

1990

Janet R. Bowles v. Bevan C. Bowles : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Suzanne Marelius; Littefield & Peterson; Attorney for Appellant.

Howard Chuntz; McAllister & Chuntz; Attorney for Respondent.

Recommended Citation

Brief of Appellant, *Bowles v. Bowles*, No. 900428 (Utah Court of Appeals, 1990).

https://digitalcommons.law.byu.edu/byu_ca1/2821

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
KFU

50

A10

DOCKET NO.

900428CA

IN THE UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

JANET R. BOWLES

Plaintiff/Respondent,

v.

BEVAN C. BOWLES,

Defendant/Appellant.

APPELLANT'S BRIEF

Case No. 900428-CA

Civil No. 87440078

Priority No. 16

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HONORABLE CULLEN Y. CHRISTENSEN
District Court Judge

Suzanne Marelius
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435
Attorney for Appellant

Howard Chuntz
MCALLISTER & CHUNTZ
One East Center Street, Suite 303
P.O. Box 1372
Provo, Utah 84603
(801) 375-8891
Attorney for Respondent

FILED

FEB 4 1991

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

JANET R. BOWLES

Plaintiff/Respondent,

v.

BEVAN C. BOWLES,

Defendant/Appellant.

APPELLANT'S BRIEF

Case No. 900428-CA

Civil No. 87440078

Priority No. 16

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HONORABLE CULLEN Y. CHRISTENSEN
District Court Judge

Suzanne Marelius
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
(801) 531-0435
Attorney for Appellant

Howard Chuntz
MCALLISTER & CHUNTZ
One East Center Street, Suite 303
P.O. Box 1372
Provo, Utah 84603
(801) 375-8891
Attorney for Respondent

TABLE OF CONTENTS

Jurisdiction of Court of Appeals	1
Nature of Proceeding	1
Statement of Issues	1
Determinative Constitutional Provisions and Statutes	2
Statement of the Case	3
Statement of Facts	3
Summary of the Argument	9
Argument	10
POINT I The Court erred in not finding a material change in circumstances to justify an adjustment in child support.	10
A. The Court failed to consider and make findings upon the ability of Mr. Bowles to pay support.	13
POINT II The Trial Court erred in application of the child support guidelines and imputed income rules.	15
POINT II The Court erred in failing to consider Appellant's evidence of his efforts to find employment and in erroneously taking judicial notice of disputed facts outside the record. . .	18
Conclusion	22
Addendum	24
Certificate of Mailing	25

TABLE OF AUTHORITIES

Cases Cited

<u>Christiansen v. Christiansen</u> , 667 P.2d 592 (Utah 1983)	12
<u>DeFusion Company v. Utah Liquor Control Commission</u> , 613 P.2d 1120 (Utah 1980)	21
<u>Durfee v. Durfee</u> , 140 Ut. Adv. Rpts. 42 (August 9, 1990; Ct. App.)	14
<u>Jefferies v. Jefferies</u> , 752 P.2d 909, 911 (Ut Ct. App. 1988)	13
<u>Jense v. Jense</u> , 124 Ut. Adv. Rep. 56 (Dec. 21, 1989, Ut. Ct. App.)	11
<u>Maughn v. Maughn</u> , 770 P.2d 156 (Ut. Ct. App. 1989)	12
<u>Porco v. Porco</u> , 752 P.2d 365 (Ut. Ct. App. 1988)	11
<u>Reick v. Reick</u> , 652 P.2d 916 (Utah 1982)	12
<u>Stephens v. Stephens</u> , 754 P.2d 1952 (Ut. Ct. App. 1988)	14
<u>Stettler v. Stettler</u> , 713 P.2d 699, 701 (Utah 1985)	11
<u>Thompson v. Thompson</u> , 709 P.2d 360 (Utah 1985)	11

Statutes, Constitutional Provisions, and Rules of Evidence

Utah Code Annotated §30-3-5 (1953, as amended)	2, 10
Utah Code Annotated §78-2a-3(2)(h), (1987, as amended)	1
Utah Code Annotated §78-45-7 (1953, as amended)	2

Utah Code Annotated §78-45-7.5	2
Utah Code Annotated §78-45-7.5(5)(c)	22
Utah Code Annotated §78-45-7.5(7)	2, 16
Utah Code Annotated §78-45-7(2)	10, 13

IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

JANET R. BOWLES

Plaintiff/Respondent,

v.

BEVAN C. BOWLES,

Defendant/Appellant.

APPELLANT'S BRIEF

Case No. 900428-CA

Civil No. 87440078

Priority No. 16

Jurisdiction of Court of Appeals

Jurisdiction is conferred on this Court as Appellate jurisdiction pursuant to §78-2a-3(2)(h), Utah Code Annotated (1987, as amended), (hereinafter U.C.A.).

Nature of Proceeding

This is an appeal in a domestic relations case from a final Court Order of the Fourth Judicial District Court in and for Utah County, State of Utah, which order denied Appellant Bevan Bowles' Petition for Modification of a Decree of Divorce.

Statement of Issues

The issues presented on appeal are as follows:

1. Whether the trial court erred in finding no change of circumstances based upon Mr. Bowles' involuntary lay off from his employment at Signetics Company in September, 1989.

