1982

Diane Walch Reick v. Donald Thomas Reick : Brief of Appellant

Utah Supreme Court

Robert M. Taylor; Brad L. Swaner; Attorneys for Appellant;
Pete N. Vlanos; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

DIANE WALCH REICK,	:	
Plaintiff and Respondent,	:	
vs.	:	No. 18229
DONALD THOMAS REICK,	:	
Defendant and Appellant.	:	

APPELLANT'S BRIEF

Appeal from the order of the Second Judicial District Court for Weber County; The Honorable John F. Wahlquist, Judge

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STATEMENT OF THE CASE

This is an appeal from an Order to Show Cause in a domestic action seeking, inter alia, an increase in child support payments from the defendant.

DISPOSITION IN LOWER COURT

After a hearing before the court, sitting without a jury, plaintiff was granted an increase in child support payments from $150.00 to $225.00 per month. It is from this portion of the Order which defendant appeals.

ASSIGNMENT OF ERROR

The court below erred: by rewarding plaintiff equitable relief, despite her unclean hands by abusing its discretion in deciding that a material change in circumstance had taken place which warranted an increase in child support, and by arbitrarily using a pre-determined schedule to determine the new amount of child suport, and, thereby, denying defendant his right to due process of law.

RELIEF SOUGHT ON APPEAL

Defendant seeks an Order reversing the judgment of the court below and/or granting judgment in his favor, which denies an increase in child support payments, or, that failing, a new hearing.

STATEMENT OF FACTS

History of the Case. Plaintiff/Respondent and Defendant/Appellant were divorced in the court below on May 26, 1972. Defendant was ordered to pay child support payments in the amount of $150.00 per month, and alimony in the amount of $50.00 per month. (Decree of Divorce) Appellant made his payments irregularly, at first, but had resolved the problem and paid regularly during recent years. (F&C-1,

T6, 91, 121.)

Respondent was remarried on August 29, 1977. (T-4, 5, 25) Thereafter, respondent deliberately concealed and hid the fact of her remarriage, and continued to accept alimony payments from appellant. (T-3, 5, 25, 38, 62, 121, F&C-1) During June, 1980, approximately thirty-five (35) months later, appellant discovered the remarriage. (T-3, 87) The parties exchanged letters with respect to the remarriage and respondent's continued acceptance of alimony payments during the said thirty-five month period. (Exhibit 14D, 16P) The parties were unable to agree upon a resolution to the problem, so appellant ceased making alimony payments and began deducting their equivalent from child support, believing himself to have "prepaid child support". (T-6, 107)

Commencement. On or about November 5, 1980, respondent signed and swore to an Affidavit in support of an Order to Show Cause requesting modification of the Decree of Divorce, to-wit: an increase in child support to $250.00 per month. On page 2 of the said Affidavit, paragraph 3, respondent acknowledged that she may have been in default under the Decree of Divorce, but reasoned that she had "* * * assumed the additional $50.00 was to cover the child's additional needs because of her handicap and because Plaintiff was paying the health and accident insurance of $22.00 per month,* * *" (See plaintiff's Order to Show Cause in re: Modification, p.2.) It should be noted that the trial court later found no handicap and no responsibility in appellant for the said insurance premiums. (T-121, F&C page 2)

Discovery. The parties then responded to written Interrogatories which had been extended to each by the other.

a.) In her answers to appellant's Interrogatories, respondent itemized her necessary monthly expenses, which totalled $970.00, with the notation that "any amount remaining from balance is used for clothing and entertainment". (Answer to Defendant's Interrogatories to Plaintiff, Page 3, No. 10)

b.) Appellant itemized his necessary expenses at a total of $1,436.00 per month (Page 8, No. 17) and his net monthly income at $1,399.92 (Page 7-8, No. 15, Answers to Plaintiff's Interrogatories to Defendant).

Evidentiary Hearing. The matter came on for hearing before the Honorable John F. Wahlquist, District Court Judge, on October 22, 1981.

