the label of "findings of fact" and look to the substance). We accord a trial court's legal conclusions no particular deference on appeal, but review them for correctness. *IFG Leasing Co v Gordon*, 776 P.2d 607, 611 (Utah 1989). Without addressing the correctness of the district court's rationale, we may still affirm the result "on any proper ground(s), despite the trial court's having assigned another reason for its ruling." *Buehner Block Co v UWC Assocs*, 752 P.2d 892, 895 (Utah 1988).

[8] Shortly after the district court rendered its decision, this court addressed a similar issue in *Throckmorton v Throckmorton*, 767 P.2d 121 (Utah Ct App 1988). Mrs. Throckmorton sought to modify a 1976 divorce decree, silent as to Mr. Throckmorton's retirement benefits, to obtain one-half of those benefits. The trial court determined that Mrs. Throckmorton had the opportunity to litigate the issue at the time of the divorce, and since she failed to do so, the claim was barred under the doctrine of res judicata.

Our opinion noted that res judicata is unique in divorce actions because of the equitable doctrine which allows courts to

basis of a material change of circumstances. Utah Code Ann. § 78-45 72(1)(b) (Supp 1989)

reopen alimony, support, or property distributions if the moving party can demonstrate a substantial change of circumstances since the matter was previously considered by the court." *Id.* at 123. We noted that pension benefits were first recognized as marital assets in Utah in *Woodward v Woodward*, 656 P.2d 431 (Utah 1982) ("*Woodward I*"). *Throckmorton*, 767 P.2d at 123. We then addressed the issue whether *Woodward I* should be given retroactive effect. *Id.* We ultimately determined that "legal recognition of a new category of property rights after a divorce decree has been entered, is not itself sufficient to establish a substantial change of circumstances justifying a reevaluation of the prior property division." *Id.* at 124.

In the instant case, appellant has articulated no change of circumstance justifying a reevaluation of the original property division. Appellant's claim of lack of knowledge of the retirement benefits does not constitute such a change. The only other possible change of circumstance is *Woodward I*'s legal recognition of retirement benefits as marital assets. However, the decree of divorce was entered more than four years before the issuance of *Woodward I* and the modification order was entered a year before the issuance of *Throckmorton*. Inasmuch as *Woodward I* is to be given prospective application only, there is no appropriate basis on which to divide respondent's retirement account. Rather, we find the "policy interest favoring the finality of property settlements" to be compelling. *Throckmorton*, 767 P.2d at 124 (quoting *Guffey v LaChance*, 127 Ariz. 140, 618 P.2d 634, 636 (Ct App 1980)), see also *Porco v Porco*, 752 P.2d 365, 368 (Utah Ct App 1988). We therefore affirm the district court's order with respect to retirement benefits.

ATTORNEY FEES ON APPEAL

[9] Appellant contends she is impecunious and requests attorney fees on appeal. Although she does not cite statute or rule for such an award, Utah Code Ann. § 30-3-3 (1989) provides that either party to a divorce action may be ordered to pay

the attorney fees of the party in need. This discretionary authority has been held to include attorney fees incurred on appeal. See *Maughan*, 770 P.2d at 162-63. Based on appellant's financial declaration, it is apparent that she is in need of such assistance. Since appellant has partially prevailed, we award her attorney fees reasonably incurred on appeal.

CONCLUSION

We affirm the district court's order with respect to respondent's retirement account. The remainder of the order is vacated. The issue of child support is remanded for the entry of specific findings and an award of child support in accordance with those findings. We also remand the case for the purpose of determining and awarding attorney fees and costs reasonably incurred by appellant on appeal.

DAVIDSON and BILLINGS, JJ., concur.



Lauralee CURTIS, Plaintiff
and Appellant,

v

William Gregory CURTIS, Defendant
and Respondent

No. 890210-CA

Court of Appeals of Utah

March 27, 1990

Former wife challenged former husband's failure to return children to Utah from Mississippi. Former husband moved for enforcement of Mississippi court's modification of child custody provisions of Utah divorce decree. The Fourth District Court, Utah County, Boyd L. Park, J., enforced Mississippi court's modification of custody. Wife appealed. The Court of Appeals, Orme, J., held that (1) Mississippi court lacked jurisdiction to modify child custody while Utah court had continuing jurisdiction

² The statutory guidelines may be applied to child support orders existing prior to July 1, 1989, inasmuch as the guidelines do not form the

\$28,150 from the retirement fund to pay various debts, leaving approximately \$8,736 in the fund. Trial was held May 18, 1987. Pursuant to the parties' stipulation, the court interviewed Aaron and Marlo to aid in its custody determination. A second interview was conducted the following day at Barbara's request.

In its findings, conclusions, and decree, the court awarded custody of Benjamin and MeLea to Barbara. The court awarded the parties joint custody of Aaron and Marlo wherein their principal place of residence would be with Barbara, but both children would live six months of the year with each party as long as both parties remained in Nephi, Utah. If either party moves, Barbara would have custody subject to James's reasonable visitation rights. The court ordered James to pay \$450 in alimony, \$160 per child in child support (except for the time while Aaron and Marlo are living with him), and Barbara's attorney fees. In its property distribution, the court held James violated the restraining order by paying off personal debts with the retirement fund. The court ruled that \$32,950 (\$36,886 less \$3,936 paid in taxes) should have remained in the fund, one-half of which was credited to Barbara. Based on this premise, the court awarded Barbara exclusive possession of and one-half equity in the home, the \$7,000 lot, the remaining \$8,736 in the retirement fund, the car with clear title provided by James, and one-half of the proceeds from a sale of the \$6,000 lot. James received one-half equity in the home, the partnership interest, the stock, and one-half of the proceeds from the \$6,000 lot. The court also ordered James to pay all obligations incurred during the marriage except the mortgage on the home, liability for which was assigned to Barbara.

On appeal, James first argues the trial court erred in not equitably dividing between the parties the obligations he paid out of the retirement fund. "In adjusting the financial interests of parties to a divorce, the trial court is permitted considerable discretion and its actions are entitled to a presumption of validity." *Cook v. Cook*, 739 P.2d 90, 93 (Utah App.1987).

Absent some clear abuse of discretion, the trial court's distribution of marital assets and liabilities will not be disturbed. *Id.*

[1] Subsequent to issuance of the trial court's restraining order, James withdrew \$28,150 from the retirement fund to pay for the following: \$15,460.27 business loan from Zions First National Bank, \$3,085.08 pay advance and \$1,622.48 loan from Painter Motor, \$1,589.87 loan from First Security Bank, \$2,456.28 for two motorcycles, and \$3,936.10 in taxes. The trial court ruled that except for the tax payment, the withdrawals were in violation of its restraining order. The court credited Barbara with half the sum that should have remained in the fund. James contends the loans he paid were marital liabilities subject to equitable division. However, he failed to present any documentation or other evidence to characterize the loans as subjecting Barbara to any liability. We find no abuse of the trial court's discretion.

[2] James argues the court erred in not clearly specifying the family partnership interest and company stock were his separate property. In *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987), the Utah Supreme Court held, "Premarital property, gifts, and inheritances may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage." The trial court awarded James his partnership interest and stock. Furthermore, after removing these two assets from the marital estate, the trial court's distribution remains equitable. James's contention is therefore without merit. We also find no merit to James's contention regarding his responsibility to secure clear title to the car for Barbara. The property distribution is affirmed.

[3,4] James next argues the trial court's conduct in interviewing the two older children a second time without giving him notice violated his constitutional rights to due process and equal protection. We find no merit to James's constitutional challenge to the second interview of Aaron and Marlo. Even if James were notified of the

interview, he was not entitled to be present. Furthermore, in ruling on James's objections to the findings of fact and conclusions of law, the trial court stated the second interview was held simply to inform the two children of the joint custody decision. The failure to give James notice of the second interview was, at most, harmless error. Utah R.Civ.P. 61.

James also contends the court's findings are insufficient to support the custody award. A trial court is afforded the same broad discretion in making custody awards as it is in distributing marital property. However, to ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions. *Davis v. Davis*, 749 P.2d 647 (Utah 1988); *Marchant v. Marchant*, 743 P.2d 199 (Utah App.1987). "Proper findings of fact ensure that the ultimate custody award follows logically from, and is supported by, the evidence and the controlling legal principles." *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986). Although in equity matters this Court may review the evidence and make its own findings, that "cannot serve as an excuse for the failure below to furnish adequate findings to ensure that the trial court's discretionary determination was rationally based." *Martinez v. Martinez*, 728 P.2d 994 (Utah 1986). See *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987); *Marchant*, 743 P.2d at 203 (trial court's failure to make proper findings is harmless error only if facts clearly support only a finding in favor of custody award).

[5] In the instant case, the trial court awarded Barbara sole custody of Benjamin and MeLea and joint custody of Aaron and Marlo. In its findings, the court simply found "[Barbara] is a fit and proper person to have the care, custody, and control of the minor children, Melea [sic] and Benjamin." This Court has previously recognized the Utah Supreme Court's ruling in *Martinez* wherein the Court held:

A mere finding that the parties are or are not "fit and proper persons to be awarded the care, custody, and control"

of the child cannot pass muster when the custody award is challenged and an abuse of the trial court's discretion is urged on appeal.

728 P.2d at 995 (quoted in *Ebbert v. Ebbert*, 744 P.2d 1019, 1021 (Utah App.1987)). The findings of the trial court in the instant case are inadequate to support the custody award. Although no one set of factors governs a custody determination in every case, the trial court's findings should articulate those factors pertinent to the child's best interests which the court considered in making its determination, such as the needs of the child and the ability of each parent to meet those needs. *Sanderson v. Tryon*, 739 P.2d 623 (Utah 1987); *Marchant*, 743 P.2d at 203.

The decree of divorce is affirmed except for the custody award which is remanded for additional findings.

DAVIDSON and GREENWOOD, JJ., concur.



Eva Louise JEFFERIES, Plaintiff
and Respondent,

v.

Donald Lloyd JEFFERIES, Defendant
and Appellant.

No. 870228-CA.

Court of Appeals of Utah.

April 13, 1988.

In divorce proceeding, the District Court, Sanpete Court, Don V. Tibbs, J., awarded contract receivable on motel owned by husband and wife as child support to their adult handicapped daughter, and husband appealed. The Court of Appeals, Greenwood, J., held that: (1) where court orders party to pay child support to child who has reached age of majority but

is nevertheless entitled to support under statute requiring parent to support incapacitated child of whatever age, court must enter specific findings of fact on each of factors set forth in statute for determining amount of child support, and (2) court improperly awarded contract to parties' incapacitated adult child, where contract was for purpose of creating estate for child's permanent benefit and maintenance.

Reversed and remanded.

1. Appeal and Error ⇐1008.1(5)

When examining court's findings of fact, reviewing court defers to those findings unless they are clearly erroneous.

2. Parent and Child ⇐3.3(6, 7)

When determining amount of child support, court must consider seven factors listed in statute for determining child support, and court must enter findings of fact on those factors. U.C.A.1953, 78-45-7.

3. Divorce ⇐307

Where court, in divorce proceeding, orders parent to pay child support for child who has reached age of majority but is nevertheless entitled to support under statute requiring parent to support incapacitated child of whatever age, court must enter specific findings of fact on each of factors set forth in statute for determining amount of child support. U.C.A.1953, 78-45-2, 78-45-7.

4. Divorce ⇐307

Court's findings of fact in divorce proceeding regarding child support order for adult incapacitated child were insufficient, where court failed to enter findings on all factors contained in statute for determining amount of support. U.C.A.1953, 78-45-7.

5. Divorce ⇐308

Court improperly awarded husband's and wife's contract receivable on motel to their incapacitated adult child in divorce proceeding, where award of contract was for purpose of creating estate for child's permanent benefit and maintenance; court could have awarded support equal to net contract proceeds and had those proceeds

under control of wife for sole benefit of child.

Noall T. Wootton (argued), American Fork, for defendant and appellant.

Richard B. Johnson (argued), Orem, for plaintiff and respondent.

Before BENCH, DAVIDSON and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

Defendant, Donald Lloyd Jefferies, appeals from a divorce decree which awarded a contract, owned by defendant and plaintiff, Eva Louise Jefferies, to their adult handicapped daughter. Defendant seeks reversal of the trial court's findings and remand for further findings. We reverse and remand.

Plaintiff and defendant were divorced following forty-four years of marriage. During the marriage, the parties had four children. At the time of the divorce, all of the children were adults, but one child, Joycelyn, was thirty-seven, had a mental age of approximately thirteen and was dependent upon plaintiff for support.

The trial court found plaintiff's earning ability was \$136 per month from social security and defendant's earning capacity was \$436 per month from social security and \$300 per month from part-time work. The trial court also found that if it did not make provision for support of Joycelyn, she would become a ward of the state. The court then divided the parties' marital assets, including contracts receivable on properties the parties sold during the marriage, and awarded one contract receivable, on the El Rancho Motel in Provo, Utah, to Joycelyn. The contract receivable on the El Rancho Motel provided for payments over the next 28.9 years, with a principal balance of \$178,655 plus interest of 8.5% and monthly payments of \$1,385. A contract payable by the parties on the same property had a \$17,846 principal balance payable at \$500 per month for approxi-

mately 5.25 years. The court ordered that the net proceeds of the two contracts be placed in an account for Joycelyn's use with plaintiff as custodian of the monies and the use thereof. The court also ordered defendant to pay \$1 per month support for Joycelyn.

Defendant claims that the amount of child support was arbitrarily determined without consideration of the factors set forth in Utah Code Ann. § 78-45-7 (1987) and that the court erred in awarding the contract receivable to Joycelyn.

I

We first examine whether the trial court's child support award was arbitrarily determined without proper consideration of the factors set forth in section 78-45-7.

The financial obligation of a parent to an incapacitated adult child is contained in section 78-45-1 through 13 (1987), the Utah Uniform Civil Liability for Support Act. Sections 3 and 4 state that every man and every woman is required to support his or her child. "Child" includes "a son or a daughter of whatever age who is incapacitated from earning a living and without sufficient means." Section 78-45-2(4). The trial court found that

the parties have a child, Joycelyn Jefferies, who was born on December 5, 1949, who has a mental age of approximately 13 years. The Court finds the parties have always been responsible for the child and that the Court must consider those factors in deciding this case. Specifically, the Court finds that if the Court does not make provision for support of this individual, that individual shall become award [sic] of the State of Utah.