2. Whether the trial court made sufficient or accurate findings of fact upon which to base its Order denying any adjustment to Mr. Bowles' level of child support.

3. Whether the Court erred in failing to consider the evidence presented by Mr. Bowles showing his efforts to find employment and in taking "judicial notice" of disputed factual matters outside of the record.

4. Whether the Court erred in its application of the child support guidelines at U.C.A. §78-45-7.5(7) where the Court imputed income to Mr. Bowles at the level of his most recent past employment from which he was involuntarily laid off rather than relying on Mr. Bowles' evidence of his actual earnings or his evidence of historical earnings.

Determinative Constitutional Provisions and Statutes

Utah Code Annotated, 1953 as amended at the following sections:

- a. §78-45-7 (Child Support Guidelines);
- b. §78-45-7.5 (Determination of Gross Income, Imputed Income);
- c. §30-3-5 (Continuing jurisdiction of the Court to modify support orders).

Statement of the Case

This an appeal from a final Court Order on a Petition for Modification in a domestic relations case issued by Judge Cullen Y. Christensen of the Fourth Judicial District Court in and for Utah County, State of Utah. The Defendant/Appellant Bevan Bowles had filed a Petition for Modification seeking to modify the parties' Decree of Divorce which was issued three years earlier. Mr. Bowles sought an adjustment to his child support obligation based on his involuntary lay off from employment, as well as a court review of issues of visitation and tax exemptions. A hearing was held on June 20, 1990, where only the parties were witnesses and the Court ruled that Mr. Bowles failed to show a substantial change in circumstances to support an adjustment to child support and had not made reasonable efforts to locate new employment. Mr. Bowles filed a Notice of Appeal dated August 2, 1990, the Docketing Statement was filed on August 24, 1990.

Statement of Facts

1. After a 13 year marriage, the parties to this action were divorced on July 6, 1987, and Respondent Janet Bowles was awarded custody of the parties two minor children age 12 and 14 at the time of the modification hearing. Mr. Bowles was ordered to pay child support in the amount of \$326 per child per month. (Record at 15; hereinafter R. 15).

2. Mr. Bowles' child support obligation was modified pursuant to a hearing and an Order dated February 27, 1989, where support was adjusted to the sum of \$272 per child per month from that day forward. (R. 53).

3. In August, 1989, Mr. Bowles was told by his employer Signetics Company that he would be laid off. He asked his ex-wife for a temporary, voluntary reduction in child support pending his finding new employment commensurate with the amount of unemployment compensation he would be receiving. Mrs. Bowles refused to make any voluntary adjustment to child support. (R. 56)

4. In September, 1989, Mr. Bowles filed a Petition for Modification of Decree of Divorce alleging a substantial change of circumstances based on his lay off from employment with Signetics Company effective September 29, 1989. (R. 56).

5. Mr. Bowles was employed by Signetics Company as a construction worker from November, 1983, until September, 1989, a total of approximately six years. (Transcript p. 6; hereinafter T. 6). Although Signetics is primarily a manufacturer of semiconductors it employed a staff of construction workers for plant remodeling. Mr. Bowles thus received above-average wages for construction work, year round employment and benefits--all exceptional attributes for construction work which is typically unstable, seasonal and without benefits. (T. 15).

6. At the time Mr. Bowles' was laid off he was earning a gross monthly salary of \$2,658 per month. (T. 7, Exhibit 1).

7. After his lay off Mr. Bowles began to receive unemployment compensation initially for a period of 26 weeks at the rate of \$208 per week, a total of \$894 gross per month. (T. 8).

8. At the time of his lay off Mr. Bowles met with the Office of Recovery Services to inform them of his changed situation and entered into a wage assignment agreement where that Office deducted one-half of every unemployment compensation check received by him which was paid to Respondent as child support, a total of \$412 per month. (T. 10, 63, Exhibit 1).

9. Prior to his employment at Signetics Mr. Bowles was self-employed in the excavation business where he owned a back hoe and would contract out his personal labor. Mr. Bowles earned his living in this manner for three years from 1981 through 1983. (T. 10, 11). Mr. Bowles testified from the parties' income tax returns as to his earnings for these three years which average \$738 per month. (Addendum - Chart 1) (T. 12-14).

10. Mr. Bowles testified that during the years 1981 through 1983 his family in fact received loans and gifts of money from their family as his earnings were inadequate to meet basic expenses. (T. 14).

11. At the time of his lay off, Mr. Bowles' educational credentials consist of a high school diploma and excavation license (T. 11).

12. Mr. Bowles testified that his salary at Signetics was the most he had ever earned as a construction worker and that his beginning wage was \$9 per hour when he was hired in November, 1983 and that his ending wage was \$13.42 per hour when he was laid off. (T. 14-15).

13. Mr. Bowles testified that his employment at Signetics was not typical of the construction industry overall as there he received a salary and benefits and worked 12 months a year whereas generally construction work is lower pay, sporadic, seasonal, and without employment benefits. (T. 15).

14. Mr. Bowles testified that he began seeking employment before his lay off in September and met all the requirements to receive unemployment compensation consisting of at least two job applications per week. (T. 16, 17).

