

1992

Lisa Hartwig v. David Hartwig : Brief of Respondent

Utah Court of Appeals

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Kathryn S. Denholm; attorney for appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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LISA HARTWIG,	:	
Plaintiff/Respondent,	:	Case No. 920496-CA
v.	:	
DAVID HARTWIG,	:	Priority No. 15
Defendant/Appellant.	:	

---oooOooo---

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE ANNE M. STIRBA, DISTRICT JUDGE

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Appellant



FILED

JAN 22 1993

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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LISA HARTWIG,	:	
Plaintiff/Respondent,	:	Case No. 920496-CA
v.	:	
	:	Priority No. 15
DAVID HARTWIG,	:	
Defendant/Appellant.	:	

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF ADDITIONAL FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
POINT I	6
POINT II	10
POINT III	13
CONCLUSION	14
ADDENDUM	17

TABLE OF AUTHORITIES

<u>UTAH STATUTES CITED</u>	<u>Page</u>
Section 30-3-3, <u>Utah Code Ann.</u> (1953 as amended)	6, 13
Section 30-3-5(4), <u>Utah Code Ann.</u> (1953 as amended)	7
Section 78-45-1 et. seq., <u>Utah Code Ann.</u> (1953 as amended)	11
Section 78-45-7.7 (2)(c), <u>Utah Code Ann.</u> (1953 as amended)	11
Section 78-45-7.8(5), <u>Utah Code Ann.</u> (1953 as amended)	11
Section 78-45-7.9(6), <u>Utah Code Ann.</u> (1953 as amended)	11
Section 78-45-7.16, <u>Utah Code Ann.</u> (1953 as amended)	12
Section 4-903, <u>Utah Code of Judicial Administration</u>	8

UTAH CASES CITED

<u>Bake v. Bake</u> , 772 P.2d 461 (Utah App. 1989)	2, 6
<u>Carter v. Carter</u> , 584 P.2d 904 (Utah 1978)	14
<u>Dahlberg v. Dahlberg</u> , 77 Utah 157, 292 P.214 (1930)	14
<u>Hogge v. Hogge</u> , 649 P.2d 751 (Utah 1982)	7
<u>Maughan v. Maughan</u> , 770 P.2d 156 (Utah 1989)	2, 6, 14
<u>Nilson v. Nilson</u> , 652 P.2d 1323 (Utah 1982)	2, 6
<u>Saunders v. Sharp</u> , 806 P.2d 198, 199 (1991)	9
<u>Walker v. Walker</u> , 707 P.2d 110 (Utah 1985)	7

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LISA HARTWIG,	:	
Plaintiff/Respondent,	:	Case No. 920496-CA
v.	:	
	:	Priority No. 15
DAVID HARTWIG,	:	
Defendant/Appellant.	:	

---oooOooo---

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Respondent accepts Appellant's statement of the case as an accurate synopsis of the procedural history of the case.

RELIEF SOUGHT ON APPEAL

Respondent (hereinafter "Plaintiff") seeks affirmance of the Order Modifying Decree of Divorce and Findings of Fact and Conclusions of Law entered June 29, 1992.

STATEMENT OF ISSUES ON APPEAL

Defendant's Statement of the Issues lists numerous sub-issues which confuse and distort actual issues on appeal. In an attempt to clarify those issues, defendant states as follows:

Appellant, (hereinafter "Defendant") seeks reversal of two principle aspects of the Order Modifying the Decree of Divorce;

- 1) Defendant's extended summer visitation wherein, commencing in the summer of 1993, Defendant shall have summer visitation for two

three-week periods, continuing until each child reaches age 9. As each child turns nine, the visitation shall increase to six weeks with two blocks of time, with no blocks of time being longer than one month; and 2) the daycare and preschool expenses.

With regard to the issue of summer visitation, the issue presented for appeal is whether the Trial Court's decision is so unjust as to represent an abuse of discretion. (See Nilson v. Nilson, 652 P.2d 1323 (Utah 1982), Bake v. Bake, 772 P.2d 461 (Utah App. 1989), Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989)).

With regard to daycare and preschool expenses issue, no standard of review has been identified. However, the "reasonableness" language in the relevant statute indicates this Court should only disturb the decision if it determines the Trial Court's abused its discretion.

Defendant's Objection to the Findings of Fact fails to state any specific objection to the Findings as entered by the Court.

STATEMENT OF ADDITIONAL FACTS¹

In addition to the facts set forth in Appellant's brief as "relevant Facts" Plaintiff (referred to in transcript as "Mrs. Fithian", her married name) adds the following important testimony and evidence from the proceedings.

¹ These abbreviations are used throughout: The record as paginated by the District Court Clerk is designated as "R"; The Findings of Fact and Conclusions of Law, entered by Judge Anne M. Stirba, on June 29, 1992 are designated as "Findings"; the Order Modifying Decree of Divorce, entered June 29 1992, is designated "Order"; the Transcript of the trial proceeding is designated "Tr.".

Although Defendant was regular in his exercise of visitation with his children, at the time of trial, the longest time he had exercised extended visitation has been nine consecutive days. (Tr. at 16 and 57). This occurred when Plaintiff and Defendant both resided in Salt Lake City, Utah.

Plaintiff testified that her proposed extended visitation schedule (the schedule adopted in the Court's ruling) was based on the children's well-being as it related to the Defendant's problem with controlling his anger. (Tr. at 30 and 31). Plaintiff also testified that, during long term visitation, she actually feared for the children's physical well being. (Tr. at 53). The parties both related an incident during the summer of 1991 when Defendant had visitation of the boys and had a fight with his current wife. During the course of the problem with his wife, Defendant returned the boys to Plaintiff until his anger subsided. (Tr. at 19 and 31). During the marriage, plaintiff was very concerned about Defendant's rage. He put a fist through the wall and has put his head through a wall. (Tr. at 32 and 33).