With respect to a change in circumstance, the evidence adduced before the Court was based upon inflation. (T-16-17, 121-122)

a.) Appellant's income had increased during the ten years from approximately $8,000.00 per year to approximately $25,000.00 per year. (T-72) Appellant testified that his net monthly income at the time of the hearing was $1,540.00 per month, after taxes. (T-92) The uncontradicted evidence with respect to his monthly necessary living expenses was that they total the $1,436.00 per month sworn to in the Answers to Interrogatories, plus additional expenses caused by inflation, leaving approximately $30.00 in excess for use for clothing, vacation, gifts, entertainment or similar frills, each month. (T-95-97, 106)

b.) Respondent's income had increased more dramatically during the same period. She had risen from a U. S. Civil Service rating of

GS-4 to a rating of GS11, accounting for an annual income at the time of the hearing of $22,500.00, which gave her a net income at the time of the hearing of approximately $1,223.00 per month. (T-4, 62, 122) At the hearing, Respondent presented a new exhibit with respect to her expenses (Exhibit 1P), which indicated and additional $410.00 in monthly living expenses. On cross examination, respondent testified that the difference between the new schedule and her Interrogatory response is the difference "between necessary and actual" expenses, based upon her use of her money. (T-55-6, testimony with respect to expenses T-8, 54-62)

As an additional change of circumstance, respondent claimed that the parties' child had a learning disability. The parties testified with respect to the matter (T-18, 42-47, 100), but the Court found the child to be normal. (T-122-123)

Arguments Presented by the Parties. Appellant's counsel argued to the trial court that respondent was not entitled to equitable relief for the reason that she does not have clean hands. (TA-1) With respect to the child support issues, appellant argued that there was no change in the circumstance (TA-8), there was no need for an increase indicated (TA-6, 15), and that even if there were appellant did not have the ability to pay an increased amount (TA-6, 7, 15-16).

Respondent argued to the court that the Uniform Child Support Schedule of the Second Judicial District, adopted by policy statement and rule (a copy of which is attached hereto as Exhibit "A"), should be utilized to determine the amount to be paid, based solely upon the income of appellant as applied to the schedule. (TA-9, 17, 19) The said

schedule purports to be one promulgated pursuant to 45 CFR 302.53, with respect to child support enforcement by the Utah Department of Social Services, Office of Recovery Services. The expressed intention for the use of the schedule relates to ex parte temporary support orders, no hearings having yet been held. (See Exhibit) Respondent's counsel, in urging its use, submitted that the schedule had been prepared by the trial judge, and that the judge had followed it and ought to follow it in the instant case. (TA-19)

In response, appellant argued that the support issue should be based upon the mother's need and the father's ability to pay, and not upon the schedule. (TA-14)

Holding of Court Below. With respect to the matter being appealed from, the court below found that inflation was the chief change in circumstance with respect to the position of appellant, and that respondent has "done much better in life" and, further, that "her income should improve very rapidly for the next five years if she * * * is able to hold her job at all * * *". (T-122) The court found that respondent had deliberately concealed her remarriage and that appellant would be entitled to an offset for the amount overpaid. (T-121) Except to note his opinion that the parties "need to update the child support order after nine years", the court below gave no explanation, but raised the child support figure to $225.00 per month. (T-122, 123)

Appeal. Appellant has appealed the decision of the court, urging that the decision of the court below could only have been made arbitrarily on the basis of the pre-determined schedule. The abuse of discretion resulted in an inequitable and unfair order, in that it

ignored the facts adduced which indicated that no material change in circumstance had taken place warranting an increase, and, further, that appellant was unable to pay an increased amount, despite the express assumptions made in the schedule. Further, appellant urges that the said arbitrary use of the schedule violated his right to due process of law. Finally, appellant urges that the plaintiff came to the court below in equity, without clean hands, and was not entitled to equitable relief.