15. Mr. Bowles searched for construction and excavation work and also applied for advertised jobs and those forwarded to him by Job Service. He testified that he looked in the Provo-Orem area as well as Salt Lake and St. George. He named at least six construction companies he had applied with in these areas as well

as efforts he made through friends in the construction industry to find available jobs. (T. 18).

16. In mid-December, 1989, Mr. Bowles determined he could not find employment in the construction industry and because the industry itself was unstable and seasonal, that he needed to consider job training which would allow him more stable and lucrative employment. (T. 19). He also testified that he had depleted his financial resources (retirement and IRA's) to keep current in his child support and make up the shortfall in his expenses (T. 23).

17. Mr. Bowles qualified for a State sponsored Job Training Program through Job Service as his work for Signetics was classified as an industry affected by foreign competition (semiconductors) which had caused his lay offs. The job retraining program requirements provided that unemployment compensation would be extended up to a year so long as the applicant maintained full-time student status of at least 12 hours. (T. 9, 20).

18. Mr. Bowles began attending Dixie College in January, 1990, and estimated he would complete a nursing or x-ray technician program by the Spring of 1993. (T. 21, 43). He has maintained at least 12 hours and a "B" average and testified he had approximately three hours of class daily and three hours per class hour of homework daily. (T. 59).

19. Since his lay off Mr. Bowles also obtained part-time employment at a convenience store earning approximately \$60 per week. (T. 21, 22). Thus, at the time of the hearing he was earning \$894 from unemployment compensation and \$260 from part-time work for a total of \$1,154 per month. The sum of \$412 per month of this total was being withheld as child support, leaving Mr. Bowles \$754 for his personal expenses. (T. 24-25).

20. Mr. Bowles testified to and filed a pre-trial settlement statement reporting his personal monthly expenses to be \$1,294 per month which increases to \$1,694 a month when child support of \$412 is added. (R. 88). Mr. Bowles testified that he had been able to maintain the expense shortfall by depleting his retirement and IRA accounts from his employer and at the time of hearing he had approximately \$400 left from those funds. (T. 23).

21. Janet Bowles testified that she had been working full-time for Alpine School District since 1985 and at the time of the hearing was earning \$7.47 per hour for a gross monthly income of \$1,284.85. (T. 60, 62).

22. Mrs. Bowles testified that she had remarried and her husband earned \$2,000 a month, that her household consisted of herself, her husband and her two children from her marriage to Mr. Bowles and that she had just purchased a new home and a car. (T. 63-66)

23. Mr. Bowles proffered a child support worksheet based on the income levels produced through discovery showing child support should be \$194 total per month and proposed to the Court that his support obligation be reduced to \$200 per month until he had graduated and was re-employed full-time. (Exhibit 8)

24. The trial court held that there had not been a substantial, material change of circumstances to justify any adjustment to child support. The Court also commented that it did not find that Mr. Bowles' job search efforts reasonable and that the Court was aware that a lot of construction was going on in St. George. (T. 86).

Summary of the Argument

1. The trial court failed to find a material change in circumstances to justify any adjustment to child support. Mr. Bowles had been involuntarily terminated from his employment and his income was reduced from \$2,658 per month to income at the time of trial from unemployment compensation and part-time work totalling \$1,154 per month. The Court's failure to find a substantial change of circumstances when the lay off was beyond the control of the individual and had resulted in a drastic, permanent loss of income is reversible error.

2. In light of the proven loss of income earning ability of Mr. Bowles', the Court erred in not considering his

changed ability to pay support and ordering a modification of support, as required by U.C.A. §78-45-7(2). Regardless of whether the Court was persuaded or not as to the reasonableness of Mr. Bowles' re-employment efforts, his lay off was involuntary and the Court had a duty to Order relief for some period of time or amount.

3. Utah law requires a trial court to make specific, detailed findings on all material issues. The trial court herein failed to make any findings as to Mr. Bowles' present income, his historical income, or as to why the Court felt his search for employment was not reasonable, in light of no contrary evidence.

4. The trial court erred in not considering Mr. Bowles' unrefuted testimony about the unavailability of employment after a three month job search. Further, it was improper for the Court to discount this testimony based on the Court's own personal opinion that construction work was available in another city where no evidence or testimony had been presented to that effect.

ARGUMENT

POINT I

The Court erred in not finding a material change in circumstances to justify an adjustment in child support.

Pursuant to Utah Code Annotated §30-3-5 (1989), a trial court has continuing jurisdiction to modify child support obligations and upon a request for such a modification a threshold

requirement for relief is to show a substantial change of circumstances occurring since entry of the Decree of Divorce and not contemplated in the Decree itself. Jense v. Jense, 124 Ut. Adv. Rep. 56 (Dec. 21, 1989, Ut. Ct. App.), Stettler v. Stettler, 713 P.2d 699, 701 (Utah 1985). For this Court to overturn the Trial Court's finding that there have been no changed circumstances, Mr. Bowles must show that "the evidence clearly preponderates against the findings or that the trial court has abused its discretion." Thompson v. Thompson, 709 P.2d 360 (Utah 1985), and Porco v. Porco, 752 P.2d 365 (Ut. Ct. App. 1988).