[1] Defendant does not dispute his responsibility to provide support for Joycelyn so long as she is in need, nor the fact that she has limited capacity. Defendant does, however, contend that the court should have, but did not, consider all of the factors set forth in section 78-45-7. Section 78-45-7 states:

the court, in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the age of the parties;
- (g) the responsibility of the obligor for the support of others.

Because those factors involve questions of fact, we examine the trial court's findings of fact and defer to those findings unless they are clearly erroneous. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). It is well-established that "[f]ailure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)). In addition, "[t]he findings 'should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" *Id.* (quoting *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)).

[2-4] Section 78-45-7 requires the trial court to consider at least the seven factors listed therein. Further, those factors constitute material issues upon which the trial court must enter findings of fact. In this case, however, the trial court failed to enter findings on all of the factors. Further, the facts in the record are not so clear and uncontroverted as to support the amount of child support awarded to Joycelyn. For example, the only evidence in the record regarding Joycelyn's financial needs is plaintiff's financial declaration, but that declaration does not separate plaintiff's and Joycelyn's financial needs. Therefore, we conclude that the trial court's findings of fact are insufficient. We specifically hold that where the court orders a party to pay child support to a child who has reached the age of majority but is nevertheless entitled to support under section

8-45-2, the court must enter specific findings of fact on each of the factors set forth in section 78-45-7. Our holding should not be interpreted to mean that the trial court's decision as to the amount of child support is incorrect, but only that the court's findings of fact are insufficient to allow appellate review of the amount awarded.

II

We next address whether the trial court erred in awarding the parties' contract receivable to their adult child. In *English v. English*, 565 P.2d 409, 412 (Utah 1977), the Utah Supreme Court stated:

A court may not, under a decree of divorce, attempt to transfer any property of either parent to the children, for the purpose of creating an estate for their permanent benefit. Furthermore, the court may not make provision out of the property of either of the parties for the maintenance of children who are of age, and who are not physically incapacitated.

[5] In this case, the court awarded the parties' personal property, the contract receivable on the El Rancho Motel, to Joycelyn. The property was clearly intended to provide an estate for Joycelyn's permanent benefit. Joycelyn would receive income of \$85 per month for the first 5.25 years of the contract, and, after payout of the underlying obligation, \$1,385 per month for out 23 years after that. The contract would provide financial resources for Joycelyn at least until she reached the age of 18, unless she sold or otherwise disposed of the asset. Accordingly, the court's award of the contract receivable to Joycelyn is contrary to the rule as stated in *English*. Therefore, we hold that the trial court erred in awarding the parties' contract receivable to their mentally handicapped daughter.

We note, however, that this Court has no objection to or quarrel with the trial court's apparent notion that support payments to defendant for Joycelyn should be from a source other than defendant's income and

In *Fletcher v. Fletcher*, 615 P.2d 1218, 1222 (Utah 1980), the Utah Supreme Court restated his portion of *English* in dicta. Because that

that the net proceeds from the El Rancho Motel contract would be an appropriate source for those support payments. This end could be met, after making necessary findings of fact, by awarding support equal to the net contract proceeds and having those proceeds under the control of plaintiff for the sole benefit of Joycelyn.

Reversed and remanded for proceedings in accordance with this opinion.

BENCH and DAVIDSON, JJ.
concur.



**AMERICAN ROOFING COMPANY
and/or Employers Mutual
Liability, Plaintiffs,**

v.

**INDUSTRIAL COMMISSION OF
UTAH, George Roy Green, and
the Second Injury Fund, Defendants.**

No. 870189-CA.

Court of Appeals of Utah

April 13, 1988.

Employer and insurer petitioned for review of Industrial Commission order awarding workers' compensation benefits. The Court of Appeals, Bench, J., held that: (1) evidence supported Commission's finding of compensable injury, and (2) claimant was entitled to average weekly wage based on a minimum of 20 hours per week, even though claimant only worked 13 hours per week.

Affirmed in part and remanded in part.

restatement appears to be inaccurate and because it is dicta, we do not rely on the restatement in this opinion.

OPINION

BENCH, Judge:

American Roofing Company (American Roofing) and its insurance carrier Employer's Mutual Liability petition this Court for review of an order of the Industrial Commission (Commission) awarding workers' compensation benefits to an injured employee.

In February 1956, George Green, an employee of J.E. Steel Company (J.E.), injured his lower back in an industrial accident. He received medical treatment and, between 1956 and 1983, visited two chiropractors for occasional treatments. In February 1983, Green, while still employed by J.E., now known as Paulsen Steel Company (Paulsen), fell on a ladder and again injured his lower back. Following this injury, Green began experiencing severe stabbing pains beginning in his lower back and moving down his legs. Green would typically treat his pain with a hot bath and rest. In the summer of 1983, Green left Paulsen and was hired by American Roofing. Green's pains increased in May 1985, and he consulted Dr. Henrie, an orthopedic surgeon. Dr. Henrie diagnosed a degenerative spinal condition and scheduled a CAT scan and lumbar myelogram for September 25, 1985.

On September 6, while still in the employ of American Roofing, Green attempted to unload a thirty pound bucket of debris out of his truck. As he leaned over the bed and lifted the bucket, the bucket snagged on something and Green suffered a much more severe "lightning bolt" of pain in his back and legs. After several minutes, Green was able to get into his car and return home. He never returned to work again. The CAT scan and myelogram were performed as scheduled as well as a chemonucleolysis in November 1985. Green was diagnosed as suffering from disc herniation.

Green filed applications for a hearing seeking disability benefits from the 1983 and 1985 accidents. After a hearing on May 1, 1986, the Administrative Law Judge

1. Workers' Compensation ¶1533

Substantial evidence supported administrative law judge's finding that workers' compensation claimant's on the job injury was "by accident"; although claimant had previously experienced pain in lower back and legs when injured while working for other employers, he was able to return to work after a period of rest and when lifting bucket of debris for last employer, he suffered injury which rendered him totally and permanently disabled, unable to return to work. U.C.A.1953, 35-1-45.

2. Workers' Compensation ¶597, 1417

Element of causation, a prerequisite for finding injury compensable under workers' compensation law, requires proof of both legal cause and medical cause. U.C.A.1953, 35-1-45.

3. Workers' Compensation ¶1490

Industrial Commission's finding that evidence of weight of bucket, together with manner in which workers' compensation claimant lifted bucket and fact that bucket snagged, combined to characterize claimant's action as unusual or extraordinary so as to show legal causation, for workers' compensation purposes, was not arbitrary or capricious. U.C.A.1953, 35-1-45.

4. Workers' Compensation ¶821

Workers' compensation claimant was entitled to compensation based on average weekly wage based on a minimum of 20 hours per week, even though claimant only worked 13 hours per week. U.C.A.1953, 35-1-67, 35-1-75, 35-1-75(1)(e), (1)(g)(iii).

Michael E. Dyer (argued), Stephanie A. Mallory, Richards, Brandt, Miller & Nelson, Salt Lake City, for plaintiffs.

Erie V. Boorman, Adm'r, Second Injury Fund, Barbara Elicerio, Legal Counsel, Indus. Com'n, William W. Downes, Jr. (argued), Salt Lake City, for respondent Green.

Elliot Morris, Workers Compensation Fund of Utah, Salt Lake City.

Before BENCH, GARFF and ORME, JJ.

Subject matter jurisdiction is the power and authority of the court to determine a controversy and without which it cannot proceed. Without jurisdiction over the subject matter alleged in plaintiff's claims, the court was without authority to proceed or to enter any adjudication on the merits of the claims.

... The jurisdictional limits of a statutorily created court, such as the circuit court, are circumscribed by its empowering legislation. A circuit court cannot expand its jurisdiction to adjudicate claims which are in excess of \$10,000 or which involved the title to real property. Unlike a court's exercise of jurisdiction over a person or party, subject matter jurisdiction cannot be created or conferred on the court by consent or waiver.

(citations omitted.) This court further noted that the trial court was under an obligation, even absent an objection, to determine its jurisdiction over the subject matter of the claims asserted. *Id.* Having determined that the matter was outside its jurisdiction, the trial court could proceed only by dismissal. Transworld seeks to distinguish *Thompson* on the basis that that case concerned the \$10,000 jurisdictional limit and the limitation regarding real property matters. The distinction is without merit because the same principles apply equally to the exception to jurisdiction involved in this case. "Since the entire proceedings before the circuit court were conducted absent jurisdiction, they are a nullity and are void." *Id.* The appeal is dismissed, and this case is remanded to the circuit court with instructions to dismiss for lack of jurisdiction.

ALL CONCUR:

Pamela T. Greenwood, Judge
Russell W. Bench, Judge
Richard ... , Judge

Cite as
140 Utah Adv. Rep. 42

IN THE UTAH COURT OF APPEALS

Marilyn J. DURFEE (Wolf),
Plaintiff and Appellee,

v.
Frank W. DURFEE,
Defendant and Appellant

No. 890221-CA
FILED: August 9, 1990

Third District, Tooele County
Honorable Pat B. Brian

ATTORNEYS:

J. Franklin Allred, Salt Lake City for
Appellant
Ephraim H. Fankhauser, Salt Lake City, for
Appellee

Before Judges Davidson, Bench, and Orme.

OPINION

BENCH, Judge:

Appellant appeals from a final order of the trial court which modified a divorce decree by increasing child support payments and denied appellant's counterpetition for modification. We affirm in part, but vacate the support award and remand the case for further proceedings and entry of additional findings.

Appellant Frank Durfee and appellee Marilyn Durfee were divorced in 1978. Appellee received custody of their two children then aged two and six. Appellant was required to pay \$150 per child per month as child support.

In 1988, appellee filed a petition to amend the decree of divorce and asked that child support be increased to a minimum of \$300 per child per month. The suggested basis for the increase was that expenses for the two children had increased and that appellant's income had increased substantially since the original divorce decree was entered in 1978. Appellee also sought reimbursement for half of the medical, dental, and optical expenses incurred by the minor children which were not paid by insurance.

Appellant filed a counterpetition asking, in relevant part, that his obligation to pay support for the older son be terminated because the child lives with his maternal grandmother during the school year. Appellant also asked that appellee be required to execute the appropriate forms to allow appellant to claim the two children as exemptions on his state and federal income tax returns.

After a trial was held on January 13, 1989, the trial court entered an order on February

27, 1989 which increased child support to \$323 per month for the younger child, then age 12, and \$375 per month for the older child, then age 16. The trial court calculated these amounts based solely on the Uniform Child Support Guidelines, *Utah Code of Judicial Admin.*, Appendix H, (1988) (hereinafter referred to as the "1988 Guidelines").¹ The court also required each party to assume and pay half of the children's unpaid medical, hospital, dental, orthodontic, and optical expenses not paid by insurance. Furthermore, the trial court denied appellant's counterpetition.

MATERIAL CHANGE IN CIRCUMSTANCES

Appellant argues that the trial court erred in finding a material change of circumstances due to an increase in appellant's gross income and an increase in the cost of providing for the children as they grow older.

Pursuant to Utah Code Ann. §30-3-5 (1989), the trial court has continuing jurisdiction to modify child support obligations. "On a petition for a modification of a divorce decree, the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself." *Stettler v. Stettler*, 713 P.2d 699, 701 (Utah 1985).

The trial court found that appellant's gross income increased from approximately \$29,000 per year in 1978 to approximately \$45,000 per year in 1988 for an increase of approximately \$16,000. Appellant contends that the trial court erred in determining his 1978 and 1988 salaries and that the actual increase was only approximately \$9,000. The court's findings on this issue, however, are not clearly erroneous. See *Utah R. Civ. P. 52(a)*; *Grayson Roper Ltd. Partnership v. Finlinson*, 782 P.2d 467, 470 (Utah 1989). In any event, the disparity was harmless since even the substantial increase proposed by appellant would have sufficed to establish a material change of circumstances.

Appellant contends that "it could not reasonably be argued [that] such a modest increase in salary was not contemplated by the parties at the time of the entry of decree of divorce." The fact that the parties may have anticipated an increase of income in their own minds or in their discussions does not mean that the decree itself contemplates the change. In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change. See *Christensen v. Christensen*, 628 P.2d 1297, 1300 (Utah 1981) (substantial, unexpected increase in father's income did not constitute a substantial change in circumstances when original

divorce decree required father to pay supplemental child support payments equal to one half of his increase in income over a set amount); see also *Dana v. Dana*, 789 P.2d 726, 729 (Utah Ct. App. 1990) (there was no substantial change in circumstances where the trial court reasonably anticipated that plaintiff would increase her earnings by a specific amount). Since the divorce decree at issue did not have a provision expressly anticipating an increase in appellant's income, and since appellant did not offer any evidence at trial that the trial court had previously anticipated the increase in income when the original divorce decree was entered, we find that the increase was not a material change in circumstances contemplated in the original divorce decree.

Since the substantial increase in appellant's income constitutes a material change of circumstances sufficient to provide a basis for modification of the decree, see, e.g., *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989), we need not address the issue of whether the aging of a child may also constitute a material change of circumstances.

CHILD SUPPORT

Appellant next argues that the trial court erred in its determination of child support by applying the 1988 Guidelines without examining the actual expenses attributable to the children, and by not considering appellant's ability to provide support.

"The [trial court's] apportionment of financial responsibility between the parties will not be upset on appeal unless the evidence clearly preponderates to the contrary or we determine that the court has abused its discretion." *Ostler v. Ostler*, 789 P.2d 713, 715 (Utah Ct. App. 1990) (citations omitted). We find that the trial court abused its discretion in failing to enter sufficient findings of fact to support the child support ordered.

The "Overview" section of the 1988 Guidelines clearly indicated that the guidelines were only advisory to the court. Section I, paragraph 1, stated that "[f]inal orders in all cases shall be made at the discretion of the court based upon the facts of the individual case." At the time of these proceedings, Utah Code Ann. §78-45-7(2) (1987) provided that

- (2) When ... a material change in circumstances has occurred, the court, in determining the amount of prospective support, shall consider all relevant factors including but not limited to:
 - a) the standard of living and situation of the parties;
 - b) the relative wealth and income of the parties;
 - c) the ability of the obligor to earn;
 - d) the ability of the obligee to earn

- e) the need of the obligee;
- f) the age of the parties;
- g) the responsibility of the obligor for the support of others.