T = Reporter's Transcript of Testimony and Ruling

TA = Reporter's Transcript of Arguments

F&C indicates Findings of Fact and Conclusions of Law

3rd Revision Jan. 30, 1981 KP
4th Revision Feb. 25, 1981 KP

UNIFORM CHILD SUPPORT SCHEDULE
SECOND JUDICIAL DISTRICT

NONCUSTODIAL PARENT MONTHLY GROSS	RANGE	AMOUNT TO BE PAID - GIVEN THE TOTAL NO. OF CHILDREN 1	2	3	4	5
	400 - 473	47	70	87	116	145
	474 - 562	56	84	102	116	145
	563 - 651	67	100	120	132	145
	652 - 741	76	114	138	156	165
	742 - 830	85	128	153	172	180
	831 - 919	96	142	171	192	205
	920 - 1008	105	160	189	212	230
	1009 - 1098	115	174	207	228	245
	1099 - 1187	125	188	225	248	270
	1188 - 1276	135	202	243	272	285
	1277 - 1366	144	218	261	292	310
	1367 - 1455	154	232	276	308	330
	1456 - 1544	164	246	294	328	350
	1545 - 1633	173	260	312	348	375
	1634 - 1723	184	276	330	364	390
	1724 - 1812	193	290	348	388	415
	1813 - 1901	202	304	366	408	435
	1902 - 1991	213	318	387	424	455
	1992 - 2080	222	334	399	444	475
	2081 - 2169	232	348	417	464	495
	2170 - 2258	242	362	435	484	520
	2259 - 2348	252	376	453	504	540
	2349 - 2437	261	394	471	524	560
	2438 - 2526	271	408	489	544	580
	2527 - 2616	281	422	504	560	605
	2617 - 2705	290	436	522	580	620
	2706 - 2794	301	452	540	600	645
	2795 - 2883	310	466	558	624	665
	2884 - 2973	319	480	576	640	685
	2974 - 3062	330	494	594	660	710

This table was designed according to criteria set forth in 45 CFR 302.53, and was computed using Section B of Form 849-P (revised Feb. 1981,) Utah Department of Social Services, Office of Recovery Services, Basic Child Support Enforcement.

The amounts listed are intended to be used as the total temporary support order, given the collective number of children cared for by the custodial parent and the non-custodial parent's gross monthly income (i.e., if the non-custodial parent's gross monthly income is between $1009 and $1098, and there are three children, the suggested "target" for a temporary support order would be $207.00.

The schedule is based upon the non-custodial parent's monthly gross income. It automatically assumes deductions (federal, state, FICA, retirement) and necessities such as housing utilities, and transportation. It also assumes the earning potential of the absent parent the ability to borrow, needs of the child and the amount of assistance which would be paid to the child under the full standard of need of the State's IV-A plan. The formula is also designed to insure, as a minimum, that the child for whom support is sought benefits from the income and resources of the absent parent on an equitable basis in comparison with any other [illegible] 45 CFR 302.53

EXPLANATION OF TABLE

This schedule is based upon the non-custodial parent's monthly gross income. It automatically assumes deductions and necessities, normal taxes, transportation, employment and living expenses, etc.

It was designed according to criteria set forth in 45 CFR 302.53, and was computed using Section B, of Form 849-P (revised Feb. 1981), Utah Department of Social Services, Office of Recovery Services, Basic Child Support Enforcement

The amounts listed are intended to be used as the total ex parte temporary support order, given the collective number of children of the non-custodial parent who are cared for by the custodial parent, (i.e., if the non-custodial parent's gross monthly income is between $1025 and $1075, and there are a total of three children in the care of the custodial parent, the non-custodial parent could expect a temporary support order in the amount of $207.00.

NOTE: The figures in this table are intended to give the parties a "target," and to assist the parties in arriving at what has been determined as reasonable and conscionable based upon mean family income, standard deductions, welfare grants, etc. The non-custodial party will be granted a hearing for a change from this table, if such a hearing is requested. The use of the table is not intended to foreclose the Court from hearing issues involving who should be the custodial parent. Use of the table will be interpreted to be a waiver of a right to a temporary hearing, unless requested by the adverse parent.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

POLICY STATEMENT

Many parties at the beginning of a divorce, petition the Court to determine a temporary child support figure, and frequently this is the only real issue between them. Because there is no general policy statement, the parties are handicapped in negotiating temporary agreements. Occasionally, the costs in attorney fees, lost wages, and other expenses of the hearing, exceed the real difference between the parties on their proposed temporary child support figures.