The Trial Court herein erred in not finding a material change of circumstances due to Mr. Bowles' unexpected termination of employment from Signetics Company. Although acknowledging that Mr. Bowles was the victim of an involuntary lay off and was unemployed, the Court still found that there was no material change in circumstances to justify a reduction in child support. (T. 88). The undisputed facts in this case are that Mr. Bowles was involuntarily laid off from his employment of six years with Signetics Company. Without question, the involuntary loss of employment must be found to be a substantial change in circumstances sufficient for the Court to review and adjust child support. At the very least the Court should suspend present payment of support pending re-employment or adjust the present

payment to conform to the parties' current income. To make no finding that circumstances have even changed is error and an abuse of discretion. That has been the holding in many cases before this Court. In the case of Christiansen v. Christiansen, 667 P.2d 592 (Utah 1983), the Court held that in a determination of a change of circumstances justifying support modification, it is proper to consider changes in the parent's ability to pay support. Similarly, in the case of Reick v. Reick, 652 P.2d 916 (Utah 1982), the Court affirmed that changes in the parties' incomes can constitute a material change of circumstances justifying modification of child support obligations. See also, Maughn v. Maughn, 770 P.2d 156 (Ut. Ct. App. 1989).

In review of this record, this Court must find that the Trial Court's finding of no change of circumstances is in fact clearly erroneous and reverse this finding. Mr. Bowles' lay off was a fact clearly beyond his control or ability to influence. It is manifest injustice not to find that this lay off was a sudden, adverse and material change in his circumstances that directly affected his ability to pay child support and justify relief from the ongoing support order. Regardless of whether the Trial Court was persuaded as to the reasonableness of Mr. Bowles' job search efforts after his termination, there can be no question but that

the termination itself constituted a substantial change of circumstances and the Court erred in not making this finding.

A. The Court failed to consider and make findings upon the ability of Mr. Bowles to pay support.

Once a substantial change of circumstances is established, the Court's next step must be a review of legal factors and the situation of the parties, to determine whether an adjustment to support is required.

Utah Code Annotated at §78-45-7(2) provides that once a material change in circumstances has occurred, the Court must consider all relevant factors to determine the amount of prospective support 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."

The Court of Appeals has held that a consideration of these factors constitute "material issues upon which the trial court must enter findings of fact". Jefferies v. Jefferies, 752 P.2d 909, 911 (Ut

Ct. App. 1988), Durfee v. Durfee, 140 Ut. Adv. Rpts. 42 (August 9, 1990; Ct. App.). This Court has often reversed decisions where the trial Court has failed to make detailed findings of fact and conclusions of law necessary for consideration by a reviewing court. Stephens v. Stephens, 754 P.2d 1952 (Ut. Ct. App. 1988).

In the present case, no findings were made by Judge Christensen in this case on the ability of Mr Bowles to pay the former child support amount of \$427 a month in his unemployed condition of reduced income. The Court gave no consideration to the changes in Mr. Bowles' income from \$2,658 gross per month with Signetics to the level he was earning at the time of the hearing from unemployment compensation of \$864 gross per month, plus part-time earnings of \$260 for a total of \$1,124 gross per month. From this, \$412 was automatically withheld for on-going support leaving him with \$724 for his own expenses. The Court also gave no consideration to the fact that Mr. Bowles had expended all available financial resources consisting of his retirement distribution and IRA funds to satisfy his Court ordered obligations and expenses leaving him only with earned income to pay ongoing child support. Additionally, the Court ignored the facts that Mr. Bowles was current in support until his lay off and that no hardship situation existed with Mrs. Bowles who had a household income of \$3,284 gross per month for a family of four which does

not even include child support of \$412 per month she also receives. Failure to review these factors and adjust support accordingly is reversible error and this Court should so find.

POINT II

The Trial Court erred in application of the child support guidelines and imputed income rules.

By making no adjustment to child support and finding no changed circumstances, the Trial Court implicitly held that Mr. Bowles had an imputed income at his former salary level of \$2,658 per month.

The Trial Court made confusing, and inaccurate findings on Mr. Bowles' historical income and what should possibly be his imputed income in this case. Although these matters were discussed, the Court in fact made no specific findings on Mr. Bowles' actual, historical or imputed income which Mr. Bowles submits is reversible error. Moreover, it was error to even consider imputing income when evidence of actual income was unrefuted and accurate.

Mr. Bowles presented evidence at trial that prior to his six years of employment with Signetics his only previous earnings had been from the construction industry where he earned substantially less than his employment with Signetics. Mr. Bowles testified that Signetics was a unique and superior construction job

as it was primarily a manufacturer of semiconductors with only secondary and limited construction needs. It was thus a major employer which provided full benefits, full-time employment and excellent wages, whereas typical construction work in his experience lasted from six to eight months in a given year, was sporadic, seasonal, not as well paid and provided no job benefits. (T. 15). Having no future employment prospects with Signetics, the Court can only consider Mr. Bowles' historic earnings in usual construction work before Signetics, or prevailing community standards as a relevant basis for imputing income under U.C.A. §78-45-7.5(7).

