

1990

# Janet R. Bowles v. Bevan C. Bowles : Brief of Respondent

Utah Court of Appeals

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Suzanne Marelius; Littefield and Peterson; Attorney for Appellant.

Howard Chuntz; McAllister and Chuntz; Attorney for Respondent.

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**UTAH COURT OF APPEALS  
BRIEF**

DOCKET NO. 900428 CA

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

---

JANET R. BOWLES,

Plaintiff/Respondent,

v.

BEVAN C. BOWLES,

Defendant/Appellant.

**RESPONDENT'S BRIEF**

Case No. 900428-CA

Civil No. 87440778

Priority No. 16

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

---

Howard Chuntz  
McALLISTER & CHUNTZ  
One East Center St., Suite 300  
P.O. Box 1372  
Provo, Utah 84603  
(801) 375-8891  
**Attorney for Respondent**

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

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Howard Chuntz  
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One East Center St., Suite 300  
P.O. Box 1372  
Provo, Utah 84603  
(801) 375-8891  
**Attorney for Respondent**

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

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STATEMENT OF FACTS

Appellee concurs with appellant's Statement of Facts with the exception of paragraph 21 and paragraph 24. Appellee sets forth a more correct statement of the facts with respect to these two noted paragraphs as well as additional facts relevant to the case.

1. Janet Bowles testified that she was employed full-time in the Alpine School District working 30 hours per week at an hourly rate of \$7.47 per hour and that she had earned \$8,885.00 from that employment in 1989. (T. 60, 61 and 62).

2. With respect to paragraph 24 of appellant's statement of facts, appellant's statement that "the Court was aware that a lot of construction was going on in St. George." is an incorrect statement. Rather, the Court stated "But by his own testimony, it appears to the Court that that is a moving construction area." The Court was referring to the St. George area and to the appellant's testimony regarding construction opportunities in that area.

3. Mr. Bowles only made job search efforts in the Provo-Orem area. (T. 18).

4. Mr. Bowles only looked for construction and backhoe type work until the middle of December, 1989, a period of approximately 6 weeks. (T. 18).

5. Mr. Bowles made no effort to obtain employment other than part-time, minimum wage employment from mid-December, 1989, through the date of trial, June 20, 1990, a period of 7 months. (T. 48).

6. Mr. Bowles sought employment with only one company that did backhoe work. (T. 39-40).

7. Mr. Bowles was the owner of a backhoe but had not used it for more than a year, nor had he attempted to lease it for the purpose of earning income. (T. 45, 58).

8. Mr. Bowles has been allowing a friend to use the backhoe for free. (T. 47, 58).

9. Mr. Bowles stated that the backhoe could be leased for \$35.00 per hour. (T. 48).

10. Mr. Bowles testified that there were a lot of construction companies in St. George but that he really hadn't checked into what work might be available for him. (T. 58).

11. Mr. Bowles wouldn't make the backhoe available for Mrs. Bowles to lease out. (T. 46).

12. Mrs. Bowles testified that she had had at least one offer

to lease the backhoe from her for \$20.00 per hour for 20 to 30 hours per week. (T. 72-73).

13. Mr. Bowles owns a one-half interest in a home in Nephi but doesn't want the money from the sale of said home to go for the support of his minor children. (T. 48-49).

#### SUMMARY OF THE ARGUMENT

1. The petitioner for modification of Decree of Divorce has the burden of submitting credible evidence to the trial court that there has been a material change in circumstances sufficient to warrant the modification requested. The court is required to view the evidence of each changed circumstance in light of all the facts and circumstances of the case in making its determination of whether the evidence submitted meets the threshold requirement. Loss of job and proof of reduced income do not automatically require the trial court to find that a material change in circumstance has occurred when evidence of other important factors such as job seeking efforts and asset utilization efforts establish that the petitioner's reduced income status is the result of an exercise of personal preference to be a full-time student rather than a full-time earner.

2. If the party petitioning the court for a modification of child support fails to convince the court that a material change in circumstance has occurred to warrant such a change, the court is



not required to make findings of fact concerning the petitioner's ability to pay child support. An order requiring the petitioner to pay child support is already in effect and based upon the petitioner's ability to pay. The trial court need not reexamine these issues because the petitioner has failed to produce the requisite evidence that would allow the court to make the requested modification.

3. A finding that there has been no material change in circumstances sufficient to warrant a modification in a child support award is not an imputation of income to the petitioner. Neither the court's findings nor anything in the trial transcript indicates or implies that the court has imputed income to the appellant, but rather, refuses to impute a lower income to the appellant because of his loss of job. Therefore, the court neither erred nor abused its discretion.