The Court therefore has searched for a general standard which might have some guidance to the parties in negotiations. Not infrequently, the welfare department is involved in the situation. All states, including Utah, that have adopted the Uniform Child Support Act, have committees which attempt to establish a conscionable standard of what the non-custodial parent will pay to a custodial parent or a welfare agency. The Utah committee has consulted with the other states, and the current Utah schedule is attached. The welfare agencies use a formula that involves some calculations, but the final result is based on gross income, and is reflected in the attached table. The table assumes the non-custodial parent has normal tastes, and it makes normal allowances for independent living and transportation, taxes, etc. In an effort to avoid unnecessary litigation expenses, a custodial parent will be permitted to secure an ex-parte order in accordance with the table. It would, of course, be necessary that the custodial parent's affidavit contain evidence of correct information regarding income of the non-custodial parent.

While the welfare hearing officers are authorized to vary 25% in either direction after hearing, no such variances are issued without hearings.

It is the Court's hope that the adoption of such a schedule will avoid some litigation and expense. In adopting the Rule, the Court does not intend to limit either party's right to a hearing, should either side request it.

RULE

A custodial party may secure an ex-parte child support order in accordance with the attached table. The request must contain an affidavit as to the non-custodial parent's gross income, based on reasonably certain information. Ex-parte orders without the affidavit will not be granted. Ex-parte orders for child support amounts above the figures in the table will not be granted, nor will figures below the table be accepted, without hearing.

ARGUMENT

POINT 1. RESPONDENT, HAVING ENGAGED IN FRAUD AND DECEIT AND THEREBY HAVING FAILED TO DO EQUITY, WAS NOT ENTITLED TO A REWARD OF EQUITABLE RELIEF.

It is well settled that divorce actions and supplemental actions therein for modifications of support orders are equitable in nature. U.C.A., 1953, 30-3-5. Further, Article VIII, Section 9 of the Utah Constitution permits the Supreme Court to review questions of both law and fact in equity cases, and, thus to make its own findings and substitute its own judgment for that of the trial court when it is fair and equitable in the interest of justice. Wright vs. Wright 586 P.2d 443, 445 (Utah 1978).

It is fundamental that it is incumbent upon one seeking equity to do equity with respect to the subject matter involved, before relief will be awarded. 27 Am.Jur. 2d Equity § 131, Page 660; Coleman Company, Inc. vs. Southwest Field Irrigation Company 584 P.2d 883, 884 (Utah 1978). In Coleman supra., the plaintiff sought equitable relief in the form of a prescriptive easement, after having changed the location of a ditch, which was involved in the need for the said easement, for its own benefit and convenience. In so doing, it had effectively increased the burden upon the defendant, from whom the relief was sought, so the court refused to grant equitable relief.

In Jacobson vs. Jacobson, 557 P.2d 156 (Utah 1976), a case involving the suit of a son against a father to reform a deed, in equity, where the plaintiff had previously deceived a court and creditors

with respect to his claimed interest in the property, the Utah court noted:

> * * * The precept that equity does not reward one who has engaged in fraud or deceit in the business under consideration, but reserves its rewards for those who are themselves acting in fairness and good conscience, or as is sometimes said, to those who have come into court with clean hands.

In the case at hand, it was made clear and the trial court found that the respondent had concealed her remarriage from the appellant and accepted alimony payments from him for a period of thirty-five (35) months. Further, it cannot be doubted that she knew that she was not entitled to receive the said alimony, which conclusion can be drawn by inference from her sworn statement that she thought of the money as "additional" money. (P.2 of her Affidavit in support of her Order to Show Cause.)