Mr. Bowles testified that prior to Signetics he was self-employed in excavation work for three years from 1981 through 1983. The tax returns from those years were introduced as Exhibit 2 and in Addendum Chart 1 to this brief, Mr. Bowles has set forth the relevant income data from those tax returns. That Chart shows the gross receipts from each year, less business expenses with the adjustment that any depreciation has been added back in as a non-cash expense which is not usually deducted for child support purposes. The three years outlined confirmed Mr. Bowles' testimony that typically the construction business is sporadic and unpredictable as his first year in business he had a net profit of \$3,684, his second year it was \$20,054 and his third year it was

\$2,846. A summary of these three years shows average annual income of \$8,861, with an average monthly income of \$738. Mr. Bowles also testified that prevailing wage rates for construction jobs he had been seeking were \$8 to \$10 per hour, again with the prospect of only work 6 to 8 months a year. (T.54,15). This evidence was unchallenged and was available to the Court in considering Mr. Bowles' historical earnings and the imputed income issue.

In reviewing this evidence the Court stated that the only year in which the Mr. Bowles made substantial income from his excavation work was 1982 where he earned about \$1,400 a month. The Court ignores the other years and makes no conclusion from this evidence as to what Mr. Bowles historical earnings were from his construction work. The Court's "finding" on this matter is clearly wrong and is refuted on the record where the tax returns prove that Mr. Bowles' historical earnings from self-employed construction/excavation work was an average of \$738 per month over that three year period.

At the time of hearing, Mrs. Bowles made the argument that Mr. Bowles still owned his back hoe and could be using that to supplement his income. The Court also comments on this and states that the Court felt that \$1,200 per month could be generated from the leasing of that machine. This statement is derived only from Mrs. Bowles' testimony that she knew someone who would lease the

machine for \$20/hour but had never informed Mr. Bowles of this offer. (T. 46, 72, 73). Mr. Bowles also testified he had a brother-in-law in the excavation business who did not feel leasing the equipment in the St. George area was viable. (T. 58). Also, Mr. Bowles testified he had no time to operate the machine while he worked for Signetics or attended school and that it was to be sold by Court Order in November, 1990. (T. 55-58). Again, however, the Court makes no conclusion or actual "finding" from this comment as to whether that level of income should be imputed to Mr. Bowles for child support purposes.

Notwithstanding this argument, the earning potential from the back hoe is irrelevant as the parties' Decree of Divorce, as modified, ordered that it be sold by November, 1990, and the proceeds divided equally between the parties. (R. 54) (T. 55,57). This sale has been completed and the back hoe is no longer available for use by either party.

POINT III

The Court erred in failing to consider Appellant's evidence of his efforts to find employment and in erroneously taking judicial notice of disputed facts outside the record.

Mr. Bowles testified that he was first aware that he would be laid off in August, 1989, and that he began his job search at that time. (T. 17). His search began with Job Service where he obtained unemployment compensation benefits and was required to

make two job contacts a week for the first 26 weeks of his benefits. Mr. Bowles testified that he met all the requirements for those benefits which calculates to 52 job inquiries over that period. Mr. Bowles testified that he looked for work through December and concentrated on the construction industry in the Provo-Orem area, in Salt Lake and also St. George. He specifically named six employers among others, namely: Thorne Construction, Kurt Restoration, B&B Foundation, Lloyd Tibbets Construction, Mike Gunn Construction, and Park's Construction with whom he actually made applications based on job prospects. (T. 18 and 40). Mr. Bowles regularly checked advertisements and the Job Service board as well as applying for available positions forwarded to him by Job Service, as well as personally networking among his contacts in the construction industry. (T. 15-18). He testified that at best he could only find part-time work and that he was in fact working part-time at the time of the hearing as a convenience store clerk.

There was no evidence presented by Janet Bowles to contradict Mr. Bowles' testimony about the unavailability of full-time employment in construction and his testimony is unrefuted. Admittedly, the fall and winter are probably the slow season for construction employment, but Mr. Bowles had no control over when he would be laid off. Mr. Bowles also had no financial resources to draw upon for a prolonged job search. He testified his personal

expenses were \$1,200 plus \$412 in support on an income of \$1,124. Mrs. Bowles had also refused his offer to temporarily adjust support until he was re-employed. The question thus becomes in these circumstances how long is it reasonable for Mr. Bowles to have waited to find construction employment? Mr. Bowles had to make a decision and determined that he could not survive financially through a prolonged period of unemployment and that prospects in the construction industry even if he found work were likely to remain unstable with sporadic work. Mr. Bowles submits it was not unreasonable to take advantage of a unique job retraining opportunity to learn basic new skills in a profession with long term stability and overall better benefits and pay. Importantly, the job training also promised a continued income to Mr. Bowles for at least a year so reasonable child support could still be paid. Eventually, Mrs. Bowles and the parties' two children will also benefit from Mr. Bowles' retraining and the permanent career change with higher future child support.