In addition, Plaintiff testified that the stepped up visitation schedule she proposed and adopted by the Court, was in part based on the children's personalities. (Tr. at 34 and 35). The older child, Ben, is verbal and when he is under stress he is angry and outspoken. The younger child, Nathan, is more introspective and comes back from visitation bed wetting with additional aggressive behavior. (Tr. at 35 and 51). The issue of breaking up the summer visitation is so important to Plaintiff that

she is willing to pay for the transportation for a second, short summer visit. (Tr. at 35). Plaintiff testified that she is fearful for both the children's physical and psychological well-being on long visitation with the defendant. (Tr at 53).

On the issue of the reasonableness of the daycare expense, Plaintiff testified that while the parties were married they had in-home daycare. (Tr. at 28). Plaintiff also testified that before she had in-home daycare in California, her work schedule necessitated that she drop the children off before school for daycare so that the children had supervision before school began each morning. (Tr. at 50). Currently, Plaintiff's daycare expense is \$1,017.50 per month: \$752.50 for a full time in-home provider, or nanny, and approximately \$265 for the youngest child's Montessori preschool. (Tr. at 39). Plaintiff further testified that the in-home daycare provider she currently employs in California arrives at the home between 7:30 and 8:30 in the morning and gets the boys ready for school, feeds them breakfast, and gets them off to school. The nanny then picks up the children from school at the two different times they are out and cares for them until Plaintiff gets home from work. The youngest child gets out of school at 12:00 p.m. and the eldest child finishes school at 2:20 p.m. (Tr. at 44). If Plaintiff is later than usual in the evening the nanny feeds the children dinner. (Tr. at 38). The nanny transports the children to their numerous after school activities, does their laundry and cleans up after them. (Tr. at 38). The nanny does not do any laundry for other members of the

household, nor does she do general housekeeping. (Tr. at 45 and 46).

No evidence was presented that the children's grandmother, Mr. Fithian's mother, utilized, nor required any services of the in-home daycare provider. (Tr. at 40). Plaintiff also testified that it was not appropriate for the elder Mrs. Fithian, at 83 years of age, to be enlisted to perform child care services. (Tr. at 43).

Both parties testified that there had been problems in the past with daycare receipts and accounting in terms of what would satisfy defendant's need for verification of plaintiff's child care expenses. Ultimately, the parties had to go back to court to obtain assistance from the Court Commissioner as to what constituted appropriate verification. (Tr. at 9, 10 and 41). Plaintiff agreed to keep Defendant informed should the cost of her daycare increase or decrease, but testified that it would be much easier if Defendant were ordered to pay a set amount each month, than having to submit verification of daycare expenses to Defendant on a monthly basis and potentially have the same types of problems arise as the parties had before. (Tr. at 42).

SUMMARY OF ARGUMENT

POINT I

In order to prevail on appeal, Defendant must establish that the Trial Court's Order regarding extended summer visitation is a ruling so outrageous as to constitute an abuse of discretion. Defendant raises a number of bases for his objection to the Court's

ruling; however, the Court's detailed Findings, well supported by the evidence clearly establish that Judge Stirba's ruling is in the children's best interests and should be upheld.

POINT II

Defendant also objects to the Court's ruling that he is responsible for one-half of his children's daycare and preschool expense. Again, this is an issue wherein the Trial Court may exercise considerable discretion. A review of the detailed findings establish the reasonableness of the daycare and preschool costs and the statute dictates that Defendant is responsible for one-half that cost, so long as it is actually incurred.

POINT III

Plaintiff should be awarded her attorney's fees and costs incurred in defending this appeal pursuant to Utah Code Ann. §30-3-3 (1953, as amended).

ARGUMENT

POINT I

APPELLANT FAILS TO ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THE AWARD OF EXTENDED SUMMER VISITATION.

Broad discretion is given to the Trial Court in matters of child custody and visitation and only when the Court's action is flagrantly unjust that it rises to the level of abuse of discretion should this court overrule it. (See Nilson v. Nilson, 652 P.2d 1323 (Utah 1982), Bake v. Bake, 772 P.2d 461 (Utah App. 1989), Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989).

Furthermore, the overriding consideration in all issues of child custody and visitation is the child's best interest.

Walker v. Walker, 707 P.2d 110 (Utah 1985), Hogge v. Hogge, 649 P.2d 751 (Utah 1982). This principle has been codified in Utah Code Ann. §30-3-5(4) (1953, as amended) which states, "In determining visitation rights of parents, grandparents, and other relatives, the Court shall consider the welfare of the child." Nonetheless, Defendant seems to take the approach that mathematical precision and the annual number of days of visitation he is entitled to exercise are more appropriate considerations. Defendant's argument is that he should be awarded the same number of days of visitation with his children as in the original Decree of Divorce, regardless of how this affects his children's best interests. Defendant's position fails to acknowledge the primary importance of the children's best interests in determining an appropriate visitation schedule.

Defendant objects to Plaintiff's testimony at trial regarding Defendant's behavior during the marriage. (Tr. at 32, 33 and 54). However, this evidence was not objected to at trial and cannot be objected to for the first time on appeal.