These factors "constitute material issues upon which the trial court must enter findings of fact." *Jefferies v. Jefferies*, 752 P.2d 909, 911 (Utah Ct. App. 1988).

It is well-established that "[f]ailure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)). [These findings] "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." (quoting *Rocker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)).

Jefferies, 752 P.2d at 911.

In this case, the trial court's findings are "clearly inadequate to demonstrate that the trial court considered the relevant factors in determining [the] child support awards. Detailed findings of fact and conclusions of law are necessary for this reviewing court to ensure that the trial court's discretionary determination of the ... child support awards was rationally based." *Stevens v. Stevens*, 754 P.2d 952, 959 (Utah Ct. App. 1988). We further find that the facts in the record are not clear and uncontroverted in support of the amount of the child support awarded, which was based solely on the advisory amounts provided by the 1988 Guidelines. We therefore reverse the trial court's order increasing the amount of child support.

EXTENDED ABSENCE OF CHILD

Appellant also argues that the trial court erred in denying his request to terminate child support payments to appellee for their oldest child because appellee did not maintain continuous physical custody of the child. The extended absence of the oldest child from appellee during the school year, however, did not extinguish appellant's obligation to provide adequate child support. See Utah Code Ann. §78-45-3 (1987). The legal obligation to support one's child may only be terminated by the legal adoption of the child by another person. See *Riding v. Riding*, 8 Utah 2d 136, 139, 329 P.2d 878, 880 (1958). Appellant is therefore not excused from his obligation to support his oldest child simply because the child resides with and receives care from a third party, in this case his grandmo-

ther. See *In re Olsen*, 111 Utah 365, 180 P.2d 210, 213-14 (1947) ("The fact that the maternal grandparents honored the request of the dying mother to look after the children certainly did not absolve the father of the duty to furnish them necessities.").

Although the child's extended absence from the appellee does not excuse appellant from his legal duty to provide support, we agree with appellant that the child support he provides must be applied to the child's care. We disagree with appellant, however, that such support payments must, as a rule, be delivered directly to the third party providing the care.

The means by which child support payments are made is to be designed by the trial court. Utah Code Ann. §30-3-5(1) (1989). "The trial court may fashion such equitable orders in relation to the children and their support as is reasonable and necessary" *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985). Typically, child support payments are made to the custodial parent because the custodial parent, by reason of physical custody, incurs the expenses of caring for the child. A trial court may, however, determine that it is in the best interest of the child to have support payments made directly to a third-party care provider during the child's extended absence. A trial court may, on the other hand, decline to order payments directly to the third party if it concludes that the support paid to the custodial parent will likely be applied to the care of the child during the extended absence. A trial court therefore has discretion to make such arrangements as may be required by the circumstances of a given case to ensure that a child receives the support ordered.

Testimony at trial indicated that appellee forwarded the child support payments to the grandmother for the benefit of the child while the child was living with the grandmother. Since the evidence was clear and uncontroverted that prior support payments had been applied to the support of the child, and since there was no indication that the payments would not in the future be applied to the support of the child, it was not an abuse of discretion for the trial court to deny appellant's counterpetition to terminate child support payments to appellee during the extended absence.

CONCLUSION

We have reviewed the other issues raised by appellant and find them to be without merit.

We affirm the trial court's conclusion that a material change in circumstances has occurred. We also affirm the denial of appellant's counterpetition. We vacate the trial court's order increasing the amount of child support and remand the question of the amount of child support for further proceedings and entry of additional findings.

No costs or attorney fees awarded on

appeal.

Russell W. Bench, Judge

WE CONCUR

Richard C. Davidson, Judge
Gregory K. Orme, Judge

1. Pursuant to section 1, paragraph 5, of the 1988 Guidelines, the three-child schedule was used to take into account appellant's duty to support the two children from his marriage to appellee, and a child from his current marriage. The 1988 Guidelines were repealed in 1989. Effective April 23, 1990, new child support guidelines were adopted and codified at Utah Code Ann. §§78-45-2 and 78-45-7.2 through-7.18 and apply to child support modifications on or after July 1, 1989.

2. Utah Code Ann. §78-45-7 (1987) was amended in 1989. See note 1.

Cite as

140 Utah Adv. Rep. 45

IN THE UTAH COURT OF APPEALS

Harry THORSEN,
Plaintiff and Appellant,

v.

Markay JOHNSON, et al.,
Defendants and Appellees.

Gooseberry Estates, et al.,
Plaintiffs and Appellees,

v.

Harry Thorsen and Donald Gates
Defendants and Appellant.

No. 890411-CA
FILED: August 9, 1990

Sixth District, Sevier County
Honorable Don V. Tibbs

ATTORNEYS:

Frederic A. Jackman and Michael K. Black,
Orem, for Appellant

Ken Chamberlain, Richfield, for Appellees

Before Judges Greenwood, Davidson, and Orme.

OPINION

DAVIDSON, Judge:

This case was previously appealed to the Utah Supreme Court. *Thorsen v. Johnson*, 745 P.2d 1243 (Utah 1987) (Thorsen I). The Supreme Court affirmed in part and reversed in part for reconsideration of damages. We affirm the trial court's reassessment of damages.

FACTS

In the original action, Gooseberry Estates brought an action against Thorsen for damages Thorsen caused to Gooseberry's property located in Sevier County. Gooseberry owned approximately 94 acres of undeveloped land which it intended to develop as a subdivision. Thorsen, who was a downstream water user opposed to the development, discovered that he owned an inactive water easement across the property. The original ditch, which was one foot deep and between two and three feet wide, was washed out in many places and barely visible. Thorsen entered the property and excavated the ditch, making it much larger. In the process, he uprooted several hundred trees and left huge rocks and other debris strewn about the property. His efforts destroyed the possibility of developing the property.

After a bench trial, the trial court concluded that Thorsen caused \$54,000 in damages calculating the value of the land as a completed subdivision. The Utah Supreme Court held that determination of value on the completed subdivision basis was incorrect. It instead set forth the following test:

[G]enerally the measure of damages for injury to real property is the difference between the value of the property immediately before and immediately after the injury

Thorsen, 745 P.2d at 1244-45.

The case was remanded to the trial court. The trial court reviewed additional evidence in the form of uncontradicted affidavits submitted by Gooseberry's experts and determined that Thorsen caused \$38,785 in damages to the property.² Thorsen appeals that judgment, arguing that the trial court again incorrectly determined the measure of damages.

In the original opinion, the Supreme Court concluded that the value of the land prior to damage was \$1,250 per acre. *Thorsen*, 745 P.2d at 1246. It also concluded that Gooseberry was entitled to damages. *Id.* at 1244-45. Finally, the Supreme Court determined that it is proper for the trial court to figure damages viewing the property's value in light of its intended use:

It is proper to show that a particular tract of land is suitable and available for subdivision into lots and is valuable for that purpose. It is not proper, however, to show the number and value of lots as separated parcels in an imaginary subdivision thereof. Stated differently, it is improper for the jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued

10. See generally *Groeneveld v. Camano Blueprint Oyster Co.*, 196 Wash. 54, 61, 81 P.2d 826, 829 (1938).

11. *Wilson v. Schneider's Riverside Golf Course*, 523 P.2d 1226, 1227 (Utah 1974); see *Condos v. Trapp*, 717 P.2d 827, 830-32 (Wyo. 1986).

12. *Condos*, 717 P.2d at 830.

13. *Id.* at 831-32 (last grantee is one who last records — — — — — also Utah Code Ann. §§68-3-1, -2 (1993) — — — — — on of common law to statute).

Cite as

4. Utah Adv. Rep. —

IN THE UTAH COURT OF APPEALS

John Franklin ALLRED,
Plaintiff and Appellant,
v.

Gaydi S. ALLRED,
Defendant and Appellee.

No. 890335-CA
FILED: August 13, 1990

Third District, Salt Lake County
Honorable Scott Daniels

ATTORNEYS:

Randall Gaither, Salt Lake City, for Appellant
Vicki Rinne, Highland, for Appellee
Before Judges Davidson, Bench, and Orme

OPINION

ORME, Judge:

Appellant, John Franklin Allred, appeals from an order which requires his former wife, Gaydi S. Allred, to pay \$100 per month in child support, with those payments to be deposited into an interest-bearing account earmarked for their child's college education and disbursable only on the further order of the court. He argues that the trial court abused its discretion in failing to make adequate findings of fact, in setting the level of child support at a level below Ms. Allred's ability to pay, and in ordering that the support payments be placed beyond his reach. We reverse and remand.

FACTS

The parties were divorced in 1981. For nearly five years, Ms. Allred had custody of the parties' three minor children, Aaryn, Derek, and Corey. Mr. Allred's monthly court ordered child support was \$350 per child.

In January 1986, the parties stipulated to give custody of Derek to Mr. Allred and to cease Mr. Allred's \$350 payment for Derek's support. Moreover, Ms. Allred agreed to

"pay" Mr. Allred \$100 monthly for the support of Derek. As a convenience, the parties stipulated that her monthly payment be made in the form of a credit against what Mr. Allred was required to pay, and thereafter he accordingly paid Ms. Allred \$600 per month toward the support of the two children still in her custody.

In late 1987, Corey also began living with Mr. Allred. On January 19, 1988, Mr. Allred filed a petition for modification of the divorce decree requesting a formal change of custody for Corey and seeking child support. Mr. Allred was awarded custody of Corey on October 7, 1988. On December 21, 1988, a hearing was held to decide the issues of child support, insurance, and medical expenses for Corey.

The trial court made several findings. Findings concerning Ms. Allred were that 1) she earned an annual salary of \$29,000; 2) Aaryn having reached her majority, Ms. Allred has no minor children in her custody dependent on her for support; and 3) she is unable to provide medical coverage for her children on the insurance policy provided by her employer. The court found that Mr. Allred 1) earned \$80,000 in 1986, \$52,000 in 1987, and \$80,000 in 1988; 2) has experienced a reduction in his law practice during the past three years, and it is unlikely that his income in the future will equal or exceed his income for the preceding three years; 3) has two minor children in his custody dependent on him for support; and 4) purchases health and accident insurance for himself and the two children at a price of \$104 per month. The court also found that, under the advisory child support guidelines then contained in the Utah Code of Judicial Administration, the total support amount recommended for Corey would be "\$937.99 of which \$255 was allocable to [Ms. Allred] with \$683.00 allocable to [Mr. Allred]." The court declined to embrace the guideline recommendation, but also failed to find what was actually needed for Corey's support, either to assure him a level of support equal to what he would have received had there been no divorce or in terms of what would be appropriate given his present circumstances.

The court's pertinent conclusions were as follows:

1. The defendant is entitled to child support from plaintiff for the minor child Corey Allred.

2. The court elects not to apply the support amount derived from the child support guidelines.

3. Plaintiff should pay to defendant the sum of \$100.00 per month ... for the minor child Corey Allred until such time as the minor child Corey Allred obtains the age of 18 years and completes high school.

court's findings in this case.

ADEQUACY OF TRIAL COURT'S FINDINGS

At the time of this dispute, the Utah Code provided, with our emphasis, that upon a material change in the circumstances of a divorced couple, such as the change in Corey's custody in this case,

the court, in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the age of the parties;
- (g) the responsibility of the obligor for the support of others.

Utah Code Ann. §78-45-7(2) (1987).¹ This court has recognized that "[s]ection 78-45-7 requires the trial court to consider at least the seven factors listed ... [and to] enter findings on all of the factors." *Jeffries*, 752 P.2d at 911 (emphasis added). When the court fails to enter adequate findings on each relevant factor, it is reversible error unless the undisputed evidence clearly establishes the factor or factors on which findings are missing. *Ostler*, 789 P.2d at 715. Findings are adequate only if they are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah Ct. App. 1988) (quoting *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)).

Although the court in this case entered findings on some of the factors listed in §78-45-7(2), the findings as a whole are insufficient, especially since they omit any finding on the critical question of the total amount needed for Corey's monthly support, other than to reject what the advisory guidelines would suggest. Moreover, the findings do not indicate how the court reached its ultimate determination of \$100 per month—a figure which has no discernible basis in the evidence other than it was the figure the parties previously stipulated could be paid for Derek's support when his custody shifted to Mr. Allred.

The \$100 award in this case may reflect the court's erroneous view of how to fix child support in the instant context. At one point in the trial, the court had the following exchange with the parties:

Ms. Allred: ... But my question is, if I was able to raise three children

5. The defendant shall be solely responsible for the maintenance of insurance for the minor children and solely responsible for all costs of medical and dental care not covered by such insurance.

In its findings and conclusions, the court did not explain why it elected not to apply the support guidelines or what factors prompted it to set an award significantly below that suggested by the guidelines.

In a subsequent hearing, the court ordered that Ms. Allred pay the child support into an interest-bearing account in Corey's name, rather than having it paid to Mr. Allred for the on-going support needs of Corey. In support of this order, the court made the following findings: (1) Mr. Allred had previously been given a similar opportunity to satisfy a \$1000 judgment for back child support by placing the money in interest-bearing accounts for the children; (2) it would be a good thing for Corey to have the opportunity to attend college; (3) it would be more palatable for Ms. Allred than would be paying the money directly to Mr. Allred; and (4) Mr. Allred did not actually need the money to support Corey. In the latter regard, the court remarked: "I think [Ms. Allred] is right. You know, you can support these children okay. The \$100.00 a month isn't going to make the difference between them having shoes and not having shoes."

On appeal, Mr. Allred argues that the trial court failed to make adequate findings of fact to justify the amount of child support to be contributed by Ms. Allred. He also argues that the court erred in ordering that the support be paid into an interest bearing account earmarked for Corey's college education. We reverse and remand for reconsideration of the support award and for the entry of adequate findings supporting an appropriate award.