The Court's comment on Mr. Bowles' job search was simply that "there is no evidence to the Court that he has made a reasonable effort in the view of the Court" (T. 87). No other findings or rationale is provided to support this view. The Court also stated that "it appears to the Court that [St. George] is a moving construction area" (T. 87). Mr. Bowles submits that this

comment of the Court had no bearing on the evidence presented at trial and appears to be solely the Court's own belief as to possible employment in St. George. Such unrelated and unreliable of a finding is totally improper and shows evidence either of bias or at least, of a clearly erroneous and unsupportable finding. The Utah Supreme Court has held that such judicial notice is only proper where the matter is of common knowledge, authoritatively settled, of no doubt or uncertainty and known within the limits of the Court's jurisdiction. DeFusion Company v. Utah Liquor Control Commission, 613 P.2d 1120 (Utah 1980). Certainly the construction industry in St. George does not come within the parameters of such common knowledge and was an abuse of the Court's discretion to rely on such unreliable speculation.

Mr. Bowles' employment at Signetics Company was a one-of-a-kind construction job because of the benefits, stability and above-average wages. When he was laid off from that position, his income earning ability was seriously and permanently diminished, leaving only the prospect of re-employment in typical construction jobs which are traditionally seasonal and unstable. On that basis the Court had a duty to find that a substantial, material change of circumstances had occurred and to make some reasonable adjustment to support. Mr. Bowles presented evidence of both actual and historic earnings which were unrefuted yet totally ignored by the

Court. It was clearly an abuse of discretion to ignore this evidence and refuse to make any adjustment to support in light of Mr. Bowles' involuntary lay off, his good faith job search in a depressed industry and his reasonable decision to accept a job training opportunity which provided him income and excellent future career prospects which will benefit all concerned.


Conclusion

Based on the evidence and testimony the Trial Court had a duty to do the following: first, to find that a material, substantial change in circumstances had occurred based on Mr. Bowles' involuntary lay off; second, to review the required statutory factors on adjusting child support which include a review of Mr. Bowles' earning ability; third, to adjust Mr. Bowles' child support based on either his actual income where he was earning \$1,124 per month at the time of the hearing, or on an imputed income basis according to §78-45-7.5(5)(c) using his actual historic earnings in typical construction as a basis for imputing income at the level of \$738 gross per month. There was no justification in the record for the Court to make no change whatsoever to the Plaintiff's level of child support based on his involuntary termination and this Court should reverse the Trial Court's ruling and find that an adjustment of child support to \$200 per month should have been made effective with Mr. Bowles' date of

termination until such time as he graduates and is re-employed full-time.

DATED this 1st day of February, 1991.

LITTLEFIELD & PETERSON


SUZANNE MARELIUS
Attorney for Appellant

ADDENDUM

- I Chart 1 - Summary of Appellant's Earnings
 from Excavation Work 1981 - 1983
- II Transcript excerpt containing the Ruling of
 the Court. (T. 86-93).
- III U.C.A. §78-45-7(2)
 U.C.A. §78-45-7.5
 U.C.A. §30-3-5

CHART 1

SUMMARY OF TRIAL EXHIBIT 2
INCOME TAX RETURNS SHOWING INCOME FROM
EXCAVATION WORK

1981 -	Gross Receipts	\$13,666
	Business Expenses	<u>9,981</u>
	(Schedule C - No depreciation listed as no equipment was owned)	
	Net Profit	3,684
	Gross Monthly Amount	\$ 307
1982 -	Gross Receipts	\$36,383
	Business Expenses	<u>16,690</u>
	(Schedule C - Depreciation of \$3,364 added back in)	
	Net Profit	20,054
	Gross Monthly Amount	\$ 1,670
1983 -	Gross Receipts	\$15,438
	Business Expenses	<u>12,592</u>
	(Schedule C - Depreciation of \$4,934 added back in)	
	Net Profit	2,846
	Gross Monthly Amount	\$ 237

Summary - Three Year Period 1981 to 1983

Total Income - \$26,584
Average Annual Income - \$8,861
Average Monthly Income - \$738

1 expenses. And there's a large sum of money that's tied up
2 in the equity of that home.

3 Mrs. Bacon wishes to have access to her share of
4 that equity. If Mr. Bowles feels that it's necessary for him
5 to keep that in the family, the home can be appraised with a
6 fair market value and Mr. Bowles can buy Mrs. Bacon's equity
7 out of it. But she has a right to have her equity out of
8 that home. The home cannot be divided, actually, partitioned.
9 And therefore the Court should order that it be sold and the
10 equity divided between the parties.

11 Thank you.

12 THE COURT: Well, counsel, addressing
13 the issues that have been reserved in the pre-trial order.

14 First of all child support. Two things concern the
15 Court about Mr. Bowles' position. No question but what he
16 lost his job. The thing the Court is concerned about, though,
17 the effort that he's making to gain employment to supplement
18 that, his schooling.

19 Now, the Court's only testimony, that I have before
20 me, as I recall it: The efforts to get employment have been
21 made in this area or in the Salt Lake area. He checked the
22 board a couple of times in St. George. But by his own testi-
23 mony, it appears to the Court that that is a moving construc-
24 tion area. It would be whether he is occupying the seat on a
25 backhoe or working in some other capacity on a construction

1 job. The testimony is he has the ability to do that.

2 I'm not satisfied that he's made an effort to
3 employ himself, as he fully might under the circumstances, in
4 getting employment in that operation. It may be that the
5 backhoe itself may not be the instrument by which he can
6 improve his position. But there's no evidence to the Court
7 that he's made a reasonable effort, in the view of the Court,
8 to obtain employment in the field in which he is obviously
9 skilled and capable of doing.