Another basis for Defendant's dissatisfaction with the Trial Court's visitation ruling is because it is not in conformity with the "Standard Visitation Schedule." The "Standard Visitation Schedule" referred to and relied on in Defendant's brief is not law; it is not derived from either statute or case law. It is a schedule defined by the Third District Court Commissioners to assist the Court and parties in outlining a visitation schedule. Defendant has not and cannot present legal authority to support his

position that what he refers to as "Standardized Visitation Schedule" should have any bearing on this case whatsoever.

Defendant also refers to the Court Commissioner's Recommendation at Pre-Trial as a relevant factor this Court should consider. Pursuant to the Utah Code of Judicial Administration, Section 4-903, the recommendation of the Commissioner at Pre-Trial is not binding and only a recommendation. Therefore, Defendant's reference to the Recommendation of the Commissioner and his inclusion of the Minute Entry as addendum "B" in his brief should be given little or no weight in the court's review of this appeal. Furthermore, Judge Stirba had the benefit of considering, not only Commissioner Arnett's recommendation, but also the evidence and testimony from the parties themselves in making her Order and Findings of Fact.

Defendant's brief cites a case from Iowa, wherein a father was awarded an unspecified length of extended visitation with a six year old child in Greece. Defendant argues that if a six year old child can travel to Greece, than he should be awarded longer extended visitation with his children, ages 5 and 7, who reside in a neighboring state.

This argument highlights the importance of upholding the discretion of the Court in making custody and visitation determinations. Every child, every custodial parent and every visiting parent and their individual situations are different. Accordingly, there can be no set rule as to what visitation

schedule is appropriate for every 5 and 7 year old child having visitation with their father who lives in another state.

The Trial Court is in the best position to make this determination. The cases cited above outlining the broad discretion of the Trial Court recognize this. In the instant case, the Court appropriately took into consideration the amount of extended visitation Defendant had previously spent with the children, the ability of Defendant to personally spend extended visitation with the children, Defendant's stability in his current marriage and the ages and maturity of the children. These considerations are appropriately reflected in the court's detailed Findings of Fact. All these factors and criteria were considered by the Court in light of the children's best interests. Accordingly, the Court did not abuse its discretion in establishing a summer visitation schedule and its decision should be affirmed.

In addition, Defendant has failed to marshal the evidence in support of the findings in order to attempt to demonstrate that those findings are clearly erroneous. This Court wrote in Saunders v. Sharp, 806 P.2d 198, 199 (1991) that, "If the appellant fails to marshall the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's Conclusions of Law and the application of that law in the case."

POINT II

THE CHILD CARE EXPENSE AWARD IS REASONABLE AND APPROPRIATE AND DEFENDANT FAILS TO SHOW THAT THE COURT ABUSED ITS DISCRETION OR THAT THE AWARD WAS CLEARLY ERRONEOUS.

Defendant admits in his brief that there is no standard of review defined in Utah Case law for appellate review of a child care award, but concedes that the trial court's decision should be given great discretion and overruled only if its ruling is found to be clearly erroneous. (Appellant's brief at p. 18). A review of the court's Findings of Fact indicate that the Trial Court's decision is reasonable and well supported by the evidence.

The Court made detailed Findings on the reasonableness of the child care costs. Those Findings of Fact indicate that the Court took the following factors into consideration:

That \$752.50 per month is a reasonable amount of expense to pay on a monthly basis for in-home child care, especially in light of the duties that were testified to in Court, namely, getting the children ready for school; getting them breakfast; taking the children to school; bringing the children home from school; providing lunch for the child that comes home midday; taking the children to these various activities; and, attending to their laundry. The Court is aware of what laundry the children could generate, and household disarray that they could create, taking care of the home insofar as it relates to the child care. There is not credible evidence otherwise in this Court's view that the daycare expense was in part attributable to other household duties. All the evidence presented to the Court really indicates that the child care provider is, in fact, providing child care and not providing other household duties. Therefore, the Court finds that the child care expense of \$752.50 per month is reasonable and also necessary to provide child care.

Findings at p. 11.

The Court further found "with regard to someone being in the home at times when that child is not at home, the Court finds that there is not anything unusual about that particular practice here, given that fact that person has to be on call in case a child is sick or that provides an opportunity of time in which to take care of other child-related issues at home. The Court does not think that is unreasonable under the circumstances." (Findings at p. 12).

As evidenced by the above Findings, the Court took into consideration all of the facts and circumstances surrounding the daycare issue including Defendant's concern that there would be times when the daycare provider was in the home and the children were not. The Court's detailed Findings support her decision that \$752.50 per month for in-home daycare is reasonable.

Utah Code Ann. Sections 78-45-7.7 (2)(c), 78-45-7.8(5) and 78-45-7.9(6) (1953, as amended) all indicate that the work-related child care expense shall be allocated equally to each parent. As admitted by the Defendant, there is no formula or ratio for the division of child care expenses as they relate to each parent's income; child care costs are simply split between the parties equally, regardless of income. The issue of any consideration of Defendant's second income in arriving at his share or percentage of responsibility for daycare expenses is irrelevant and totally unsupported by the Uniform Civil Liability for Support Act, Utah Code Ann. 78-45-1 et. seq., (1953, as amended).

In response to Defendant's objection to paying a set amount towards daycare each month, the Court's decision to structure the child care award in this manner is supported by its Finding that Plaintiff has had great difficulty in collecting the work-related daycare expenses. (Findings at p. 13). In addition, there was testimony by both parties that there had been numerous accounting problems with daycare expenses in the past. (Tr. p. 9, 41). In addition, there was no dispute that Plaintiff is actually incurring the daycare and Montessori expenses testified to in court of \$1,017.15 per month. Therefore, the Court's order that Defendant pay daycare of a set amount each month, until circumstances change is well supported by the testimony presented, appropriately documented in its Findings of Fact and not unreasonable and certainly not an abuse of discretion or clearly erroneous. Defendant continues to be afforded statutory protection under Utah Code Ann. 78-45-7.16 (1953, as amended) that provides, "If an actual expense included in an amount specified in the order ceases to be incurred, the obligor may suspend making monthly payments of that expense while it is not being incurred without obtaining a modification of the child support order."