4. The trial court considered all of the appellants job search efforts as part of the facts and circumstances to determine whether appellant's reduced income status warranted a finding that a substantial change in circumstance had occurred. The trial court also considered the appellant's testimony concerning the number of construction companies operating in the St. George area and appellant's testimony that he did not inquire after employment with those companies in the aforesaid determination. The trial court

did not take judicial notice of the availability of employment in the St. George area but only accepted appellant's testimony concerning this factor. Considering appellant's job search efforts and potential employment opportunities were well within the court's proper evaluation of the case and not error.

### ARGUMENT

#### POINT I

Proof of reduced income does not automatically require the trial court to find that a material change in circumstances has occurred sufficient to warrant modification of a decree of divorce.

A party seeking to have a decree of divorce modified must assert and prove that there has been a substantial change in circumstances occurring since the entry of the decree of divorce. (Jense v. Jense, 124 Ut. Adv. Rep. 56 (December 21, 1989) Ut. Ct. App.). In the present case, the appellant claims that because he lost his job and remains unemployed or underemployed, that the trial court was required to find that a substantial change of circumstance existed sufficient to warrant lowering his child support obligation. But the trial court isn't required to view appellant's evidence in a vacuum. "Indeed, Section 78-45-7(2) lists a parent's income and ability to earn as two separate, presumably distinct, factors to be considered by the court as it sets the amount of child support." Proctor v. Proctor, 773 P.2d 1389 (Utah App. 1989). Therefore, the trial court in this case was

required to consider not only appellant's present lack of income but also his earning capacity as well.

The evidence established that Mr. Bowles income was quite low because he lost his job, now worked only part-time at a minimum wage occupation, and attended college on a full-time basis. The evidence also established that Mr. Bowles had not made any effort during the past 7 months to obtain full-time employment in the construction trades despite his knowledge that there many construction companies in the St. George area using backhoe equipment and the fact that Mr. Bowles was licensed as an excavator. Furthermore, the evidence before the trial court established that Mr. Bowles owned a backhoe that could be used for earning income of at least \$20.00 per hour for 20 to 30 hours per week, either by self operation or by leasing, but that Mr. Bowles had made no effort to utilize the backhoe.

The evidence before the court showed that although Mr. Bowles may have had diminished income, he had ample opportunity to earn but failed to make a good faith effort to utilize those opportunities. This Court has previously stated "that an able bodied person who stops working, as an exercise of personal preference . . ., nonetheless retains the ability to earn and the duty to support his or her children." Proctor v. Proctor, Ibid at 1391. The appellant may not have quit his job, but his decision to

attend college rather than seek to earn income at his full potential is such an exercise of personal preference.

The trial court weighed all of the evidence before it and determined that Mr. Bowles had failed to meet the threshold requirement that a substantial change in circumstances had occurred to his earning capacity, not merely to his income.

#### POINT II

The trial court is not required to make findings of fact concerning appellant's income if the court finds that no substantial change in circumstance has occurred.

Mr. Bowles argues that the trial court erred in not making findings of fact concerning his ability to pay child support. But findings of fact regarding ability to pay are not necessary when the court finds that no substantial change of circumstance has occurred. (Christiansen v. Christiansen, 667 P.2d 592, 595 (Utah 1983)). If the party seeking modification fails to convince the trial court of this threshold requirement, then the trial court does not need to examine the other factors set forth in Utah Code Annotated 78-45-7(2). Ostler v. Ostler, 789 P.2d 713, 715 (Utah 1990).

Although the trial court found that appellant's lay off was a substantial change in his employment circumstance, it did not find a substantial change had occurred in his earning ability. Rather, it found Mr. Bowles to have made inadequate effort at gaining

employment or exercising his earning capacity either by searching for work or utilizing the backhoe. "And for that reason, the court does not believe that I can legitimately find a material change in circumstances that would justify the court in reducing the obligation for child support at this time." (T. 88 at lines 18 through 21). Therefore, it was the trial court's opinion that the threshold requirement was not established by appellant and it became necessary only to find that the change of circumstance did not warrant modification. (Christiansen v. Christiansen, 667 P.2d 592, 595 (Utah 1983)).

### POINT III

The trial court did not impute income to appellant.