STANDARD OF REVIEW

Ordinarily, we accord the trial court considerable discretion in adjusting the financial interests of divorced parties and, thus, the court's "actions are entitled to a presumption of validity." *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App. 1987). However, where the court has abused its discretion in apportioning those financial responsibilities, we cannot affirm that determination. *Id.* See also *Ostler v. Ostler*, 789 P.2d 713, 715 (Utah Ct. App. 1990). One such abuse we have recognized in this area of the law is the failure to enter specific, detailed findings supporting each of the factors which must be considered when making a child support award. *Stevens v. Stevens*, 754 P.2d 952, 958-59 (Utah Ct. App. 1988), *Jeffries v. Jeffries*, 752 P.2d 909, 911-12 (Utah Ct. App. 1988). With this standard in mind, we analyze the adequacy of the

on \$33,000 a year. I question why John is asking me for child support or raise two on eighty. That's all I have to say.

The Court All right Mr Allred she is probably right.

Later, the court stated to Mr Allred "I think that she should pay something for the support of the child, although your income is greater than hers. I am going to order that she pay the \$100 a month." Finally, as noted earlier, at the second hearing, the court justified placement of the funds into a trust account by stating:

You know, you can support those children okay. The \$100 a month isn't going to make the difference between them having shoes and not having shoes. I am going to give the child an opportunity to have a little money to go to college, and it would be a good thing for him.

Each of these statements appears to reflect the view that because Mr Allred's salary was sufficient to support the children, any amount from Ms Allred need only be a token gesture.² The law does not support this position.

The trend of the law today is "toward equal rights and responsibilities for women requiring that the wife contribute child support if she is financially able in an amount approximately proportional to her financial ability." *Propriety of Decree in Proceeding Between Divorced Parents to Determine Mother's Duty to Pay Support for Children in Custody of Father*, 98 A.L.R.3d 1146, 1150 (1980). Although apparently never addressing this precise issue before, Utah appellate courts have recognized that "both parents have an obligation to support their children." *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985) (per curiam). This notion of equal responsibility is also apparent as a matter of statutory law in Utah.³

Because the court's findings were not adequate to support its award and appear to have been tainted by its erroneous view of the extent to which Ms Allred should be expected to contribute to Corey's support, we must remand for reconsideration of the support award and for the entry of adequate findings supporting an appropriate award.

We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached. Although we cannot decide from the record before us that \$100 is an inadequate award as a matter of law, we "note the apparent inadequacy in the amount of the child support award." *Ostler*, 789 P.2d at 715. One hundred dollars is well below the amount suggested by either the advisory support guidelines in effect at the time of the trial or the subsequently enacted statutory guidelines now in effect.⁴ See Utah

Code Ann. §78-45-7(2)(a) (1990). Even when not directly applicable, support guidelines may be relevant in considering the adequacy of an award. See *Ostler*, 789 P.2d at 715-16 (noting Utah's current guidelines), *Martinez v. Martinez*, 754 P.2d 69, 73 (Utah Ct. App. 1988) (noting guidelines from other jurisdictions).

On remand, the trial court should employ a systematic approach, tailored to this situation where both parents are gainfully employed, which will insure a proper outcome. While this approach has not been clearly enunciated in any prior child support decision, it is consistent with those decisions. It does not ignore the statutorily mandated factors to be considered, but merely accords them a sensible priority. It is an approach which now enjoys statutory sanction, see note 8, *infra*, although it would be appropriate even without this legislative endorsement. First, the trial court must find the amount of total support needed for the child. *Jeffries*, 752 P.2d at 911. That figure should ideally "assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred."⁵ *Ostler*, 789 P.2d at 716 (quoting *Peterson v. Peterson*, 748 P.2d 593, 596 (Utah Ct. App. 1988)). Once the total cost of support is ascertained, the trial court can determine through a fairly simple mathematical operation each parent's proportional share of that support with reference to each parent's share of their combined income. Other things being equal, the amounts determined through the use of this formula will be the amounts each parent must contribute. However, the court may go on to consider other appropriate factors, including those listed in §78-45-7(2), and adjust these amounts as needed if unusual circumstances exist.⁷ Unusual circumstances prompting adjustment of the respective support figures must be adequately supported by detailed findings.⁸

Whether \$100 is an adequate award given application of this approach remains to be seen. If it takes just under \$400 a month to support Corey, but there are no unusual circumstances prompting some adjustment, then \$100 per month is just right. If it takes considerably more than that to support him, but unusual circumstances exist in Ms Allred's favor for which no countervailing circumstances exist in Mr Allred's favor, it may still be acceptable. But if it takes more than \$400 per month to support Corey and no such unusual circumstances are shown, Ms Allred's support obligation needs to be increased to an amount proportional to her income.

We reverse and remand for reconsideration of the support award using the analytical approach outlined herein. The final determination must be supported by adequate findings made in the course of employing this approach.

oach.

TRUST ACCOUNT

The court ordered the \$100 support payments to be placed into a trust account essentially for the purpose of "giv[ing] the child an opportunity to have a little money to go to college." As previously noted, a child support award "should approximate actual need and, when possible, assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred." *Ostler*, 789 P.2d at 716 (quoting *Peterson v. Peterson*, 748 P.2d 593, 596 (Utah Ct. App. 1988)). Placing child support payments into a trust fund beyond the reach of the custodial parent does not serve the immediate needs of the child and thus does not serve the purpose of the obligation. Thus, we hold that once the support obligation has been properly determined, it must be paid directly to Mr Allred or otherwise made available to him for the ongoing support of Corey.

Gregory K. Orme, Judge

WE CONCUR

Richard C. Davidson, Judge
Russell W. Bench, Judge

1 We quote the statute as it existed when this case was decided. It has subsequently been amended principally to take into consideration the existence of new statutory child support guidelines and the relationship of the factors to those guidelines, and to expand subsection (e) to include the needs of the obligor and the child as well as those of the obligee. See Utah Code Ann. §78-45-7(3) (1990).

2 The court's order placing the money into a kind of trust account for college is itself indicative of the court's erroneous view concerning child support. Child support should be used to "assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred." *Ostler*, 789 P.2d at 716, not to assure that the child will have money in the future, even for such worthy pursuits like a college education.

3 Utah statutes draw no distinction in terms of support duty between custodial and non-custodial parents nor between fathers and mothers. The duty of both is the same. "Every man shall support his child." Utah Code Ann. §78-45-3 (1987). "Every woman shall support her child." Utah Code Ann. §78-45-4 (1987).

4 As recognized by the court in its findings and conclusions, the advisory support guidelines would have imposed a support obligation on Ms Allred of approximately \$255. Utah Code of Judicial Administration H (1988). An award under the statutory guidelines now in effect would be approximately \$210. Utah Code Ann. §78-45-7-7.14 (1990). However, the level of support fixed in this case is additionally skewed against Mr Allred by the fact that 100% of one aspect of Corey's support, namely medical expenses, was to be borne exclusively by Mr Allred. It may well be prudent to require Mr Allred to continue to pay medical insurance premiums on behalf of Corey so long as those amounts are properly credited as part of the support Mr Allred is contributing. But the deduct-

ible co-payment and other out-of-pocket medical expenditures should either be built into the court's calculation of Corey's monthly total support need and shared proportionally in that way, or those expenses should be defrayed by the parties on a proportional basis as they are incurred.

5 The advisory guidelines apparently suggested a total support amount for Corey of \$937.99. The court did not indicate in its findings whether this amount would provide the standard of living Corey might have assuming no divorce nor did it find what would constitute that amount nor the amount needed to support him under his present circumstances.

6 The child support worksheet completed by Mr Allred for the support hearing suggested that Ms Allred's proportionate share of Corey's support based upon their combined income would be approximately 27%.

7 The findings currently before this court do not establish any unusual circumstances applicable to either party which suggest that Ms Allred's support payments should be increased or decreased beyond her proportional share. Persuasive reasons for adjustment may include among other things: a party's significant accumulated wealth over and above his or her salary; an extraordinary debt burden incurred for non-discretionary items; medical problems requiring exceptional ongoing expense; a history of "below scale" support levels during the time when the parent now having custody and seeking support from the other parent had been the parent paying support or competing demands on his or her income in the form of support for other dependents.

8 The orderly scheme just outlined has now been statutorily adopted. Calculation of the parent's support obligation is defined in Utah Code Ann. §78-45-7.7 (1990) which provides in pertinent part:

(1) The parents' child support obligation shall be divided between them in proportion to their adjusted gross incomes.

(2) Except in cases of joint physical custody and split custody as defined in Section 78-45-2, the total child support award shall be determined as follows:

(a) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the child support obligation table.

(b) Calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income.

"[T]he award amounts resulting from the application of the guidelines are presumed to be correct. Utah Code Ann. §78-45-7.2(2)(b) (1990) may be rebutted if there is:

[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 the use of the guidelines would be unjust, inappropriate, or not in the best interest of a child.

Utah Code Ann. §78-45-7.2(3) (1990) If the court finds sufficient evidence to suggest deviation from the guidelines, the court shall establish support after considering all relevant factors, including those listed in §78-45-7(3) (1990).

Cite as
141 Utah Adv. Rep. 18

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Devin Lincoln ANDERSON,
Defendant and Appellant.

No. 890395-CA
FILED: August 13, 1990

Fifth District, Iron County
Honorable David S. Young

ATTORNEYS:

James L. Shumate, Cedar City, for Appellant
R. Paul Van Dam and Judith S. H. Atherton,
Salt Lake City, for Appellee

Before Judges Garff, Jackson, and Newe-

OPINION

NEWHEY, Judge:

Defendant Devin Anderson was convicted of the theft of \$17.75-worth of gasoline in violation of Utah Code Ann. §76-6-404 (1990). After receiving evidence of prior theft convictions, the trial court in this case determined that Anderson had earlier been twice convicted of theft, and, pursuant to Utah Code Ann. §76-6-412(1)(b)(ii) (1990), classified this crime as a third-degree felony. Anderson appeals the classification of this offense, and we reverse its classification as a third-degree felony.

To establish two prior theft convictions, the State introduced evidence drawn from records of the Utah circuit courts and consisting mainly of preprinted forms filled in by a court clerk. One such form was entitled "Information," dated "8 Dec 1981," and captioned "Salt Lake City ... vs. Anderson, Devin." In it, a person whose name is illegible complains that a Devin Anderson committed petty larceny by stealing "merchandise having a value not exceeding \$100.00" The disposition of the charge is not shown except in notes apparently made by the clerk after locating the records in 1988, notes which say that the "Defendant was convicted of the charge below." The clerk who located the records did not testify at trial; from the signature certifi-

ying the copies, the clerk's name appears to be "Chris Peifili," although it is difficult to read the handwritten surname.

Another form dated "12 02-83" showed the plaintiff as "SLC," a common abbreviation for Salt Lake City, and "Devin Anderson" as the defendant. The defendant was not further identified. The name of a circuit judge appeared and a notation indicated that the defendant acted pro se, but plaintiff's counsel was not listed. The only indication of what took place in this case was the following cryptic, handwritten notation:

1589 DPWOC

c/o sent--15 dsjspf \$200.00
12 02-83

At trial, the State proffered the testimony of Carolyn Bullock, a court clerk, to the effect that this notation would indicate a conviction for retail theft.

The State's final exhibit was entitled "Circuit Court Criminal Case Filing/Disposition Report" dated "11/8/82 from the then Ninth Circuit Court, Cedar City Department. It showed the defendant as "Devin Lincoln Anderson" and identified him by date of birth and gender. Defendant was charged with "defrauding an innkeeper" in violation of local ordinance 38-15. The form further indicates that the defendant changed his plea to guilty and the case was concluded on that basis, with the defendant sentenced to pay a fine and make restitution. The form is not signed.

Based on this evidence, the trial court found that all three exhibits established prior convictions of Anderson for theft-type offenses, and accordingly enhanced the penalty for Anderson's present conviction pursuant to section 76-6-412(1)(b) (ii). Before the trial court and here on appeal, Anderson argues that the penalty should not have been enhanced because the State failed to show judgments against Anderson had been validly entered in the prior proceedings.

At common law, the judgment in a criminal case was usually nothing more than the oral declaration of guilt and sentence, pronounced while a clerk took notes.¹ The practice of rendering oral judgments in criminal cases has persisted to this day in many courts, including apparently many of the Utah circuit courts, despite sound reasons opposing its continuation. Those reasons include the following: (1) entry of a time-stamped, written judgment fixes clearly on the record the date of the judgment, thereby simplifying the question of when the time begins to run for post-trial motions, filing notice of appeal, and for any probation ordered;² (2) a written judgment in proper form is clear evidence of the defendant's conviction in later proceedings;³ (3) a written judgment signed by the judge helps assure the absence of clerical error or misun-

derstanding in the record and shows that responsibility for the judgment rests on the shoulders of the judge; and (4) it provides at least the beginning of a basis for meaningful review of the judgment.⁵ Accordingly, the Model Penal Code §57.03 and 7.04, the American Bar Association Standard for Criminal Justice 18-6.6, Federal Rule of Criminal Procedure 32(b)(1), and many states⁶ have departed from the common law practice and require entry of a written result in a criminal case.

In Utah, the end of the former practice of unwritten criminal judgments is mandated by Utah Rule of Civil Procedure 81(e), which serves generally to unify civil and criminal procedure in Utah except where a statute or rule provides otherwise for criminal cases.⁷ We know of no statute or rule countermanning⁸ in criminal cases the requirement of Utah Rule of Civil Procedure 58A that the court (or the clerk in the case of a verdict) sign and file a written judgment;⁹ on the contrary, a criminal statute requires that the judgment state in writing the reasons for any required restitution.¹⁰ We see no reason why the circuit court should be required to adjudicate civil cases in writing pursuant to rule 58A but nevertheless impose the more onerous criminal penalties and leave only a vague, secondary record of the judgment.