Defendant further objects to the Court's order that no ruling was made at this juncture regarding the reasonableness of the youngest child's attendance at Montessori first grade. At the time of trial this child was attending Montessori pre-school with a reasonable monthly expense of \$265 per month. The Court made a Finding that if this child should attend Montessori first grade,

then Defendant's obligation to pay for 1/2 the cost may be brought by Order to Show Cause. In fact, contrary to Defendant's portrayal of this as shifting the burden to him to show the child should continue to attend Montessori, the Court specifically found that if the Plaintiff decides to continue Montessori Plaintiff must "present justification at that time if she feels it appropriate for him to continue to go to a Montessori program and require Defendant to pay one-half of the costs thereof". (Findings at p. 10).

It would be inappropriate for the Court to make a finding one way or the other regarding the reasonableness of the child's attendance at Montessori in the future. The Court's finding that any further dispute regarding Montessori may be brought via Order to Show Cause was an attempt on her part to expedite any hearing on the matter.

Defendant's Objection to the Findings of Fact fails to state any specific disputed language or provision. The Findings were properly reviewed and entered by the judge and should be upheld by this Court.

POINT III

DEFENDANT SHOULD BE AWARDED HER ATTORNEY'S FEES AND COSTS INCURRED BY HER IN THE DEFENSE OF THIS APPEAL.

Section 30-3-3, Utah Code Ann. (1953 as amended) is the statutory basis for an award of attorney's fees in a divorce action. It states that: "The Court may order either party to pay to the clerk a sum or money . . . to enable such party to prosecute or defend the action." Id.

This section has been interpreted to apply to attorney's fees incurred both at the trial and appellate levels. See Dahlberg v. Dahlberg, 77 Utah 157, 292 P. 214 (1930), Carter v. Carter, 584 P.2d 904 (Utah 1978), and Maughan v. Maughan, 770 P.2d 162, (Utah App. 1989).

Clearly, this statute gives the Court the authority to award Plaintiff her attorney's fees to allow her to defend this appeal.

Plaintiff prevailed at the trial level and should Defendant's appeal uphold the Trial Court's decision, she is certainly entitled to a reimbursement from Defendant for the legal fees and expenses she has incurred in defending this action before this Court. Furthermore, Defendant is an attorney licensed to practice law in the State of Utah and it is believed that he is doing much, (if not all) of the work on his own appeal. Accordingly, defendant's costs in pursuing this appeal may be much less (or none at all), than the costs Plaintiff has been forced to incur to defend this action.

The Court should award Plaintiff all of her attorney's fees and costs related to defending this appeal and the matter should be remanded to the Trial Court for a determination of the amount of the fees and for entry of an appropriate judgment against Defendant.

CONCLUSION

Defendant has chosen to appeal the Trial Court's decision in two highly discretionary areas: visitation and day care costs.

Defendant alleges that the Court's order of extended summer visitation constitutes an abuse of discretion and that the Court's Finding that Plaintiff's actually incurred daycare costs are reasonable is clearly erroneous. The Trial Court should be afforded great discretion in both areas and the Judge's decision tampered with, only, if her decision is deemed clearly unjust. In this case, the Court heard both party's testify, made detailed Findings, well supported by the evidence and, its decision should be upheld in all respects. Plaintiff should be awarded all her attorney's fees and costs for having to defend this matter.

RESPECTFULLY SUBMITTED this 20 day of January, 1993.

DART, ADAMSON & DONOVAN

By 

SHARON A. DONOVAN

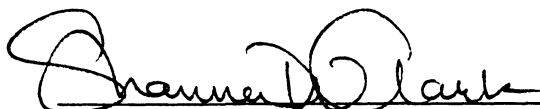
SHANNON W. CLARK

Attorneys for Lisa Hartwig, Plaintiff/
Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of January, 1993, two true and correct copies of the above and foregoing Appellee's Reply Brief were duly hand delivered, addressed to:

Kathryn S. Denholm, Esq.
263 East 2100 South
Salt Lake City, UT 84115


SHARON A. DONOVAN, ESQ.
SHANNON W. CLARK, ESQ.

ADDENDUM

INDEX TO ADDENDUM

	<u>Page</u>
Order Modifying Decree of Divorce	A-1
Findings of Fact and Conclusions of Law	A-5

JUN 29 1992

Charles S. Johnson Clerk 3rd Dist Court

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Telephone: (801) 521-6383

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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LISA FITHIAN (HARTWIG),	:	
	:	ORDER MODIFYING
Plaintiff,	:	DECREE OF DIVORCE
	:	
v.	:	
	:	Civil No. 894900194
DAVID HARTWIG,	:	
	:	Judge Anne M. Stirba
Defendant.	:	
	:	215/9105

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Both parties' Petitions for Modification of Decree of Divorce came on regularly for trial on April 2, 1992, before the Honorable Anne M. Stirba, one of the Judges of the above-entitled Court, Plaintiff appearing in person and by and through her attorney, Sharon A. Donovan, and Defendant appearing in person and by and through his attorney, Kathryn S. Denholm, and the Court having heard testimony of Plaintiff and Defendant and having received documentary evidence, and counsel for the parties having met in chambers and having resolved certain visitation issues and submitted the issue of summer visitation and amount of day care to the Court, and the Court being fully advised in the premises, and the Court having made and entered its written Findings of Fact and Conclusions of Law herein,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant's visitation shall be modified as follows:

A. Alternate school breaks, not to exceed a one-month block.

B. One-half of the Christmas break, with Christmas Day to be included in Defendant's visitation period in odd-numbered years beginning in 1993, with the further provision that the children not be required to travel on Christmas Eve or Christmas Day.