Appellant's argument that the trial court erred in its application of child support guidelines and the imputed income statute is based upon two incorrect premises. First, the trial court did not impute income to appellant. By finding that the changed circumstances were insufficient to warrant a modification in the child support award, the trial court had no need to impute income to Mr. Bowles. It did not impute any amount of income to Mr. Bowles nor apply the child support guidelines in this matter.

Second, appellant is incorrect in his assertion that by finding that no substantial change of circumstance existed to justify modifying the child support award the court implies an

imputation of income at Mr. Bowles former level. The trial court was well aware that Mr. Bowles income was greatly reduced. It also had sufficient evidence to support a finding that Mr. Bowles had more earning capability than his present low income proved.

The trial court advised Mr. Bowles that lack of effort to earn would not be rewarded with a reduction in child support but that the evidence presented to the court was insufficient to determine what lower amount of income could be imputed to him. If Mr. Bowles had made effort to gain full-time employment in construction in the area he had been living for six months prior to trial, the trial court would have had evidence of what pay rate, number of hours, etc. were available to him. If Mr. Bowles had made efforts to hire out the backhoe, an hourly rate and number of hours per month of income from this source would have been available for the court to use to either determine or impute income to Mr. Bowles. By voluntarily remaining underemployed and not utilizing the backhoe to earn income, the appellant disallowed the court from imputing any lower income to him.

The trial court only ruled that until appellant submitted adequate evidence of a good faith effort to earn income at his potential, that the court was not justified in finding the requisite change of circumstances to warrant reducing the child support award.

#### POINT IV

The trial court neither erred in considering appellant's job search efforts nor took judicial notice of factors outside of the record.

Appellant's brief suggests that he made job inquiries for a period of 26 weeks and made 52 such inquiries. The trial transcript does not support those suggestions. Mr. Bowles made only two job applications per week during the month prior to beginning school. (T. 16). He made those job applications in November and December of 1989 and terminated his job searching by the middle of December, 1989. (T. 17, 18). He testified of six employers he applied to and further testified that there were two or three other employers whose names he couldn't remember with whom he'd made application. (T. 18). After mid-December, he did no more than look on the job board in St. George and he made no application and had no interviews there because he was too busy with school. (T. 41).

The trial court was fully aware of Mr. Bowles efforts to find employment. It remarked on his efforts to get employment (T. 86), its lack of satisfaction at those efforts (T. 87), and its finding that it didn't think he was making a legitimate effort to obtain employment (T. 88). The trial court considered this limited effort to find full-time work, the seven month hiatus in meaningful job search activity and the factors of full-time schooling and part-

time work to be unsupportive of appellant's position that no employment beyond part-time minimum wage jobs existed for him.

Mr. Bowles also asserts that the trial court took judicial notice of possible employment available in St. George. The court did not take judicial notice of this fact but accepted it based on appellant's own testimony. During the course of trial the trial judge asked Mr. Bowles, "What work might be available in St. George for a backhoe?" (T. 58 at lines 14-15). Mr. Bowles answered, "There is a lot of construction companies down there with equipment like that. I haven't really checked into it." (T. 58, at lines 16 through 18).

From this exchange, the trial judge found that Mr. Bowles "checked the board a couple of times in St. George. By his own testimony, it appears to the court that that is a moving construction area." (T. 86 at lines 21 through 24). The trial court did not take judicial notice of the status of the construction industry in St. George but based its opinion on Mr. Bowles testimony. Therefore, there was neither error or abuse of discretion made by the trial court.

#### CONCLUSION

Appellant had the burden, as the petitioner for modification, to present the trial court with sufficient evidence to support a finding that a substantial change of circumstance had occurred with



respect to the child support issue so as to allow the trial court to consider such a change. Although appellant provided the trial court with evidence of his diminished income, the trial court concluded that his insufficient efforts to obtain full-time employment or earn income from his backhoe did not justify a finding that appellant had met the threshold requirement for obtaining modification of a decree of divorce.

Each of the appellant's arguments derive from his belief that the trial court erred in not finding that his loss of employment alone met this threshold requirement. Each of his arguments fails because the trial court correctly considered all of the evidence before it in determining that appellant had not shown sufficient change of circumstances to warrant modification.

Appellee, therefore, respectfully submits that the lower court's ruling should be upheld.

DATED 3/1/91.

  
Howard Chuntz  
Of Attorneys for Respondent

CERTIFICATE OF MAILING

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

Ms. Suzanne Marelius  
LITTLEFIELD & PETERSON  
426 South 500 East  
Salt Lake City, Utah 84102  
Attorney for Appellant

  
\_\_\_\_\_