In this case, the 1981 information is not a conviction, but rather only a charge.¹¹ There is nothing in that case to show that the defendant was convicted of the charged petty larceny except the notation nine years later of an unidentified Chris P-. The cryptic notations from 1983 can be deciphered as showing a conviction only with recourse to the interpretation of an experienced circuit court clerk familiar with the clerical shorthand of the time, but in themselves are utterly vague and unintelligible.¹² The 1982 record is considerably better than those from 1981 and 1983, but still fails to comply with the requirement of rules 58A(b) and 81(e) that the court sign the judgment. Absent any showing that a signed, written judgment against Anderson was entered, the evidence is inadequate to support the trial court's finding that Anderson had been twice convicted of theft. Thus, the finding to that effect is clearly erroneous. See *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). Our ruling thus requires that a judgment of prior conviction be written, clear and definite, and signed by the court (or the clerk in a jury case) in order to serve as the basis for enhancing a penalty pursuant to Utah Code Ann. §76-6-412(1)(b)(ii) (1990).¹³

From what appears to have been the prevailing practice, many enhancements of the classification of theft pursuant to §76-6-412(1) may have been based on unwritten judgments and fragmentary evidence. However, previously enhanced theft convictions should not now be reversed or held

invalid by our ruling, which applies only prospectively. See *State v. Hickman*, 779 P.2d 670, 672 n.1 (Utah 1989); *State v. Norton*, 675 P.2d 577 (Utah 1983) cert. denied 466 U.S. 942 (1984), overruled on other grounds, *State v. Hansen*, 784 P.2d 421 (Utah 1986); *State v. Vasilacopoulos*, 756 P.2d 92 (Utah Ct. App. 1988).

The enhancement of Anderson's penalty and the classification of his offense as a third-degree felony are therefore reversed, and the case is remanded for resentencing in accordance with this opinion.

Robert L. Newey, Judge

WE CONCUR:

Regnal W. Garff, Judge
Norman H. Jackson, Judge

1. Robert L. Newey, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. §78-3-24(10) (Supp. 1990).

2. See *Miller v. Sanford*, 161 F.2d 291, 292 (5th Cir. 1947).

3. See *Sather v. Gross*, 727 P.2d 212 (Utah 1986); *Salt Lake City v. Griffin*, 750 P.2d 194 (Utah Ct. App. 1988), see also 6A J. Moore & J. Lucas, *Moore's Federal Practice* §58.02.1 (1989); C. Wright & A. Miller, *Federal Practice and Procedure* §2652 (1983).

4. At common law, there was little need to introduce evidence of a prior conviction. The common law did not enhance penalties based on prior convictions, and there was less need to do so, since the penalty for a first offense of larceny, for example, was originally death, eliminating the possibility of a subsequent conviction. R. Perkins & R. Boyce, *Criminal Law and Procedure* 174 (6th ed. 1984). However, in a time of less drastic punishments and a greater effort to address recidivism, there is a need in every proceeding to make a record that can later be used to determine whether the defendant has a longstanding problem in the area of the subsequent charge.

Besides the need to know of previous convictions for later sentence enhancements, there is a need to be able to reliably determine whether the defendant has already been in jeopardy for the offense, and a need to keep a person's record and reputation clear of spurious criminal implications.

5. Appellate courts have often noted in cases remanded for lack of findings that we cannot review a case on appeal if we cannot ascertain what the trial court decided. *Andrus v. Bagley*, 775 P.2d 934, 936 (Utah 1988); *Smith v. Smith*, 776 P.2d 423, 426 (Utah 1986); see also *State v. Lamper*, 779 P.2d 1125 (Utah 1989); *State v. Nelson*, 725 P.2d 1353, 1356 (Utah 1986).

6. See, e.g., *Fisher v. State*, 482 So 2d 587 (Fla. Ct. App. 1986); *Bishop v. State*, 176 Ga. App. 357, 335 S.E.2d 742 (1985); *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982); *Commonwealth v. Foster*, 229 Pa. Super. 269, 324 A.2d 538 (1974); *State v. Dean*, 107 Ohio App. 219, 158 N.E.2d 217, 224 (1958) (dictum); *State v. Vinson*, 337 Mo. 1023, 87 S.W.2d 637, 639 (1935); *State ex rel Echile v. Card*, 148 Wash. 270, 268 P. 869 (1928).

7. Rule 81(e) provides:

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENTS I-X [BILL OF RIGHTS] AMENDMENTS XI-XXVI

AMENDMENT I

[Religious and political freedom.]
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

AMENDMENT II

[Right to bear arms.]
A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]
No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Reasonable searches and seizures.]
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising out of land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be con-

fronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of counsel for his defence

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people

AMENDMENT X

[Powers reserved to states or people.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three

on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

Section

1. [Slavery prohibited.]
2. [Power to enforce amendment.]

Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. [Power to enforce amendment.]

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section

1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]
4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to

vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

AMENDMENT XV

Section

1. [Right of citizens to vote — Race or color not to disqualify.]
2. [Power to enforce amendment.]

Section 1. [Right of citizens to vote — Race or color not to disqualify.]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. [Power to enforce amendment.]

The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

[Income tax.]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

currence of a majority of all justices of the supreme court. If a justice of the supreme court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause. 1985

Sec. 3. [Jurisdiction of supreme court.]

The supreme court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The supreme court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the supreme court's jurisdiction or the complete determination of any cause. 1985

Sec. 4. [Rule-making power of supreme court — Judges pro tempore — Regulation of practice of law.]

The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the supreme court upon a vote of two-thirds of all members of both houses of the legislature. Except as otherwise provided by this constitution, the supreme court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The supreme court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law. 1985

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause. 1985

Sec. 6. [Number of judges of district court and other courts — Divisions.]

The number of judges of the district court and of other courts of record established by the legislature shall be provided by statute. No change in the number of judges shall have the effect of removing a judge from office during a judge's term of office. Geographic divisions for all courts of record except the supreme court may be provided by statute. No change in divisions shall have the effect of removing a judge from office during a judge's term of office. 1985

Sec. 7. [Qualifications of justices and judges.]

Supreme court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection, and admitted to practice law in Utah. Judges of other courts of record shall be at least 25 years old, United States citizens, Utah residents for three years preceding selection, and admitted to practice law in Utah. If geographic divi-

sions are provided for any court, judges of that court shall reside in the geographic division for which they are selected. 1985

Sec. 8. [Vacancies — Nominating commissions — Senate approval.]

When a vacancy occurs in a court of record, the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the judicial nominating commission having authority over the vacancy. The governor shall fill the vacancy within 30 days after receiving the list of nominees. If the governor fails to fill the vacancy within the time prescribed, the chief justice of the supreme court shall within 20 days make the appointment from the list of nominees. The legislature by statute shall provide for the nominating commissions' composition and procedures. No member of the legislature may serve as a member of, nor may the legislature appoint members to, any judicial nominating commission. The senate shall consider and render a decision on each judicial appointment within 30 days of the date of appointment. If necessary, the senate shall convene itself in extraordinary session for the purpose of considering judicial appointments. The appointment shall be effective upon approval of a majority of all members of the senate. If the senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence. Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political considerations. 1985

Sec. 9. [Judicial retention elections.]

Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment. Following initial voter approval, each supreme court justice every tenth year, and each judge of other courts of record every sixth year, shall be subject to an unopposed retention election at the corresponding general election. Judicial retention elections shall be held on a nonpartisan ballot in a manner provided by statute. If geographic divisions are provided for any court of record, the judges of those courts shall stand for retention election only in the geographic division to which they are selected. 1985

Sec. 10. [Restrictions on justices and judges.]

Supreme court justices, district court judges, and judges of all other courts of record while holding office may not practice law, hold any elective nonjudicial public office, or hold office in a political party. 1985

Sec. 11. [Judges of courts not of record.]

Judges of courts not of record shall be selected in a manner, for a term, and with qualifications provided by statute. However, no qualification may be imposed which requires judges of courts not of record to be admitted to practice law. The number of judges of courts not of record shall be provided by statute. 1985

Sec. 12. [Judicial Council — Chief justice as administrative officer.]

A Judicial Council is established, which shall adopt rules for the administration of the courts of the state. The Judicial Council shall consist of the chief justice of the supreme court, as presiding officer, and such other justices, judges, and other persons as provided by statute. There shall be at least one representative on the Judicial Council from each court established by the constitution or by statute. The chief justice of the supreme court shall be the chief administrative

officer for the courts and shall implement the rules adopted by the Judicial Council. 1985

Sec. 13. [Judicial Conduct Commission.]

A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:

- (1) action which constitutes willful misconduct in office;
- (2) final conviction of a crime punishable as a felony under state or federal law;
- (3) willful and persistent failure to perform judicial duties;
- (4) disability that seriously interferes with the performance of judicial duties; or
- (5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

Prior to the implementation of any commission order, the supreme court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the supreme court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order. The legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission. 1985

Sec. 14. [Compensation of justices and judges.]

The legislature shall provide for the compensation of all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office. 1985

Sec. 15. [Mandatory retirement.]

The legislature may provide standards for the mandatory retirement of justices and judges from office. 1985

Sec. 16. [Public prosecutors.]

The legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by statute, and shall be admitted to practice law in Utah. If a public prosecutor fails or refuses to prosecute, the supreme court shall have power to appoint a prosecutor pro tempore. 1985

ARTICLE IX

CONGRESSIONAL AND LEGISLATIVE APPOURTIONMENT

Section

- [Apportionment.]
- [Number of members of Legislature.]
- [Renumbered.]
- [Repealed.]

Section 1. [Apportionment.]

At the session next following an enumeration made by the authority of the United States, the legislature shall divide the state into congressional, legislative, and other districts accordingly. 1989

Sec. 2. [Number of members of Legislature.]

The Senate shall consist of a membership not to exceed twenty-nine in number, and the number of representatives shall never be less than twice nor greater than three times the number of senators. 1985

Sec. 3. [Renumbered as Section 2 of this Article.]

Sec. 4. [Repealed.]

ARTICLE X

EDUCATION

Section

1. [Free nonsectarian schools.]
2. [Defining what shall constitute the public school system.]
3. [State Board of Education.]
4. [Control of higher education system by statute — Rights and immunities confirmed.]
5. [State School Fund and Uniform School Fund — Establishment and use.]
6. [Repealed.]
7. [Proceeds of land grants constitute permanent funds.]
8. [No religious or partisan tests in schools.]
9. [Public aid to church schools forbidden.]
10. [Repealed.]
11. [Repealed.]
12. [Renumbered.]
13. [Renumbered.]

Section 1. [Free nonsectarian schools.]

The legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control. 1985

Sec. 2. [Defining what shall constitute the public school system.]

The public education system shall include all public elementary and secondary schools and such other schools and programs as the legislature may designate. The higher education system shall include all public universities and colleges and such other institutions and programs as the legislature may designate. Public elementary and secondary schools shall be free, except the legislature may authorize the imposition of fees in the secondary schools. 1987

Sec. 3. [State Board of Education.]

The general control and supervision of the public education system shall be vested in the State Board of Education. The membership of the board shall be established and elected as provided by statute. The State Board of Education shall appoint a State Superintendent of Public Instruction who shall be the executive officer of the board. 1987

Sec. 4. [Control of higher education system by statute — Rights and immunities confirmed.]

The general control and supervision of the higher education system shall be provided for by statute. All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed. 1987

tenance of appropriate health, hospital, and dental care insurance for the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide day care for the dependent children, necessitated by the employment or training of the custodial parent.

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

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates on the remarriage of that former spouse. However, the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by a party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

1985

30-3-5.1. Provision for income withholding in child support order.

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Chapter 45d, Title 78.

1985

30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation.

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court shall order that an investigation be conducted by the Division of Family Services in the Department of Social Services in accordance with Part 5, Chapter 4 of Title 62A. A final order of custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Family Services within 30 days of the filing of the notice and request for an investigation.

1988

6. Repealed.

1985

7. When decree becomes absolute.

A decree of divorce becomes absolute on the date signed by the court and entered by the clerk in

the register of actions or at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending or the court, before the decree becomes absolute, for sufficient cause otherwise orders. The court, upon application or on its own motion for good cause shown, may waive, alter, or extend a designated period of time before the decree becomes absolute, but not to exceed six months from the signing and entry of the decree.

1985

30-3-8. Remarriage — When unlawful.

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmation of the decree.

1988

30-3-9. Repealed.

1989

30-3-10. Custody of children in case of separation or divorce — Custody considerations.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

1988

30-3-10.1. Joint legal custody defined.

In this chapter, "joint legal custody":

(1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(2) may include an award of exclusive authority by the court to one parent to make specific decisions;

(3) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated, and

(5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

1988

30-3-10.2. Joint legal custody order — Factors for court determination — Public assistance.

(1) There is a rebuttable presumption, subject to Subsection (2), that joint legal custody is in the best interest of a child.

(2) The court may order joint legal custody if it determines that:

(a) both parents agree to an order of joint legal custody;

(b) joint legal custody is in the best interest of the child; and

(c) both parents appear capable of implementing joint legal custody.

(3) In determining the best interest of a child, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;

(d) whether both parents participated in raising the child before the filing of the suit;

(e) the geographical proximity of the homes of the parents;

(f) if the child is 12 years of age or older, any preference of the child for or against joint legal custody; and

(g) any other factors the court finds relevant.

(4) The determination of the best interest of the child shall be by a preponderance of the evidence.

(5) The court shall inform both parties that an order for joint custody may preclude eligibility for public assistance in the form of aid to families with dependent children, and that if public assistance is required for the support of children of the parties at any time subsequent to an order of joint legal custody, the order may be terminated under Section 30-3-10.4.

(6) The court may recommend that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

1988

30-3-10.3. Terms of joint legal custody order.

(1) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

(a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;

(b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;

(c) the rights and duties of each parent regarding the child's present and future physical care, support, and education;

(d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends; and

(e) as necessary the remaining parental rights, privileges, duties, and powers to be exercised by the parents solely, concurrently, or jointly.

(2) The court shall, where possible, include in the order the terms agreed to between the parties.

(3) Any parental rights not specifically addressed by the court order may be exercised by the parent having physical custody of the child the majority of the time.

(4) (a) The appointment of joint legal custodians does not impair or limit the authority of the court to order support of the child, including payments by one custodian to the other.

(b) An order of joint legal custody, in itself, is not grounds for modifying a support order.

(5) The agreement may contain a dispute resolution procedure the parties agree to use before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

1988

30-3-10.4. Modification or termination of order.

(1) On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:

(a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and

(b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.