C. In the summer of 1992, Defendant shall have both of the children for two two-week blocks. Plaintiff shall pay for the round-trip ticket for the second block of time for the children, in addition to one-half of two other visits throughout the year, as stated in paragraph 1(G) below.

Defendant shall notify Plaintiff by May 15, 1992, and thereafter by May 1st of each year of the times requires for summer visitation.

D. Commencing in 1993, Defendant shall have summer visitation for two three-week periods, and this visitation should continue until each child reaches the age of nine. As each child turns the age of nine, the visitation shall increase to six weeks, with two blocks

of time and with no block of time being longer than one month.

E. One long weekend not to exceed six days only during the time the children would not be in school, upon reasonable notice. Defendant shall pay for the transportation costs for the visit.

F. Reasonable weekly telephone visitation with the parties children on Sunday evenings at 8:00, Salt Lake City time, provided that Defendant pay the costs thereof.

G. Reasonable visitation in the home state of the children, upon fourteen days notice, as long as the visitation does not interfere with previously scheduled activities, i.e., Defendant to transport the children to and from any previously planned activities.

H. The parties shall split the transportation costs for Christmas and shall obtain the best fare possible, with the parties exchanging the information necessary by the deadline necessary in order to obtain the cheapest fare.

I. Defendant shall drop the children off to Plaintiff's husband, babysitter or relative.

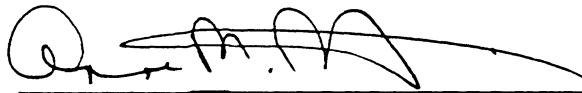
2. Defendant should be required to pay an additional \$258.75 per month for day care, until the Montessori education is concluded, for a total of \$508.75 per month, commencing in April, 1992. When the child ceases the Montessori experience, then that

will be reduced down by one-half of the total tuition of \$265.00 per month, to \$376.25 per month for day care.

3. Each party shall pay their own attorney's fees incurred herein.

DATED this 24th day of June, 1992.

BY THE COURT:



ANNE M. STIRBA
District Court Judge

Approved as to form:

KATHRYN S. DENHOLM
Attorney for Defendant



JUN 29 1992

Charles R. Schuman
Clerk 3rd Dist Court

SHARON A. DONOVAN (0901)
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IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oOo-----

LISA FITHIAN (HARTWIG),	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
v.	:	
	:	Civil No. 894900194
DAVID HARTWIG,	:	
	:	Judge Anne M. Stirba
Defendant.	:	
	:	

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Both parties' Petitions for Modification of Decree of Divorce came on regularly for trial on April 2, 1992, before the Honorable Anne M. Stirba, one of the Judges of the above-entitled Court, Plaintiff appearing in person and by and through her attorney, Sharon A. Donovan, and Defendant appearing in person and by and through his attorney, Kathryn S. Denholm, and the Court having heard testimony of Plaintiff and Defendant and having received documentary evidence, and counsel for the parties having met in chambers and having resolved certain visitation issues and submitted the issue of summer visitation and amount of day care to the Court, and the Court being fully advised in the premises, does now make, adopt and find the following:

FINDINGS OF FACT

1. The Court finds that on or about August 22, 1990, a Decree of Divorce was entered in this matter, which provided, in relevant part, as follows:

Custody/Visitation. Plaintiff was awarded the permanent care, custody and control of the parties' two minor children, Benjamin James Hartwig, age 5, born on October 17, 1984, and Nathan Meade Hartwig, age 3, born on January 19, 1987, subject to specified rights of visitation on behalf of Defendant as follows:

A. Alternate weekends, from Friday at 6:00 p.m. to Sunday at 6:00 p.m.

B. Alternate holidays, with the following holidays: New Years Day; Martin Luther King Jr. Day; President's Day; Easter; Memorial Day; Independence Day; Pioneer Day; Labor Day; Columbus Day; Halloween; Veterans' Day; and Thanksgiving Day.

C. One evening on the off week from 5:30 p.m. to 8:30 p.m.

D. Christmas Day from 6:00 p.m. through December 26th at 8:00 p.m.

E. Prior to the children entering school, two one-week blocks in the summer, with notification by June 15th for 1990 and thereafter by May 1st of each year. Once the children reach the age of nine, Defendant shall be entitled to have the children for six weeks in the summer, not to exceed four weeks for one visitation block.

F. Upon the children entering school, one-half of the Christmas break and one month in the summer for two two-week periods of time. In the event that the children are in year-round school, Defendant shall be entitled to one-half of all breaks, with no block to exceed two weeks at a time and not to exceed one month total on an annual basis prior to the children reaching nine years of age, or to exceed six weeks total on an annual basis after the children reach the age of nine, not to exceed four weeks for one visitation block.

G. Each Father's Day, regardless of whose weekend upon which this holiday may fall.

H. Each Mother's Day will be with the Plaintiff, regardless whose weekend upon which this holiday may fall.

I. The afternoon and evening of each child's birthday, or one day in the same week as that child's birthday as determined by the child.

J. If Defendant works every weekend as his primary job and primary source of income, he shall be entitled to one overnight visitation per week on a consistent night to be agreed between the parties. At such time as Defendant no longer works every weekend as his primary job and primary source of income, the other visitation provisions provided herein, i.e., alternate weekends, one evening on the off week, etc., should be implemented.