Thus, respondent had failed to do equity by knowingly accepting alimony payments which were no longer due, and, through her deceit and fraudulent behavior, increased the burden upon the appellant for support payments. After thirty-five months of receiving an extra $50.00 per month, the respondent was caught. Faced with receiving only $100.00 per month, she sought to be rewarded by the court in equity in a fashion which would make up for the money no longer being received. As a result of her previous cheating on support payments, the court below should have refused, as it did in Tuttle vs. Henderson, 628 P.2d 1275 (Utah 1981), to consider equitable relief. In the Tuttle case, Id., an action by a mother seeking a change in custody after "snatching" the child from the father, the court stated, at 1277, that

> * * * In any equitable proceeding, the fundamental

rule is that he who seeks equity must do equity. Plaintiff has not done equity in the instant case.

And, therefore, respondent herein has not done equity. The court below erred in granting an increase in child support.

POINT 2. UNDER THE FACTS PRESENTED, THE COURT BELOW SUBSTANTIALLY ERRED AND ABUSED ITS DISCRETION IN FINDING A CHANGE IN CIRCUMSTANCE SUFFICIENT TO INCREASE CHILD SUPPORT AND, FURTHER, IN UTILIZING A PREDETERMINED SCHEDULE AND CONSEQUENTLY ORDERING AN INCREASE IN CHILD SUPPORT TO $225.00 PER MONTH.

As was noted at the beginning of Point 1, this is an equitable action, and the court is authorized to make its own findings and substitute its own judgment for that of the court below in the interest of justice. See also Dahlberg vs. Dahlberg, 77 U. 157, 292 P. 214, 217 (Utah 1930).

The Utah court has consistently noted that it may disturb the result of such an action where the result is unjust or inequitable, where the evidence preponderates against the findings, or where there was a misapplication of the law or the facts resulting in such an error or abuse of discretion. Dahlberg vs. Dahlberg, Id., at 216, Westenskow vs. Westenskow 562 P.2d 1256, 1258 (Utah 1977), McBroom vs. McBroom 14 Utah 2d 393, 384 P.2d 961, (1963). In McBroom, Id., at 962 it was noted that the court "* * * will not disturb a trial court's judgment in the division of property or awards of alimony and child support unless it appears to be unjust, inequitable, or contrary to the evidence and therefore an abuse of discretion. Whether the awards are unjust

or inequitable must necessarily depend upon the facts and circumstances in each particular case." (Citation omitted)

It has, further, been stated consistently that there is no general rule which may be followed by the trial court, but that the conclusion with respect to support payments must be based upon "* * * the peculiar circumstances of each case." Bullen vs. Bullen, 71 U.63 262 P.292, 293 (Utah 1927). See also Wooley vs. Wooley 113 Utah 391, 195 P.2d 743, 745, (1948) wherein the court noted that generally accepted guidelines are only guidelines and that the evidence in each case must be applied. There, the application of the guidelines resulted in an unjust order with respect to the assets.

This court has set forth and referred to certain evidentiary elements which should be given consideration in determining alimony, support payments and property settlements. See Pinion vs. Pinion, 92 Utah 255 67 P.2d 265, 267, (1937); Allen vs. Allen, 109 U. 99, 165 P.2d 872, 875 (1946).

In Owen vs. Owen, 579 P.2d 911, 913, (Utah 1978), the court addressed the issues applicable to an increase in child support thusly:

> While an increase of the defendant's income is certainly an important factor to consider, this proposition is also true: the fact that a man may so use his abilities as to increase his income should not necessarily impose a penalty upon him by automatically increasing his obligations under a divorce decree. The increase in income is only to be considered along with the other facts and circumstances concerning the needs of the children and the ability of the father and mother to provide for them. There is yet another matter which, though not of controlling importance, the trial court could legitimately give some attention to in judging the equities as between these parties and the welfare

> of their children. That is that this defendant appears to have willingly and regularly made the payments required by the decree, which is all too frequently not the case.