(2) (a) The order of joint legal custody is terminated upon the filing of a motion for termination by:

(i) both parents; or

(ii) one parent, when notice of the motion is sent by certified mail to the other parent and an affidavit is filed with the motion, indicating the motion has been mailed as required by this subsection.

(b) The order of joint legal custody shall be replaced by the court with an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court.

(3) If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party.

1988

30-3-10.5. Payments of support, maintenance, and alimony.

Unless the order or decree providing for support, maintenance, or alimony under this chapter or Chapter 4, Title 30, provides a different time for payment, all monthly payments of support, maintenance, or alimony provided for in the order or decree shall be due one-half by the 5th day of each month, and the remaining one-half by the 20th day of that month.

1985

30-3-10.6. Payment under child support order — Judgment.

(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.

(3) For purposes of this section, "jurisdiction" means a state or political subdivision, a territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(4) The judgment provided for in Subsection (1)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-311. 1989

30-3-11. Repealed. 1961

30-3-11.1. Family Court Act — Purpose.

It is the public policy of the state of Utah to strengthen the family life foundation of our society and reduce the social and economic costs to the state resulting from broken homes and to take reasonable measures to preserve marriages, particularly where minor children are involved. The purposes of this act are to protect the rights of children and to promote the public welfare by preserving and protecting family life and the institution of matrimony by providing the courts with further assistance for family counseling, the reconciliation of spouses and the amicable settlement of domestic and family controversies. 1969

30-3-11.2. Appointment of counsel for child.

If, in any action before any court of this state involving the custody or support of a child, it shall appear in the best interests of the child to have a separate exposition of the issues and personal representation for the child, the court may appoint counsel to represent the child throughout the action, and the attorney's fee for such representation may be taxed as a cost of the action. 1969

30-3-12. Courts to exercise family counseling powers.

Each district court of the respective judicial districts, while sitting in matters of divorce, annulment, separate maintenance, child custody, alimony and support in connection therewith, child custody in habeas corpus proceedings, and adoptions, shall exercise the family counseling powers conferred by this act. 1969

30-3-13. Repealed. 1961

30-3-13.1. Establishment of family court division of district court.

A family court division of the district court may be established with the consent of the county commission in a county in which the district court determines that the social conditions in the county and the number of domestic relations cases in the courts require use of the procedures provided for in this act in order to give full and proper consideration to such cases and to effectuate the purposes of this act. The determination shall be made annually by the judge of the district court in counties having only one judge, and by a majority of the judges of the district court in counties having more than one judge. 1969

30-3-14. Repealed. 1961

30-3-14.1. Designation of judges — Terms.

In a county within a judicial district having more than one judge of the district court but having a population of less than 300,000 and in which the district court has established a family court division, the pre-

siding judge of such court shall annually, in the month of September, designate at least one judge to hear all cases under this act. In a county within a judicial district having more than one judge of the district court and having a population of more than 300,000 and in which the district court has established a family court division, the presiding judge of such court shall annually, in the month of September, designate at least two judges to hear all cases under this act, and shall designate one of such judges as the presiding judge of such family court division. Such judge or judges shall serve on the family court division not less than one year and devote their time primarily to divorce and other domestic relations cases. 1969

30-3-15. Repealed. 1961

30-3-15.1. Appointment of domestic relations counselors, family court commissioner, and assistants and clerks.

In each county having a population of less than 300,000 and in which the district court has established a family court division the district court judge or judges may, and in each county having a population of more than 300,000 and in which the district court has established a family court division the district court judges shall, by an order filed in the office of the clerk on or before July 1 of each year, appoint one or more domestic relations counselors, an attorney of recognized ability and standing at the bar as family court commissioner, and such other persons as assistants and clerks as may be necessary, to serve during the pleasure of the appointing power. 1969

30-3-15.2. Domestic relations counselors — Powers.

Domestic relations counselors shall have the power to:

(1) Hold conciliation conferences with persons who are parties to a petition for conciliation and with parties in actions for divorce, annulment or separate maintenance who may be referred by the court in such actions.

(2) Test and evaluate all persons coming before them and either hold further conferences with them or refer them to agencies or resources for further conferences and counseling. Domestic relations counselors shall report to the court on each case referred, advising as to the number of conferences attended by the parties and whether a reconciliation has been or is likely to be effected.

(3) Conduct investigations and make reports as the court may direct regarding the award of custody or placement of children, either in pre-divorce or post-divorce matters. When a request for an investigation has been joined in or agreed to by both parties a report shall be filed with the court and received as evidence, subject to the right of either party to cross-examine the person making the report.

(4) Keep records, compile statistics and make reports as the court may direct. 1969

30-3-15.3. Commissioners — Powers.

Family court commissioners shall have power to:

(1) Secure compliance with court orders.

(2) Serve as judge pro tempore, master or referee on assignment of the court, and with the written consent of the parties to hear orders to show cause where no contempt is alleged, default divorces where the parties have had marriage

counseling but there has been no reconciliation, uncontested actions under the Uniform Act on Paternity, actions under the Uniform Civil Liability for Support Act and actions under the Reciprocal Enforcement of Support Act.

(3) Represent the interest of children in divorce or annulment actions, and of the parties in appropriate cases.

(4) Act with the domestic relations counselors in the screening and referral of applicants for counseling.

(5) Assist the domestic relations counselors in custody investigations and the presentation, where necessary, of their reports to the court. 1969

30-3-15.4. Salaries and expenses.

Salaries of persons appointed under the foregoing sections shall be fixed by the board of commissioners of the county in which they serve. Office space, furnishings, equipment and supplies for family court commissioners and conciliation staff shall be provided by the board of county commissioners. The expenses and salaries of family court commissioners and conciliation staff shall be paid from county funds under Section 17-16-7. 1969

30-3-16. Repealed. 1961

30-3-16.1. Jurisdiction of family court division — Powers.

Whenever any controversy exists between spouses which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household, and there is a child of the spouses or either of them under the age of 17 years whose welfare might be affected, the family court division of the district court shall have jurisdiction over the controversy, over the parties and over all persons having any relation to the controversy and may compel attendance before the court or a domestic relations counselor of the parties or other persons related to the controversy. The court may make orders in divorce or conciliation proceeding as it deems necessary for the protection of the family interests. 1969

30-3-16.2. Petition for conciliation.

Prior to the filing of any action for divorce, annulment, or separate maintenance, either spouse or both spouses may file a petition for conciliation in the family court division invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties or an amicable settlement of the controversy between them so as to avoid litigation over the issues involved. 1969

30-3-16.3. Contents of petition.

The petition for conciliation shall state:

(1) A controversy exists between the spouses and request the aid of the court to effect a reconciliation or an amicable settlement of the controversy.

(2) The name and age of each child under the age of 17 years whose welfare may be affected by the controversy.

(3) The name and address of the petitioner or the names and addresses of the petitioners.

(4) If the petition is filed by one spouse only, the name and address of the other spouse as a respondent.

(5) The name, as a respondent, of any other person who has any relation to the controversy.

and, if known to the petitioners, the address of such person.

(6) Such other information as the court may by rule require. 1969

30-3-16.4. Procedure upon filing of petition.

When a petition for conciliation is filed in the family court division of the district court, the court shall refer the matter to the domestic relations counselor or counselors and shall cause notice to be given to the spouses, by mail or in a form prescribed by the court of the filing of the petition and of the time and place of any hearing, conference or other proceeding scheduled by the court or domestic relations counselors under this act. 1969

30-3-16.5. Fees.

The court may fix fees to be charged for filing petition for conciliation and for use of the court counseling services. 1969

30-3-16.6. Information not available to public.

Neither the names of petitioners nor respondent nor the contents of petitions for conciliation filed under this act, shall be available or open to public inquiry, except that an attorney for a person seeking file an action for divorce, annulment or separate maintenance may determine from the clerk of the court if the other spouse has filed a petition for conciliation. 1969

30-3-16.7. Effect of petition — Pendency of a tion.

The filing of a petition for conciliation under this act shall, for a period of 60 days thereafter, act as bar to the filing by either spouse of an action for divorce, annulment of marriage or separate maintenance unless the court otherwise orders. The pendency of an action for divorce, annulment of marriage, or separate maintenance shall not prevent either party to the action from filing a petition for conciliation under this act, either on his own or at the request and direction of the court as authorized by Section 30-3-17; and the filing of a petition for conciliation shall stay for a period of 60 days, unless the court otherwise orders, any trial or default hearing on the complaint. However, when the judge of the family court division is advised in writing by a marriage counselor to whom a petition for conciliation has been referred that a reconciliation of the parties cannot be effected, the bar to filing an action or the stay of trial or default hearing shall be removed. 1969

30-3-17. Power and jurisdiction of judge.

The judge of a district court may counsel either spouse or both and may in his discretion require one or both of them to appear before him and, in the counties where a domestic relations counselor has been appointed pursuant to this act, require them to file a petition for conciliation and to appear before such counselor, or may recommend the aid of a physician, psychiatrist, psychologist, social service worker or other specialists or scientific expert, or the pastor, bishop or presiding officer of any religious denomination to which the parties may belong. The power of jurisdiction granted by this act shall be in addition to that presently exercised by the district courts and shall not be in limitation thereof. 1969

30-3-17.1. Proceedings deemed confidential. Written evaluation by counselor.

The petition for conciliation and all communications, verbal or written, from the parties to the domestic relations counselors or other personnel of the

37. Agreement to pay compensation to recover reported property unenforceable.

Agreements to pay compensation to recover or in the recovery of property reported under Section 78-44-18, made within 24 months after the date of delivery is made under Section 78-44-20, are unenforceable. 1983

38. Property in foreign country or from foreign transaction exempt.

This chapter does not apply to any property held in a foreign country and arising out of a foreign transaction. 1983

39. Duties under prior law — Property to be included in initial report.

This chapter does not relieve a holder of a duty to report, pay, or deliver property arising before July 1, 1983. Such holder who fails to comply before that date is subject to the applicable enforcement and penalties in existence at that time and those provisions are continued in effect for the purpose of this subsection, subject to Subsection 78-44-30(2). The initial report to be filed under this chapter is a property that was not required to be reported before July 1, 1983, but which is subject to this chapter include all items of property that would have resumed abandoned during the ten-year period ending July 1, 1983, as if this chapter had been in effect during that period. 1983

40. Application and construction of chapter.

This chapter shall be applied and construed as to make its general purpose to make uniform the law with respect to the subject of this chapter among the states. 1983

CHAPTER 45

UNIFORM CIVIL LIABILITY FOR SUPPORT ACT

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78-45-1. Short title.

This act may be cited as the Uniform Civil Liability for Support Act. 1957

78-45-2. Definitions.

As used in this chapter:

- (1) "Adjusted gross income" means income calculated under Subsection 78-45-7.6(1).
- (2) "Base child support award" means the award calculated using the guidelines before additions for uninsured extraordinary medical expenses and work-related child care costs.
- (3) "Base combined child support obligation table," "child support table," or "table" means the table in Section 78-45-7.14.
- (4) "Child" means a son or daughter under the age of 18 years and a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means.
- (5) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and specifically include periodic payment pursuant to pension or retirement programs, or insurance policies of any type. Earnings shall specifically include all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets.
- (6) "Extraordinary medical expense" includes medical and dental expenses for surgery, orthodontic care, psychological or psychiatric care, hospitalization, physical therapy, ophthalmology and optometry, broken limbs, and continuing illnesses or allergies such as diabetes or asthma.
- (7) "Guidelines" means the child support guidelines in Sections 78-45-7.2 through 78-45-7.18.
- (8) "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.

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

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

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

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

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

(14) "Stepchild" means any child with a stepparent.

(15) "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 one living with the natural or adoptive parent as a common law spouse, whose common law marriage was entered into in a state which recognizes the validity of common law marriages.

(16) "Total child support award" means the base child support award, plus any uninsured extraordinary medical expenses and child care costs that may be ordered.

(17) "Work-related child care costs" means reasonable child care costs for up to a full-time work week or training schedule, necessitated by the employment or training of the custodial parent, as provided in Section 78-45-7.17. 1989

78-45-3. Duty of man.

Every man shall support his child; and he shall support his wife when she is in need. 1977

78-45-4. Duty of woman.

Every woman shall support her child, and she shall support her husband when he is in need. 1957

78-45-4.1. Duty of stepparent to support stepchild — Effect of termination of marriage or common law relationship.

A stepparent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child. Provided, however, that upon the termination of the marriage or common law relationship between the stepparent and the child's natural or adoptive parent the support obligation shall terminate. 1980

78-45-4.2. Natural or adoptive parent has primary obligation of support — Right of stepparent to recover support.

Nothing contained herein shall act to relieve the natural parent or adoptive parent of the primary obligation of support, furthermore, a stepparent has the same right to recover support for a stepchild from the natural or adoptive parent as any other obligee. 1979

78-45-4.3. Ward of state — Primary obligation to support.

Notwithstanding Section 78-45-2, a natural or an adoptive parent or stepparent whose minor child has become a ward of the state is not relieved of the primary obligation to support that child until he reaches the age of majority. 1983

78-45-5. Duty of obligor regardless of presence or residence of obligee.

An obligor present or resident in this state has the duty of support as defined in this act regardless of the presence or residence of the obligee. 1987

78-45-6. District court jurisdiction.

The district court shall have jurisdiction of all proceedings brought under this act. 1957

78-45-7. Determination of amount of support — Rebuttable guidelines.

(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) If no prior court order exists, or a material change in circumstances has occurred, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

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

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the needs of the obligee, the obligor, and the child;
- (f) the ages of the parties;
- (g) the responsibility of the obligor for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

- (a) the amount of public assistance received by the obligee, if any; and
- (b) the funds that have been reasonably and necessarily expended in support of spouse and children. 1989

78-45-7.1. Medical and dental expenses of dependent children — Assigning responsibility for payment — Insurance coverage.

When no prior court order exists or the prior court order makes no specific provision for the payment of medical and dental expenses for dependent children, the court shall include in its order a provision assigning responsibility for the payment of reasonable and necessary medical and dental expenses for the dependent children. If coverage is available at a reasonable cost, the court may also include a provision requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. 1984

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

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

(b) Neither the enactment of the guidelines or any consequent impact of the guidelines on existing child support orders constitute a substantial or material change of circumstances as a ground for modification of a court order existing prior to July 1, 1989. However, if the court finds a material change of circumstances independent of

the guidelines, the guidelines may be applied to modify a court order existing prior to 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 and the award amounts resulting from the application of the 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) A noncustodial parent's obligation to provide child support for natural born or adopted children of a second family arising subsequent to entry of an existing child support order may not be considered to lower the child support awarded to the first family in the existing order.