K. The parties shall have equal access to medical, school records and other important records for the children. Plaintiff shall sign any releases that are necessary to allow the children's school to provide Defendant with a schedule of all the upcoming school activities. In the event any significant school or social events occur that are not on the schedule, Plaintiff shall provide Defendant reasonable notice in advance of those activities. Defendant shall be notified of non-routine medical treatment and shall have access to the children's medical files.

L. Each party shall keep the other advised of their current address and telephone numbers, as well as that same information concerning the children's regular care givers. Neither party shall move their residence outside Salt Lake County without thirty (30) days prior written notice to the other party.

Child Support. Defendant was ordered to pay a base amount of child support in the amount of \$140.50 per month, per child, for a total of \$281.00 per month. In addition, Defendant was ordered to pay up to \$250.00 per month for his one-half portion of the reasonable work-related day care, and there was a cap of \$250.00 for the day care expenses, for a total monthly support of \$531.00, after giving Defendant a credit for medical insurance premiums of \$50.00 per month for the children. Said support was to be paid through the Clerk of the

Court, one-half on the 5th and 20th days of each month, until the children reach the age of eighteen and graduate from high school in their expected senior year.

2. Since the entry of the Decree of Divorce, the circumstances of the parties have materially and substantially changed, including, but not limited to the following:

A. Plaintiff has remarried and at the end of August, 1991, moved to the State of California with her new husband and the children, where her new husband is starting Theology School. Plaintiff's employment in the State of Utah was also in the process of being phased out.

B. After the move to California, Plaintiff was unemployed for a period of time and is now employed, earning a gross income of \$4,166.00 per month, which is less than what she was earning at the time of the entry of the Decree of Divorce of \$4,468.00 gross per month.

C. The day care expenses for the children have substantially increased and have gone from approximately \$600.00 per month to \$1,017.15, which includes Montessori preschool and day care expenses. The overall cost of living is also higher in California, with Plaintiff's mortgage payment being \$1,200.00 per month for a very modest home.

D. Defendant has remarried and his income has increased since the entry of the Decree of Divorce. At

the time of the entry of the Decree of Divorce, his income was \$1,988.00. His present income is \$2,370.00 per month, and pursuant to Defendant's testimony, he also earned approximately \$5,000.00 in 1991 from his private law practice, after business expenses.

3. The Court finds that the parties have had ongoing problems with visitation, but the parties have stipulated to the following visitation:

A. Alternate school breaks, not to exceed a one-month block.

B. One-half of the Christmas break, with Christmas Day to be included in Defendant's visitation period in odd-numbered years beginning in 1993, with the further provision that the children not be required to travel on Christmas Eve or Christmas Day.

C. In the summer of 1992, Defendant should have both of the children for two two-week blocks. Plaintiff should pay for the round-trip ticket for the second block of time for the children, in addition to one-half of two other visits throughout the year, as stated in paragraph 3(G) below.

Defendant should notify Plaintiff by May 15, 1992, and thereafter by May 1st of each year of the times requires for summer visitation.

D. One long weekend not to exceed six days only during the time the children would not be in school, upon reasonable notice. Defendant should be ordered to pay for the transportation costs for the visit.

E. Reasonable weekly telephone visitation with the parties children on Sunday evenings at 8:00, Salt Lake City time, provided that Defendant pay the costs thereof.

F. Reasonable visitation in the home state of the children, upon fourteen days notice, as long as the visitation does not interfere with previously scheduled activities, i.e., Defendant to transport the children to and from any previously planned activities.

G. The parties should split the transportation costs for Christmas and shall obtain the best fare possible, with the parties exchanging the information necessary by the deadline necessary in order to obtain the cheapest fare.

H. Defendant should drop the children off to Plaintiff's husband, babysitter or relative.

4. The Court further finds, with regard to the summer visitation issue, that the non-custodial parent is entitled to reasonable visitation, and the Court views visitation issues in light of what is in the best interests of the children and in light of the non-custodial spouse's parents' entitlement to reasonable visitation. The Court finds that the parties have agreed that for

1992, there may be two two-week periods for both of these children and that it seems to be in the best interests of the children and reasonable in light of the stipulation of the parties.

With regard to subsequent years, the Court finds that visitation must be set in recognition of the rights of the natural parents and what is in the best interests of the children. In making such orders, the Court considers the age of the children, the relationship of the children to the non-custodial parent, the stability of the home environment of the non-custodial parent and other issues that pertain to what is in the best interests of the children regarding visitation. In the Court's view, age is a significant factor, and the ages of the children, Nathan having just turned five in January, 1992, and Ben being seven years old at this time.

The Court finds that it is reasonable to change visitation during the summer months gradually, rather than making a significant change from two two-week periods to all of a sudden a volume of a six week period of time, from the four-week period of block of time, or even as Defendant has requested, even six weeks at a time. After hearing all of the testimony in this matter, the Court does not believe that it is in the best interests of these children, given their ages and given the fact that they have not had the opportunity to have visitation with their father for more than one week to ten days at a time to date.

Defendant testified that one of the reasons he wanted a larger block of time for visitation was due to his work schedule, and he also felt that it would benefit the children to be able to spend a larger block of time with him and that he would attempt to arrange his work schedule. The Court finds, however, that if because of his work schedule there were other problems and he were not able to fulfill the four-week arrangement, that he would then return the children to the natural mother. The Court has some concerns about that arrangement in and of itself, because even if Defendant would be able to make those kinds of changes, once the children have it in their minds and expectation of a certain period, then obviously the Court finds it is in the best interests to fulfill that expectation so long as there aren't other problems that would outweigh that in any particular circumstance.