In the instant case, each of these factors applies. The court below found that the appellant's income had increased, due to inflation. At the same time, his ex-wife's income had increased dramatically and the court even predicted that her income would improve rapidly over the next five years. (See T-121) Some other relevant facts and circumstances, which should have been given consideration by the court, involve the relative expenses of the parties. While appellant's necessary living expenses, without any money for frills such as clothing, vacation, entertainment or gifts, left him with approximately $30.00 per month for such extras (T-95-97); his ex-wife's situation was such that she had $400.00 left over after paying for what she justified as her necessary expenses. (T-55-56) (This fact may be determined by adding the then existing child support ($150.00) per month to her net monthly income, ($1,223.00), for $1,373.00 total, and subtracting therefrom the $970.00 "necessary" expenses which she incurred each month. Included within those expenses were the expenses necessary for supporting the child. It is, therefore, easy to understand why she did not bring an action to increase child support until she was caught improperly accepting alimony payments.)

Had the court below applied these facts, it could only have fairly and equitably determined that there was not a substantial change in circumstance which warranted an increase in child support payments. Despite inflation, the $150.00 per month adequately assisted the

respondent in supporting the parties' child. If anything, the support amount may have been set too high at the beginning. Had the respondent not so successfully increased her ability to provide support, a change in circumstance such as that referred to in Wright vs. Wright, supra, at 445, might have been found. (There, inflationary wage increases had kept the father in the same relative financial condition, while hurting that of mother and child.)

Even if inflation had caused a sufficient change in this case, the court below should have more properly considered the ability of the appellant to pay. As was noted in the Wright case, supra, at page 446, there must be a finding with respect to the ability of the noncustodial parent to pay, even if there is a requisite need. In light of the uncontradicted facts before the court with respect to the abilities of the appellant in the instant case, it would only be appropriate to conclude that he had no ability to support an increase; especially not a $75.00 per month increase. Accordingly, the result of the order is not only contrary to the evidence, but is unjust and inequitable.

A review of the facts adduced before the court, and application of the said facts to the various factors to be considered does not, in any way, lend itself to a logical basis for the award of the court of an increase to $225.00 per month child support. However, reference to the court's own predetermined schedule does lend itself to such a calculation, through mathematics. If one takes the gross monthly income of the appellant, approximately $2,148.00 (Exhibit 7P), and strictly applies the schedule, the amount to be paid would be $232.00. Then, allowing for the variance (within twenty-five (25%) percent according

to the policy statement) upon a hearing, it can be seen that the award of an increase was easily within the range.

According to the face of the schedule, it was promulgated pursuant to 45 CFR 302.53. The section referred to calls for the provision of a formula (not a schedule) to be utilized "* * * pursuant to Section 302.50 [determination of amounts to be collected in enforcing child support which had been paid by the state] when there is no court order covering the obligation." (Emphasis supplied) The section states that the formula should take into account certain factors including the income and resources of the absent parent, the earning potential of the absent parent, the reasonable necessities of the absent parent, the ability of the absent parent to borrow, and the needs of the child for whom support is sought, inter alia. Conspicuously absent from such criteria are similar provisions with respect to the ability of the custodial parent to pay. This absence would seem logical, as the custodial parent would not be likely to have a great ability to support the child if she were seeking the support of the government to so do.

There is no evidence with respect to how the said criteria were dealt with. Rather, the schedule's explanation states that "[i]t automatically assumes deductions and necessities, normal taxes, transportation, employment and living expenses, etc." It further states that it is for use in determining the total ex parte temporary support order. It is also intended to give parties a negotiating "target".

The explanation expressly provides that "[t]he noncustodial party will be granted a hearing for a change from this schedule, if

such a hearing is requested." Further, in its adoption of the rule utilizing the table, the District Court referred only to use in the context of an ex parte order, and in its policy statement stated that

> In adopting the rule, the court does not intend to limit either party's right to a hearing, should either side request it.

It is clearly arbitrary and, therefore, a clear abuse of discretion, to utilize such a formula or schedule to determine the amount of child support which must be paid. See, for example, Barlow vs. Barlow, 282 S.W. 2d 429 (Texas 1955), wherein the court used "* * * an established formula, well known all over the district, * * *" (Id; at 431.) The Texas court concluded that such a determination was arbitrary, clearly erroneous, and stated:

> The facts of this case, as in every case involving child support, require the exercise of a sound discretion by the trial judge, and not the arbitrary application of any formula.