10 In looking at the potential of that backhoe, I
11 recognize that the only years here in which he made substantial
12 income was 1981-1982, he made about \$1,400 a month. Consider-
13 ing, though, that he had a substantial amount of expense
14 deduction by depreciation, which the Court does not believe
15 to be a legitimate deduction from the standpoint of determin-
16 ing what his disposable income would be. 1983, \$2,088 loss.
17 As I recall, the depreciation that was claimed that year far
18 exceeded that amount. He's got that backhoe up on the job.
19 No expense to him, or no income to him. Testimony is that
20 it could be leased for at least \$20 an hour, 20 or 30 hours
21 a week. That appears to the Court to be \$2,400.

22 But even conservatively taking it, it will be
23 \$1,200 a month that the Court feels could be generated from
24 the use of that machine. I have difficulty in determining
25 what the implication of income, however, should be under the

1 circumstances, since he hasn't really worked on that job.

2 But it does appear to the Court, in the statute,
3 where there is no recent work history on which the Court
4 could rely, that the Court can consider that a 40-hour minimum
5 wage is within the potential of this defendant. I'm not
6 satisfied that one assumes his responsibility in going to
7 school after a day, I think it's common knowledge, many people
8 go who work full time, hold down a full time job, carry a
9 full load; that that isn't unreasonable to expect that one
10 do, particularly where one has a family to support.

11 So the Court doesn't believe that the evidence
12 supports a justification at this point to reduce child sup-
13 port. And the Court is going to deny the petition to modify,
14 on the basis that I've indicated. And I don't think the
15 defendant is making a legitimate effort to obtain employment.
16 I don't think he's making a legitimate effort to rent that
17 machine or to use it in a productive way, that would be pro-
18 ductive of income. And for that reason, the Court does not
19 believe that I can legitimately find a material change in
20 circumstances that would justify the Court in reducing the
21 obligation for child support at this time.

22 Now with respect to visitation. It appears that
23 the Order of the Court has heretofore been provided, as late
24 as February 27, 1989. I see no material change in the circum-
25 stances of the parties which would justify the Court in making

1 a change in that Order; except to indicate that:

2 Certainly, the plaintiff doesn't have any right to,
3 in my view, to a visitation during those extended periods of
4 visitation when the defendant has the children during the
5 summer months. Certainly, this visitation schedule must have
6 taken into account the age of the children, the expectations
7 of visitation. So that the Court does not believe that there
8 can be any material change that would change that.

9 It -- about telephone calls, as I see in here.
10 But that ought to be, Mrs. Bacon, is something that you ought
11 to recognize and give this man a chance to have every reason-
12 able visitation with his children. The more you encourage
13 their love for him and his love to them, the better it's
14 going to be for you. One thing about love, the more you
15 give, the more you permit, the more there is. It isn't eat
16 upon itself or deplete itself. And if each of you will recog-
17 nize that to the extent that you build the other up in the
18 eyes of your children, you are going to enhance your own
19 status with those children.

20 So the Court does believe that he ought to be per-
21 mitted to telephone these children, have them telephone him.
22 If it's a long distance call, that may be something else,
23 I don't know that the plaintiff ought to assume the expense
24 for that. But certainly he ought to be able to, during
25 reasonable times of the day, communicate with his children

1 during, over the telephone.

2 As far as the tax exemption is concerned. The law,
3 Federal law provided that that tax exemption be claimed by
4 the person having paramount custody of the children. That
5 does not mean, however, the Court cannot under proper circum-
6 stances order that a custodial parent sign the necessary
7 waivers or documentation to permit the non-custodial parent
8 to have the one or more of the children as dependents.

9 However, in this case, since the defendant is un-
10 employed, doesn't have anything, it doesn't appear to the
11 Court that at this time that the appropriate thing for the
12 Court to do is to order that. So the Court declines to make
13 an order directing the plaintiff, to order that she sign
14 waivers and permit the defendant to claim either of these
15 children as dependents for tax purposes.

16 And when the defendant does become productive of
17 income, as I think he's capable of doing, that may be an
18 appropriate time to consider whether or not he ought to be
19 entitled to claim an exception for such purpose.

20 Well, with respect to the home in Nephi. These
21 parties are co-tenants, and said "joint-tenants," I thought
22 I read in the file that they were "tenants in common."

23 MR. CHUNTZ: I believe I mis-spoke myself,
24 your Honor.

25 THE COURT: Either way, that doesn't

1 determine what ought to be done. The law doesn't require
2 co-tenants to remain such if one of them doesn't want to be.
3 I think the expectation is that this property be sold. And
4 since these parties are having financial difficulties, it's
5 obvious to the Court that that is one solution that may help
6 alleviate some of the problems that exist.

7 So the Court doesn't have any information as to
8 how the rental income compares with the mortgage payment and
9 the expenses of upkeep. But the Court is going to Order in
10 that case, No. 6527, that that property be sold, put on the
11 market; that either can list the property for sale.