Defendant has proposed larger blocks of time because he wants to be able to do things with the children, such as take off work and do things with them and he felt that longer blocks of time would be valuable in and of themselves. The Court has considered that issue, as well. The Court has also heard evidence from the Plaintiff concerning Defendant's marital situation and the problems he experienced in the marriage and arguments that have ensued between Defendant and his current wife in front of the children in the summer of 1992. This was not disputed by Defendant.

In light of the ages of the children and their best interests, the Court specifically finds that after 1992, the summer visitation

should occur in a gradual fashion and increase in length of time, until they reach the age of nine. The Court finds that Plaintiff's proposal is reasonable in this matter, and the Court finds that there should be two three-week periods in 1993, and that visitation should continue until each child reaches the age of nine. The Court finds that as each child turns the age of nine, the visitation should increase to six weeks, with two blocks of time and with no block of time being longer than one month. The Court specifically recommends that there will be a period of time when the older child will be staying longer and the younger child would come home. The Court finds, however, that a nine year old can better handle a longer period of visitation than a seven year old could under the same circumstances. The Court finds that it is important for the parties to encourage communication with the children.

5. With regard to the day care issue, the Court has considered the testimony that has been presented and arguments of counsel with regard to this particular issue. The Court finds that Defendant has been paying \$250.00 per month, which is less than one-half of the actual day care costs incurred by Plaintiff when she resided in Utah. That was the amount that the parties agreed to at the time of the divorce. Plaintiff's day care expenses now amount to \$1,017.15 per month, with \$265.00 going towards payment of the Montessori Preschool/day care tuition. The Court believes that is a reasonable amount for Montessori tuition. The Court is

aware that when Nathan enters kindergarten that the Montessori school amount should disappear because when he goes to kindergarten, presumably at a public school, that tuition amount will no longer apply. It is not clear, based upon the testimony, as to when Nathan will go to kindergarten, but when he does, that expense should no longer exist.

The Court finds that if the preschool expense for Montessori continues after Nathan enters kindergarten, that issue should be reserved by this Court, with Plaintiff to present justification at that time if she feels it appropriate for him to continue to go to a Montessori program and require Defendant to pay one-half of the costs thereof, which may be done by way of Order to Show Cause.

With regard to the other child care expense, that amount is \$752.50 according to Plaintiff's testimony. First of all, with regard to Plaintiff's mother-in-law who resides with the parties in California, the Court is not persuaded that expenses of child care represented in Plaintiff's figures covers any expenses for Plaintiff's mother-in-law, who is elderly (age 83), but self-sufficient. There is no credible evidence otherwise, and the Court finds that that amount does not pertain to the care, and whatever care is attributable in the family, not to the mother-in-law.

Second of all, with regard to whether the mother-in-law could step up and be a child care provider, the Court finds that the custodial parent has to have discretion in determining who is to care for the children. Obviously, part or some of the functions of

this child care provider goes to things that the mother-in-law is not able to provide, specifically, transporting the children to and from Spanish lessons, karate lessons, baseball games, try-out practices and that sort of thing, and there may be others. Some discussion has to be given to the child care so that it is apparent who is best able to provide appropriate child care. In this particular circumstance, the Court is satisfied that there has not been an unreasonable decision in not choosing the mother-in-law to care for the children, but that that person could look to outside care.

The Court finds that \$752.50 per month is a reasonable amount of expense to pay on a monthly basis for in-home child care, especially in light of the duties that were testified to in Court, namely, getting the children ready for school; getting them breakfast; taking the children to school; bringing the children home from school; providing lunch for the child that comes home midday; taking the children to these various activities; and attending to their laundry. The Court is aware of what laundry the children could generate, and household disarray that they could create, taking care of the home insofar as it relates to the child care. There is no credible evidence otherwise in this Court's view that the day care expense was in part attributable to other household duties. All of the evidence that has been presented to the Court really indicates that the child care provider is, in fact, providing child care and not providing other household

duties. Therefore, The Court finds that the child care expense of \$752.50 per month is reasonable and also necessary to provide child care. The Court finds that that covers everything with regard to the child care expense.

Accordingly, the testimony of Defendant was that it would be difficult for him to come up with the extra money, but the Court is satisfied that there is an ability to pay, to contribute the additional amounts towards child care expense. The Court finds that \$1,117.50 is a reasonable amount of total monthly child care under the circumstances and for the reasons indicated previously, and therefore, until the Montessori education is concluded, Defendant should be required to pay an additional \$258.75 per month, for a total of \$508.75 per month, which is half of that amount for day care, to commence with the month of April, 1992. When the child ceases the Montessori experience, then that will be reduced down by one-half of the total tuition of \$265.00, or a reduction to \$376.25 per month for day care.

With regard to someone being in the home at times when the child is not at home, the Court finds that there is not anything unusual about that particular practice here, given the fact that that person has to be on call in case a child is sick or that provides an opportunity of time in which to take care of other child-related issues at home. The Court does not think that is unreasonable under the circumstances. This again may change when the children are in school full-time. The Court finds that there

will have to be a re-evaluation of this at that time because presumably the child care expense would be substantially affected by having two children in school full-time. There is no evidence before the Court on which to rule on that particular issue now.

6. The Court finds that Plaintiff has had great difficulty in collecting the work-related day care expenses.

7. The Court further finds that the parties have agreed that they should each pay their own attorney's fees incurred herein.