(b) If the custodial parent of the first family petitions to increase child support, all natural born and adopted children of the noncustodial parent may be considered in determining whether to increase the award.

1989

78-45-7.3. Procedure — Documentation — Stipulation.

(1) In a default or uncontested proceeding, the moving party shall submit:

(a) a completed child support worksheet;

(b) the financial verification required by Subsection 78-45-7.5(5); and

(c) an affidavit indicating that the amount of child support requested is consistent with the guidelines, or that the amount is not consistent with the guidelines.

(2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the defaulting party's income by the moving party, based on the best evidence available, may be submitted.

(b) The evidence shall be in affidavit form and may only be offered after a copy has been provided to the defaulting party in accordance with Utah Rules of Civil Procedure.

(3) (a) If a stipulation is submitted as a basis for establishing or modifying child support, each parent shall present financial verification required by Subsection 78-45-7.5(4) and an affidavit fully disclosing the financial status of each parent, as required for use of the guidelines. A hearing is not required, but the guidelines shall be used to review the adequacy of a child support order negotiated by the parents.

(b) A stipulated amount for child support or combined child support and alimony is adequate under the guidelines if the stipulated child support amount or combined amount exceeds the total child support award required by the guidelines. When the stipulated amount exceeds the guidelines, it may be awarded without a finding under Section 78-45-7.2.

1989

Adjusted gross income shall be used in calculating each parent's share of the child support award. Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines.

1989

78-45-7.5. Determination of gross income — Imputed income.

(1) As used in the guidelines "gross income" includes:

(a) prospective income from any source, including nonearned sources, except under Subsection (3); and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time job.

(3) Specifically excluded from gross income are:

(a) Aid to Families with Dependent Children (AFDC);

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid, Food Stamps, or General Assistance; and

(c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide suitable documentation of current earnings, including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year to provide verification of earnings over time and shall document income from nonearned sources according to the source.

(c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) Income shall be imputed to a parent based upon employment potential and probable earnings as derived from work history, occupation

qualifications, and prevailing earnings for persons of similar backgrounds in the community.

(c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a forty-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills, or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a child who is the subject of a child support award, nor benefits to a child in the child's own right, such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

1989

78-45-7.6. Adjusted gross income.

(1) As used in the guidelines, "adjusted gross income" is the amount calculated by subtracting from gross income alimony previously ordered and paid and child support previously ordered.

(2) The guidelines do not reduce the total child support award by adjusting the gross incomes of the parents for alimony ordered in the pending proceeding. In establishing alimony, the court shall consider that in determining the child support, the guidelines do not provide a deduction from gross income for alimony.

1989

8-45-7.7. Calculation of obligations.

(1) The parents' child support obligation shall be divided between them in proportion to their adjusted gross incomes.

(2) Except in cases of joint physical custody and split custody as defined in Section 78-45-2, the total child support award shall be determined as follows:

(a) combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base child support obligation table;

(b) calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income, and subtracting from the products the children's portion of any monthly payments made directly by each parent for medical and dental insurance premiums;

(c) allocate any known uninsured extraordinary medical expenses to be incurred on behalf of the children equally to each parent;

(d) after subtracting federal tax credits, allocate monthly work-related child care costs equally to each parent;

(e) calculate the total child support award by adding the noncustodial parent's share of the base child support obligation calculated in Subsection (2)(b) and the two amounts allocated in Subsections (2)(c) and (d); and include in the order all three amounts and the total child support award.

(3) The base combined child support obligation table provides combined child support obligations for up to six children. For more than six children, additional amounts shall be added to the base child support obligation shown. The amount shown on the table is the support amount for the total number of children, not an amount per child.

1989

78-45-7.8. Split custody — Obligation calculations.

In cases of split custody, the total child support award shall be determined as follows:

(1) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base child support obligation table. Allocate a portion of the calculated amount between the parents in proportion to the number of children for whom each parent has physical custody. The amounts so calculated are a tentative base child support obligation due each parent from the other parent for support of the child or children for whom each parent has physical custody.

(2) Multiply the tentative base child support obligation due each parent by the percentage that the other parent's adjusted gross income bears to the total combined adjusted gross income of both parents.

(3) Subtract from the products in Subsection (2) the children's portion of any monthly payments made directly by each parent for medical and dental insurance premiums.

(4) Subtract the lesser amount in Subsection (3) from the larger amount to determine the base child support award to be paid by the parent with the greater financial obligation.

(5) Allocate any known uninsured extraordinary medical expenses to be incurred on behalf of the children equally to each parent.

(6) After subtracting federal tax credits, allocate combined monthly work-related child care costs equally to each parent.

(7) Calculate the total child support award by adding the base child support award calculated in Subsection (4) and the amounts allocated in Subsections (5) and (6). Include all three amounts and the total child support award in the child support order.

1989

78-45-7.9. Joint physical custody — Obligation calculations.

In cases of joint physical custody, the total child support award shall be determined as follows:

(1) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base child support obligation table.

(2) Calculate each parent's proportionate share of the base combined child support obligation

tion by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income. The amounts so calculated are a tentative base child support obligation due from each parent for support of the children.

(3) Multiply each parent's tentative base child support obligation by the percentage of time the children spend with the other parent to determine each parent's tentative obligation to the other parent.

(4) Subtract from the products in Subsection (3) the children's portion of any monthly payments made directly by each parent for medical and dental insurance premiums.

(5) Calculate the base child support award to be paid by the obligor by subtracting the lesser amount calculated in Subsection (4) from the larger amount.

(6) Allocate any known uninsured extraordinary medical expenses to be incurred on behalf of the children equally to each parent.

(7) After subtracting federal tax credits, allocate the combined work-related child care costs of the parents equally to each parent to obtain the other parent's tentative child care obligation.

(8) (a) Calculate the total child support award that the parent determined to be the obligor in Subsection (5) must pay when the obligee has physical custody by:

(i) adding the base child support award calculated under Subsection (5);
(ii) adding the amount of known uninsured extraordinary medical expenses allocated to the obligor in Subsection (6); and

(iii) adding the amount of the child care obligation allocated to the obligor in Subsection (7).

(b) Calculate the total child support award that the parent determined to be the obligor in Subsection (5) must pay when that parent has physical custody by:

(i) adding the base child support award calculated under Subsection (5);
(ii) adding the amount of the known uninsured extraordinary medical expenses allocated to the obligor in Subsection (6); and

(iii) subtracting the amount of the child care obligation allocated to the obligee in Subsection (7).

(9) Include the amounts determined in Subsections (8)(a) and (8)(b) and the two total child support awards in the child support order. 1989

78-45-7.10. Reduction when child becomes 18.

(1) When a child becomes 18 years of age the base combined child support award is automatically reduced to reflect the lower base combined child support obligation shown in the table for the remaining number of children due child support, unless otherwise provided in the child support order.

(2) The award may not be reduced by a per child amount derived from the base child support award originally ordered. 1989

78-45-7.11. Reduction for extended visitation.

(1) The child support order shall provide that the base child support award be reduced by 50% for each child for time periods during which specific extended visitation for that child is granted in the order for at

least 25 of any 30 consecutive days. Only the base child support award is affected by the 50% abatement. The amount added to the base child support award for uninsured extraordinary medical expenses may continue uninterrupted. The amount to be paid for work-related child care costs may be suspended if the costs are not incurred during the extended visitation.

(2) For purposes of this section the per child amount to which the abatement applies shall be calculated by dividing the base child support award by the number of children included in the award. 1989

78-45-7.12. Income in excess of tables.

If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount may be ordered, but the amount ordered may not be less than the highest level specified in the table for the number of children due support. 1989

78-45-7.13. Advisory committee — Membership and functions.

(1) On or before May 1, 1989 and May 1, 1991, and then on or before May 1 of every fourth year subsequently, the governor shall appoint an advisory committee consisting of:

(a) two representatives recommended by the Office of Recovery Services;

(b) two representatives recommended by the Judicial Council;

(c) two representatives recommended by the Utah State Bar Association; and

(d) an uneven number of additional persons, not to exceed five, who represent diverse interests related to child support issues, as the governor may consider appropriate. However, none of the individuals appointed under this subsection may be members of the Utah State Bar Association.

(2) (a) The advisory committee shall review the child support guidelines to ensure their application results in the determination of appropriate child support award amounts.

(b) The committee shall report to the Legislative Judiciary Interim Committee on or before October 1 in 1989 and 1991, and then on or before October 1 of every fourth year subsequently.

(c) The committee's report shall include recommendations of the majority of the committee, as well as specific recommendations of individual members of the committee.

(3) The committee members serve without compensation. Staff for the committee shall be provided from the existing budgets of the Department of Social Services and the Judicial Council. The committee ceases to exist no later than the date the subsequent committee under this section is appointed. 1989

78-45-7.14. Child support obligation table.

The following is the Base Combined Child Support Obligation Table:

BASE COMBINED CHILD SUPPORT OBLIGATION (Both Parents)						
(Adjusted for FICA, and federal and state taxes)						
Combined Adj. Gross Income	Children					
	1	2	3	4	5	6
Less than \$200	\$20	\$28	\$30	\$31	\$32	\$33
200	23	34	35	35	36	36

Combined Adj. Gross Income	Children					
	1	2	3	4	5	6
\$ 225	25	38	39	39	40	40
250	28	42	43	43	44	45
275	51	67	67	68	69	69
300	56	73	73	74	75	76
325	60	78	79	80	81	82
350	65	84	85	86	87	88
375	69	90	91	92	93	94
400	74	96	97	98	99	100
425	78	102	103	104	105	106
450	83	108	109	110	111	112
475	87	114	115	116	117	118
500	92	120	121	122	123	125
525	96	126	127	128	129	131
550	100	131	133	134	135	137
575	105	137	139	140	141	143
600	109	143	145	146	148	149
625	114	149	151	152	154	155
650	118	155	157	158	160	161
675	123	161	162	164	166	167
700	127	167	168	170	172	174
725	132	173	174	176	178	180
750	136	178	180	182	184	186
775	141	184	186	188	190	192
800	145	190	192	194	196	198
825	167	214	218	220	222	224
850	168	225	229	233	235	237
875	169	226	241	245	247	250
900	171	232	252	258	260	263
925	172	238	263	270	273	276
950	173	244	275	283	285	288
975	174	250	286	295	298	301
1,000	176	256	298	308	311	314
1,050	178	268	321	333	336	340
1,100	181	280	344	358	362	366
1,150	183	292	367	383	387	392
1,200	180	296	379	399	404	410
1,250	185	304	390	413	423	432
1,300	190	312	400	428	441	454
1,350	195	320	410	442	460	476
1,400	200	328	421	457	479	498
1,450	205	336	431	471	497	520
1,500	210	345	441	486	516	542
1,550	215	353	452	501	535	564
1,600	219	361	462	515	554	586
1,650	224	369	473	530	572	608
1,700	229	377	483	544	591	630
1,750	234	385	493	559	610	652
1,800	239	393	504	574	628	674
1,850	252	408	522	595	654	702
1,900	256	416	532	606	665	715
1,950	259	423	541	617	677	728
2,000	261	418	538	616	677	728
2,100	259	432	557	637	701	754
2,200	267	447	576	659	725	780
2,300	275	461	595	680	749	805
2,400	283	476	614	702	772	831
2,500	282	482	625	715	788	849
2,600	290	497	644	737	812	875
2,700	298	511	663	758	836	900
2,800	313	532	689	787	866	932
2,900	321	547	708	809	890	959
3,000	330	562	728	831	915	985
3,100	339	577	747	853	939	1,011
3,200	348	592	766	875	963	1,037
3,300	357	607	786	897	988	1,063
3,400	366	622	805	920	1,012	1,089
3,500	375	637	824	942	1,036	1,115
3,600	384	653	844	964	1,061	1,142
3,700	393	668	863	986	1,085	1,168
3,800	402	683	882	1,008	1,109	1,194
3,900	419	706	909	1,038	1,142	1,228
4,000	427	720	928	1,060	1,166	1,254
4,100	435	735	947	1,082	1,190	1,280
4,200	443	749	966	1,103	1,214	1,306
4,300	451	764	985	1,125	1,238	1,332
4,400	459	778	1,004	1,147	1,262	1,358
4,500	477	802	1,032	1,177	1,295	1,393
4,600	485	816	1,050	1,199	1,319	1,419
4,700	493	831	1,069	1,221	1,343	1,445
4,800	501	845	1,088	1,243	1,367	1,471
4,900	509	860	1,107	1,264	1,391	1,497
5,000	517	874	1,126	1,286	1,415	1,523
5,100	525	889	1,145	1,308	1,439	1,549
5,200	534	903	1,164	1,329	1,463	1,575
5,300	564	939	1,203	1,372	1,508	1,621
5,400	570	951	1,220	1,391	1,529	1,644
5,500	577	963	1,236	1,410	1,550	1,666
5,600	583	976	1,252	1,429	1,571	1,689

Combined Adj. Gross Income	Children					
	1	2	3	4	5	6
\$ 5,700	590	988	1,269	1,448	1,592	1,712
5,800	596	1,001	1,285	1,467	1,613	1,734
5,900	603	1,013	1,302	1,485	1,634	1,757
6,000	609	1,025	1,318	1,504	1,655	1,780
6,100	616	1,038	1,334	1,523	1,676	1,802
6,200	622	1,050	1,351	1,542	1,697	1,825
6,300	630	1,062	1,367	1,561	1,718	1,847
6,400	637	1,075	1,383	1,580	1,739	1,869
6,500	651	1,094	1,407	1,606	1,766	1,899
6,600	658	1,107	1,423	1,624	1,787	1,921
6,700	665	1,119	1,439	1,643	1,808	1,943
6,800	673	1,132	1,455	1,662	1,828	1,965
6,900	680	1,144	1,472	1,681	1,849	1,987
7,000	687	1,157	1,488	1,699	1,870	2,010
7,100	694	1,169	1,504	1,718	1,890	2,032
7,200	701	1,181	1,520	1,736	1,911	2,054
7,300	706	1,189	1,531	1,748	1,923	2,067
7,400	710	1,197	1,541	1,760	1,936	2,081
7,500	715	1,205	1,551	1,771	1,949	2,095
7,600	719	1,213	1,562	1,783	1,962	2,109
7,700	723	1,220	1,572	1,794	1,975	2,123
7,800	728	1,228	1,582	1,806	1,987	2,137
7,900	732	1,236	1,592	1,818	2,000	2,150
8,000	737	1,244	1,603	1,829	2,013	2,164
8,100	741	1,252	1,613	1,841	2,026	2,178
8,200	746	1,259	1,623	1,853	2,039	2,192
8,300	750	1,267	1,633	1,864	2,052	2,206
8,400	755	1,275	1,644	1,876	2,064	2,220
8,500	759	1,283	1,654	1,887	2,077	2,234
8,600	763	1,291	1,664	1,899	2,090	2,247
8,700	768	1,298	1,675	1,911	2,103	2,261
8,800	772	1,306	1,685	1,922	2,116	2,275
8,900	777	1,314	1,695	1,934	2,129	2,289
9,000	781	1,322	1,705	1,945	2,141	2,303
9,100	786	1,330	1,716	1,957	2,154	2,317
9,200	790	1,337	1,726	1,969	2,167	2,330
9,300	795	1,345	1,736	1,980	2,180	2,344
9,400	799	1,353	1,747	1,992	2,193	2,358
9,500	803	1,361	1,757	2,003	2,206	2,372
9,600	808	1,369	1,767	2,015	2,218	2,386
9,700	812	1,376	1,777	2,027	2,231	2,400
9,800	817	1,384	1,788	2,038	2,244	2,414
9,900	821	1,392	1,798	2,050	2,257	2,427
10,000	826	1,400	1,808	2,061	2,270	2,441

78-45-7.15. Medical and dental expenses — Insurance.