12 If the listing institution requires that both signa-
13 tures appear, the Court is going to Order that both of you
14 sign a listing agreement. If there's a dispute as to the
15 amount at which it ought to be listed, you've got a figure
16 of some, what is it, about \$36,000, which may or may not be
17 accurate at this time, since that was a 1986 appraisal. It
18 may be that you'll have to get an appraisal and listed at
19 some appropriate amount, and either offer it for sale at that
20 amount or, if one or the other of the parties wants to buy
21 out the other, it ought to be permitted, it seems to the
22 Court.

23 Maybe Mr. Bowles would like to do that, since it
24 did initially come as a gift from his parents to these two
25 parties.

1 The expenses of sale, commissions, if any, payment
2 of the existing mortgage, all ought to come off of the sale
3 proceeds before those matters are disbursed.

4 And if either party obtains a legitimate offer,
5 there's a dispute as to that, then the Court would have to
6 hear evidence and to take testimony, I suppose, as to whether
7 or not to require one or the other to accept such a sale, if
8 that becomes a matter in dispute.

9 I'm going to direct that you prep an order, findings
10 of fact, conclusions of law, consistent with what I've ruled
11 here today, Mr. Chuntz. Forward those to counsel for the
12 defendant, for her approval as to form. If they are not
13 approved with a statutory time, then you may submit them to
14 the Court for signature; or she may of course file her objec-
15 tions to the order if it may be submitted, if she has any.

16 Mr. Bowles, I think you have the ability and the
17 means to do more than you are doing. And that's the basis
18 that the Court is making the ruling that I am today. If you
19 legitimately cannot get work in an area where you've indicated
20 and I think where the Court can take judicial notice of the
21 fact that there's a lot of construction, a lot of work going
22 on, that you need to do it. You can't just sit back for a
23 couple of years while these children are growing up and then
24 hope to improve yourself and get a better job. That's laud-
25 ible, I understand that, it's certainly a lot better to be in

1 a stable industry than it is to be in one in which you are
2 beset by weather. But in the meantime, these children have a
3 right to be supported. They have a right to, for your con-
4 tribution toward that effort. And it needs to be a reasonable
5 and legitimate effort on your part. If you cannot and you've
6 made an effort of that nature, the Court doesn't feel that you
7 have, at this juncture, then sometime in the future the Court
8 may be in a position to consider it further.

9 So, I appreciate your input, counsel. And, we'll
10 be in recess.

11 (WHEREUPON, the Court stood in recess at 4:35
12 o'clock p.m.)

13 - - -
14
15
16
17
18
19
20
21
22
23
24
25

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23**
- 24**
- 25

12
13
14
15
16
17
18
19
20
21
22
23
24
25

14
15
16
17
18
19
20
21
22
23
24
25

20
21
22
23
24
25

NOTES TO DECISIONS

Cited in *Jefferies v. Jefferies*, 752 P.2d 909 (Utah Ct. App. 1988); *Asper v. Asper*, 753 P.2d 978 (Utah Ct. App. 1988).

78-45-3. Duty of man.

NOTES TO DECISIONS

Cited in *Race v. Race*, 740 P.2d 253 (Utah 1987).

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.

History: L. 1957, ch. 110, § 7; 1977, ch. 145, § 10; 1984, ch. 13, § 2; 1989, ch. 214, § 3.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, divided former Subsection (2) into present Subsections (2) and (3) by substituting the language beginning "require each party" at the end of Subsection (2) and the introductory language in Subsection (3) for "consider all relevant factors including

but not limited to"; rewrote Subsection (3)(e), which had read, "the need of the obligee"; substituted "ages" for "age" in Subsection (3)(f); redesignated former Subsection (3) as Subsection (4); deleted former Subsection (4), providing for the establishment and use of a uniform statewide assessment formula; and made minor stylistic changes.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

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

- (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and
- (b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance 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 the 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 upon the remarriage of that former spouse. However, if 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 the 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 any 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 the 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.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1.

Amendment Notes. — The 1985 amendment by Chapter 72 rewrote Subsection (1);

added Subsection (2); designated two undesignated paragraphs as Subsections (3) and (4); inserted "In determining" and "the court" in Subsection (4); redesignated former Subsections (2) and (3) as Subsections (5) and (6); divided Subsection (5) into two sentences, substituting "However, if the remarriage" for "unless

78-45-7.4. Obligation — Adjusted gross income used.

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.

History: C. 1953, 78-45-7.4, enacted by L. 1989, ch. 214, § 6. became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.
Effective Dates. — Laws 1989, Chapter 214

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.

History: C. 1953, 78-45-7.5, enacted by L. 1989, ch. 214, § 7.

became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1989, Chapter 214

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.

History: C. 1953, 78-45-7.6, enacted by L. 1989, ch. 214, § 8.

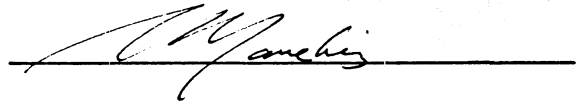
became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

Effective Dates. — Laws 1989, Chapter 214

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four true and correct copies of the foregoing, APPELLANT'S BRIEF, this 1st day of February, 1991, to:

Mr. Howard Chuntz
MCALLISTER & CHUNTZ
One East Center Street, Suite 303
P.O. Box 1372
Provo, Utah 84603
Attorney for Respondent

A handwritten signature, likely "J. Mancini", is written over a horizontal line.

sml\bowles.app