Another Texas court also had occasion, in Walton vs. Walton, 567 S.W. 2d 66 (Texas 1978), to consider the use of a schedule. In Walton, the trial court used a schedule supplied by the state bar in setting child support. There, the court did not find an abuse of discretion, and distinguished the situation from that in Barlow, noting that the court below it had utilized the schedule only to assist it in multiplying the figures with respect to salaries, and the judge had commented, on the record, that he disagreed with the schedule and that his conclusion was not within the suggested guidelines. Id. 68-9 The Texas appellate court found it not to be an abuse of discretion to make such a use of a schedule.

Appellate courts in Nebraska and Oregon, although not presented with facts involving an arbitrary use of a schedule such as that in the instant case, have also had occasion to note that the determination of the amount of support which should be paid is not susceptible to the application of a mathematical formula based upon the income of the noncustodial party. See Peery vs. Peery, 191 Neb. 782, 217 N.W.2d 837, 839 (Nebraska 1974); Picker vs. Vollenhover, 290 P.2d 789, 800 (Oregon 1955).

It is reasonably certain that, to make the determination that he did, the judge below could only have used the schedule which he prepared to determine the child support amount. Even respondent's counsel did not attempt an argument on the facts and circumstances in advancing respondent's request for an increase. Rather, he concluded his argument with respect to child support by stating:

> This schedule was prepared by your honor. Your honor has followed it, and I would think, your honor, that the schedule ought to be for the benefit of this particular child because this child needs it and needs the benefit of both parents in order to maintain the benefits that the child should have. Thank you.

Apparently the trial judge, after having prepared the schedule, came to believe it had some inherent value.

To use the schedule was arbitrary and an abuse of discretion. It, further, led to an unfair and inequitable result.

POINT 3. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S USE OF A PREDETERMINED SCHEDULE, INSTEAD OF THE EVIDENCE ADDUCED BEFORE IT, TO ESTABLISH CHILD SUPPORT.

The Fifth and Fourteenth amendments to the United States Constitution and Article I, § 7 of the Utah State Constitution guarantee all persons that they shall not be deprived of their property without due process of law.

With respect to the said protection under the Federal Constitution, the United States Supreme Court, in State of Washington ex rel. Oregon Railroad & Navigation Company vs. Fairchild, 224 U.S. 510, 524-25, 56 L.Ed. 863, 868, (1912) observed that a party

> * * *must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established. (Emphasis supplied)

The court also stated:

> For the guarantee of the constitution extends to the protection of fundamental rights, - to the substance of the order as well as to the notice and hearing which precede it. "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used in the due process of law, if the necessary result be to deprive him of his property without compensation." (Citation omitted)

See also Ivins vs. Hardy, 333 P.2d 471, Petition for Rehearing 334 P.2d 721, 722 (Montana 1959), wherein the court applied the principal to an arbitrary formula for setting a fee for a grazing permit.

Similarly, in Christiansen vs. Harris, 109 U 1, 163 P.2d 314, 317 (Utah 1945), the court has observed that under the Utah Constitution due process protection extends to the right to have judgment rendered based on the record which was made through the procedural protections. Although,

in the context of the opinion, the "essentials of due process" which are cited are limited to the deprivation of a person of his life or liberty, it is submitted that the Utah principle applies equally to the deprivation of property.

As has been established in Point 2 of this brief on appeal, the only basis for the court's child support award of $225.00 is the use of the predetermined schedule which had been adopted by the court below for use in ex parte, preliminary orders.

As has also been shown in Point 2, the only fair and equitable conclusion which could have been reached through a proper application of the facts before the court is that no substantial change in circumstance warranting an increase in child support payments was shown and, further, that even if it had been defendant does not have the ability to meet such an increase as that established by the court through the use of the schedule. Therefore, although the court does not specifically refer to it when making his order, it is clear from these facts and from the urgings of respondent's counsel in argument that the said schedule was used.

To so determine the amount of money which appellant, by the court's order will be deprived of, is to render meaningless and empty the other procedural protections, including the opportunity to present evidence to the court. To place an arbitrary schedule above the uncontradicted evidence before the court turns appellant's right to a day in court into a practical waste of time for all parties involved.