(1) Only the costs of health and dental insurance premiums for children are included in the base combined child support obligation table.

ally incurred on behalf of the dependent children of the parents shall be specified as two separate monthly amounts in the order

(b) If an actual expense included in an amount specified in the order ceases to be incurred, the obligor may suspend making monthly payment of that expense while it is not being incurred, without obtaining a modification of the child support order

(2) Unless the expenses described in Subsection (1) are included in the child support order, or the parents enter into a written agreement to share the expenses, one parent may not obligate both parents to pay the expenses 1989

78-45-7.17. Child care costs.

(1) The need to include child care costs in the child support order is presumed if the custodial parent is working and actually incurring the child care costs

(2) The need to include child care costs is not presumed, but may be awarded on a case by case basis if the costs are related to the career or occupational training of the custodial parent 1989

78-45-7.18. Limitation on amount of support ordered.

(1) There is no maximum limit on the base child support award that may be ordered using the base combined child support obligation table or for the award of uninsured extraordinary medical expenses except under Subsection (2)

(2) If the combination of the two amounts under Subsection (1) exceeds 50% of the obligor's adjusted gross income, or that by adding the child care costs, the total child support award would exceed 50% of the obligor's adjusted gross income, the presumption under Section 78-45-7.17 is rebutted 1989

78-45-8. Continuing jurisdiction.

The court shall retain jurisdiction to modify or vacate the order of support where justice requires 1987

78-45-9. Enforcement of right of support.

(1) (a) The obligee may enforce his right of support against the obligor, and the office may proceed pursuant to this chapter or any other applicable statute, either on behalf of the Department of Social Services or any other department or agency of this state that provides public assistance, as defined by Subsection 62A-11-303(3), to enforce the right to recover public assistance, or on behalf of the obligee, to enforce the obligee's right of support against the obligor

(b) Whenever any court action is commenced by the office to enforce payment of the obligor's support obligation, it shall be the duty of the attorney general or the county attorney of the county of residence of the obligee to represent the office

(2) (a) A person may not commence any action or file a pleading to establish or modify a support obligation or to recover support due or owing, whether under this chapter or any other applicable statute, without filing an affidavit with the court at the time the action is commenced or the pleading is filed stating whether public assistance has been or is being provided on behalf of a dependent child of the person commencing the action or filing the pleading

(b) If public assistance has been or is being provided, that person shall join the office as a party to the action. The office shall be represented as provided in Subsection (1)(b)

(3) As used in this section "office" means the Office of Recovery Services within the Department of Social Services 1989

78-45-9.1. Repealed.

1984

78-45-9.2. County attorney to assist obligee.

The county attorney's office shall provide assistance to an obligee desiring to proceed under this act in the following manner

(1) provide forms, approved by the Judicial Council of Utah, for an order of wage assignment if the obligee is not represented by legal counsel,

(2) the county attorney's office may charge a fee not to exceed \$25 for providing assistance to an obligee under Subsection (1)

(3) inform the obligee of the right to file impermissibly if the obligee is unable to bear the expenses of the action and assist the obligee with such filing,

(4) advise the obligee of the available methods for service of process, and

(5) assist the obligee in expeditiously scheduling a hearing before the court 1983

78-45-10. Appeals.

Appeals may be taken from orders and judgments under this act as in other civil actions 1987

78-45-11. Husband and wife privileged communication inapplicable — Competency of spouses.

Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable under this act. Spouses are competent witnesses to testify to any relevant matter, including marriage and parentage 1987

78-45-12. Rights are in addition to those presently existing.

The rights herein created are in addition to and not in substitution to any other rights 1987

78-45-13. Interpretation and construction.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it 1987

CHAPTER 45a

UNIFORM ACT ON PATERNITY

Section	
78-45a-1	Obligations of the father
78-45a-2	Enforcement
78-45a-3	Limitation on recovery from the father.
78-45a-4	Limitations on recovery from father's estate
78-45a-5	Remedies
78-45a-6	Time of trial
78-45a-6.5	Paternity action — Jury trial
78-45a-7	Authority for blood tests
78-45a-8	Selection of experts
78-45a-9	Compensation of expert witnesses.
78-45a-10	Effect of test results
78-45a-11	Judgment
78-45a-12	Security
78-45a-13	Settlement agreements
78-45a-14	Venue
78-45a-15	Uniformity of interpretation.
78-45a-16	Short title
78-45a-17	Operation of act

78-45a-1. Obligations of the father.

The father of a child which is or may be born out of

wedlock is liable to the same extent as the father of a child born in wedlock, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child. A child born out of wedlock includes a child born to a married woman by a man other than her husband 1965

78-45a-2. Enforcement.

Paternity may be determined upon the petition of the mother, child, or the public authority chargeable by law with the support of the child. If paternity has been determined or has been acknowledged according to the laws of this state, the liabilities of the father may be enforced in the same or other proceedings

(1) by the mother, child, or the public authority which have furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses, and

(2) by other persons including private agencies to the extent that they have furnished the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses 1965

78-45a-3. Limitation on recovery from the father.

The father's liability for past education and necessary support are limited to a period of four years next preceding the commencement of an action 1965

78-45a-4. Limitations on recovery from father's estate.

The obligation of the estate of the father for liabilities under this act are limited to amounts accrued prior to his death and such sums as may be payable for dependency under other laws 1965

78-45a-5. Remedies.

(1) The district court has jurisdiction of an action under this act and all remedies for the enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, necessary support, or funeral expenses for legitimate children apply. The court has continuing jurisdiction to modify or revoke a judgment for future education and necessary support. All remedies under the Uniform Reciprocal Enforcement of Support Act, are available for enforcement of duties of support under this act

(2) The obligee may enforce his right of support against the obligor and the state Department of Social Services may proceed on behalf of the obligee or on its own behalf pursuant to the provisions of Chapter 45b of this title to enforce that right of support against the obligor. In such actions by the department, all the provisions of Chapter 45b of this title shall be equally applicable to this chapter. Whenever a court action is commenced by the state Department of Social Services, it shall be the duty of the attorney general or the county attorney, of the county of residence of the obligee, to represent that department 1975

78-45a-6. Time of trial.

If the issue of paternity is raised in action commenced during the pregnancy of the mother, the trial shall not, without the consent of the alleged father, be held until after the birth or miscarriage but during such delay testimony may be perpetuated according to the laws of this state 1965

78-45a-6.5. Paternity action — Jury trial.

(1) Either party to an action commenced under this chapter may demand a jury trial to determine paternity

(2) (a) The procedure and law governing a trial by jury under this chapter is the same as for a civil jury trial in district court

(b) The standard of proof is "by a preponderance of the evidence" 1988

78-45a-7. Authority for blood tests.

The court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require 1965

78-45a-8. Selection of experts.

The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts qualified as examiners of blood types, perform independent tests under order of court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court 1965

78-45a-9. Compensation of expert witnesses.

The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action 1965

78-45a-10. Effect of test results.

If the court finds that the conclusions of all experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. If the experts conclude that the blood tests show the possibility of the alleged father's paternity, admission of this evidence is within the discretion of the court, depending upon the infrequency of the blood type 1965

78-45a-11. Judgment.

Judgments under this act may be for periodic payments which may vary in amount. The court may order payments to be made to the mother or to some person, corporation, or agency designated to administer them under the supervision of the court 1965

78-45a-12. Security.

The court may require the alleged father to give bond or other security for the payment of the judgment 1965

78-45a-13. Settlement agreements.

An agreement of settlement with the alleged father is binding only when approved by the court 1965

RULES OF THE UTAH COURT OF APPEALS

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TITLE I. APPLICABILITY OF RULES.

Rule 1. Scope of rules.

(a) **Applicability of rules.** These rules govern the procedure before the Utah Court of Appeals in all cases. When these rules provide for a motion or application to be made in a district, juvenile, or circuit court or an administrative agency, commission, or board, the procedure for making such motion or application shall be governed by the practice of the district, juvenile, or circuit court or the administrative agency, commission, or board.

(b) **Applicability of rules to review of juvenile or circuit court proceedings.** Whenever in these rules reference is made to practice and procedure in appeals or proceedings from an order or judgment of a district court, said rules shall have equal application, force, and effect with regard to practice and procedure in appeals from orders or judgments from a juvenile or circuit court.

(c) **Procedure established by statute.** If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, or board or an officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply as to such appeals or reviews.

(d) **Rules not to affect jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the Court of Appeals as established by law.

(e) **Title.** These rules shall be known as the Rules of the Utah Court of Appeals and abbreviated R. Utah Ct. App.

Rule 2. Suspension of rules.

In the interest of expediting a decision, the Court of Appeals, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(e), and 5(a), suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS.

Rule 3. Appeal as of right: How taken.

(a) **Filing appeal from final orders and judgments.** As defined and provided by law, an appeal may be taken from the final orders and judgments of a district court, juvenile court, or circuit court to the Court of Appeals by filing a notice of appeal with the clerk of the particular court from which the appeal is taken within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or an order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or join in an appeal of another party after filing separate timely notices of appeal. Such joint appeals may thereafter proceed and be treated as a single appeal with a single appellant. Individual appeals may be consolidated by order of the Court of Appeals on its

own motion, on motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the respondent. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the Court of Appeals. In original proceedings in the Court of Appeals, the party making the original application shall be known as the plaintiff and any other party as the defendant.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall name the court from which the appeal is taken; and shall designate that the appeal is taken to the Court of Appeals.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order or, if the party is not represented by counsel, to the party at the last known address of the party.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any separate or joint notice of appeal in a civil case, the party taking the appeal shall pay to the clerk of the court from which the appeal is taken such filing fees as are established by law and also the fee for docketing the appeal in the Court of Appeals. The clerk of the court from which the appeal is taken shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the court from which the appeal is taken shall forthwith transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the Court of Appeals. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the Court of Appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the court from which the appeal is taken, with the appellant identified as such, but if such title does not contain the name of the appellant, such name shall be added to the title.

Rule 4. Appeal as of right: When taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the district court, juvenile court, or circuit court to the Court of Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the court from which the appeal is taken within 30 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed by any party in an action in which the Court of Appeals would have the power of direct review (1) for judgment under Rule 50(b), (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, (3) under Rule 59 to alter or amend the judgment, or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed by any party under Rule 24 for a new trial or under Rule 26 for an order after judgment

affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any such motion under Rule 26. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the district court, juvenile court, or circuit court disposing of the motion provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in Paragraph (b) of this rule, notice of appeal filed after the announcement of decision, a judgment, or an order but before the entry of the judgment or order of the district court, juvenile court, or circuit court shall be treated as filed at such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed or within the time otherwise prescribed by Paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The court from which the appeal is taken, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Paragraph (a) of this rule. A motion to extend time that is filed before expiration of the prescribed time may be heard ex parte unless the court from which the appeal is taken requires otherwise. Notice of any such motion that is filed after the expiration of the prescribed time shall be given to all other parties in accordance with the rules of practice of the court from which the appeal is taken. No extension shall exceed 30 days past the prescribed time, 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 4A. Transfer of case from Supreme Court to Court of Appeals.

(a) **Discretion of Supreme Court to transfer.** Any time before a case is set for oral argument before the Supreme Court, that court may transfer to the Court of Appeals any case except those cases with the Supreme Court's exclusive jurisdiction. Such order of transfer shall be issued without opinion, written or oral, as to the merits of the appeal or the reasons for the transfer.

(b) **Notice of order of transfer.** Upon entry of the order of transfer by the clerk of the Supreme Court, that clerk shall immediately transmit the original of the order to the clerk of the Court of Appeals and give notice of entry by mail to each party to the proceeding. The clerk of the Supreme Court shall make note in the docket of that court of the service by mail. The clerk of the Supreme Court shall also notify the clerk of the court from which the appeal was taken of the order of transfer and shall attach a copy of the order.

(c) **Receipt of order of transfer by Court of Appeals.** Upon receipt of the original order of transfer from the clerk of the Supreme Court, the clerk of the Court of Appeals shall enter the appeal upon the Court of Appeals docket. Notice that the appeal has been docketed in the Court of Appeals shall then be immediately given by the clerk of the Court of Appeals to each party to the proceeding in the same manner as is prescribed by Rule 39(c) of these rules.