Appellant's right to due process was simply denied by the said use of the schedule.

CONCLUSION

Based upon the foregoing, Appellant therefore submits that the court below substantially erred in granting to respondent a reward of an increase in child support to $225.00 per month, and that the decision of the lower court should be reversed. No increase in child support should have been awarded.

Respondent did not deserve to be rewarded by the court in equity. The evidence clearly indicated and the court found that respondent had concealed her remarriage from the appellant. The concealment was successful for a period of thirty-five months, during which she improperly accepted alimony payments from the appellant. On the face of her Affidavit filed with the Order to Show Cause, it could be seen that she was aware of what she was doing, but had rationalized it. Courts, including this court, have often said that equity will not reward those who do not come to court with clean hands in the business under consideration. Respondent fraudulently obtained extra support from the appellant for nearly three years. After she was caught, she refused to agree to make up the debt. Rather, she brought this action for an increase in child support. According to the law of equity, the court should have refused to grant her relief, because of her unclean hands.

Even if the case could have been considered in equity, the court below abused its discretion by not properly considering the facts presented to it, and by arbitrarily applying a schedule drawn for another purpose to determine what amount the child support should be. As appellant has submitted by thorough application of the facts in his second point, the evidence preponderates against the finding

that a substantial change in circumstance had taken place warranting an increase in child support. A review of the relative financial situations of the parties indicates that the then existing child support amount, $150.00 per month, was sufficient to assist the respondent in supporting the child. With that money, the respondent had an extra $400.00 per month for non-necessary expenditures. This was largely the result of the dramatic increase in her standard of living since the divorce.

Meanwhile, the appellant's position had only improved as a result of inflation. After making the $150.00 payment, the uncontradicted evidence indicated that he would have approximately $30.00 left for non-necessary expenditures, such as for clothing, gifts, entertainment and the like. Therefore, not only was the need satisfied by the previous amount, but it was also clear that the appellant simply could not afford to pay any more.

Even so, the court below abused its discretion and found a change in circumstance. It awarded an increase to $225.00 per month, which is highly unjust and inequitable under all of the facts. Based upon the evidence, alone, the decision should be reversed.

However, the trial court's abuse of discretion became more distinct as a result of arbitrariness. Respondent's counsel argued only that a predetermined schedule should be used to set child support. The schedule, on its face, was intended only for use in absence of an evidentiary hearing. Further, the rule had been drafted for situations involving indigent custodial parents, and therefore made certain, un-

defined, assumptions based thereon; and looked only to the gross income of the noncustodial parent. To have made use of such a schedule in substitution for the facts was arbitrary. The trial court could not have arrived at the amount awarded through application of the facts presented, except through application of appellant's gross income to the schedule. As a result, the trial court's decision was arbitrary, as well as unfair and unjust, and clearly an abuse of discretion which should be set aside.

In addition to the abuse of discretion which resulted from the arbitrary use of the predetermined schedule, appellant suffered the further consequence of being denied his right to due process of law. It is basic to our very system of justice that certain rights, amounting to a day in court, must be honored by the courts. The culmination of these procedural rights must be that, based upon the evidence properly before it, the court would make its decision. In this case, even though the parties were given an opportunity to present their evidence and cross examine each others' witnesses to establish the relative needs and abilities which make up the situation of the parties, the trial court took it upon himself to use a predetermined schedule to determine child support payments and, unjustly and through a deprivation of due process, ignored the evidence. Appellant was thereby denied the very essence of his right to a day in court.

The decision of the trial judge should be reversed for any and all of the reasons stated above, and the child support payment should remain at $150.00 per month. That failing, appellant should be granted a new hearing with directions that the court make its decision

independent of any predetermined schedule.

Respectfully submitted this 26th day of April, 1982.

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MAILING CERTIFICTE

I hereby certify that on the 26th day of April, 1982, I mailed two copies of the foregoing Appellant's Brief to Pete N. Vlahos, 2447 Kiesel Avenue, Ogden, Utah 84401.