From the foregoing Findings of Fact, the Court now makes and adopts its:

CONCLUSIONS OF LAW

1. The Defendant's visitation shall be modified as follows:

A. Alternate school breaks, not to exceed a one-month block.

B. One-half of the Christmas break, with Christmas Day to be included in Defendant's visitation period in odd-numbered years beginning in 1993, with the further provision that the children not be required to travel on Christmas Eve or Christmas Day.

C. In the summer of 1992, Defendant shall have both of the children for two two-week blocks. Plaintiff shall pay for the round-trip ticket for the second block of time for the children, in addition to one-half of two other visits throughout the year, as stated in paragraph 1(G) below.

Defendant shall notify Plaintiff by May 15, 1992, and thereafter by May 1st of each year of the times requires for summer visitation.

D. Commencing in 1993, Defendant shall have summer visitation for two three-week periods, and this visitation should continue until each child reaches the age of nine. As each child turns the age of nine, the visitation shall increase to six weeks, with two blocks of time and with no block of time being longer than one month.

E. One long weekend not to exceed six days only during the time the children would not be in school, upon reasonable notice. Defendant shall pay for the transportation costs for the visit.

F. Reasonable weekly telephone visitation with the parties children on Sunday evenings at 8:00, Salt Lake City time, provided that Defendant pay the costs thereof.

G. Reasonable visitation in the home state of the children, upon fourteen days notice, as long as the visitation does not interfere with previously scheduled activities, i.e., Defendant to transport the children to and from any previously planned activities.

H. The parties shall split the transportation costs for Christmas and shall obtain the best fare possible, with the parties exchanging the information

necessary by the deadline necessary in order to obtain the cheapest fare.

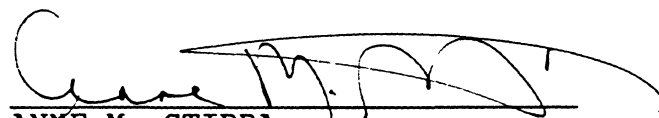
I. Defendant shall drop the children off to Plaintiff's husband, babysitter or relative.

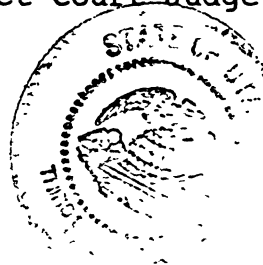
2. Defendant should be required to pay an additional \$258.75 per month for day care, until the Montessori education is concluded, for a total of \$508.75 per month, commencing in April, 1992. When the child ceases the Montessori experience, then that will be reduced down by one-half of the total tuition of \$265.00 per month, to \$376.25 per month for day care.

3. Each party shall pay their own attorney's fees incurred herein.

DATED this 29th day of June, 1992.

BY THE COURT:


ANNE M. STIRBA
District Court Judge



Approved as to form:

KATHRYN S. DENHOLM
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 7th day of May, 1992, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid, to the following:

Kathryn Schuler Denholm
Attorney at Law
263 East 2100 South
Salt Lake City, Utah 84115

Lyle M. Gray

FILED
Utah Court of Appeals

JAN 22 1993

Lisa Hartwig v. David Hartwig

Case No. 920496-CA


Mary T. Noonan
Clerk of the Court

UTAH STATUTES CITED

- (h) irreconcilable differences of the marriage;
- (i) incurable insanity; or
- (j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection 30-3-3(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless: (i) the defendant has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and (ii) the court finds by the testimony of competent witnesses that the insanity of the defendant is incurable.

(b) The court shall appoint for the defendant a guardian ad litem, who shall protect the interests of the defendant. A copy of the summons and complaint shall be served on the defendant in person or by publication, as provided by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.

(c) The county attorney shall investigate the merits of the case and if the defendant resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the defendant and the interests of the state.

(d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.

(e) The plaintiff or defendant may, if the defendant resides in this state, upon notice, have the defendant brought into the court at trial, or have an examination of the defendant by two or more competent physicians, to determine the mental condition of the defendant. For this purpose either party may have leave from the court to enter any asylum or institution where the defendant may be confined. The costs of court in this action shall be apportioned by the court. 1987

30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband. 1953

30-3-3. Temporary alimony and suit money.

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action. 1953

30-3-4. Pleadings — Findings — Decree — Sealing.

(1) (a) The complaint shall be in writing and signed by the plaintiff or plaintiff's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause.

(c) If the plaintiff and the defendant have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered, a decree of divorce may not be granted until both parties have attended a mandatory course provided in Section 30-3-11.3 and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall make and file findings and decree upon the evidence.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1992

30-3-4.1 to 30-3-4.4. Repealed.

1990

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — 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, debts or obligations, 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;
- (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; and

(c) pursuant to Section 15-4-6.5:

- (i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;
- (ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and
- (iii) provisions for the enforcement of these orders.

(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 noncustodial 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 and obligations for debts 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. 1991

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

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 78, Chapter 45d. 1985

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

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court shall order that an investigation be conducted by the Division of Family Services within the Department of Human Services in accordance with Title 62A, Chapter 4, Part 5. A final award of custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9. 1992

30-3-5.5. Petition to protect abused child — Jurisdiction under this chapter.

(1) A person who has filed a complaint under this chapter may also file a petition with the district court for a protective order for the protection of any children residing with either party to the action under this chapter. The petition and procedures shall be the same as for the issuance of protective orders in the juvenile court under Sections 78-3a-20.5, 78-3a-20.6, 78-3a-20.7, 78-3a-20.8, 78-3a-20.9, and 78-3a-20.10. The court or the cohabitant may use the protections provided in this chapter and Title 78, Chapter 3a, Juvenile Courts, and when necessary, those protections under Title 76, Chapter 5, Offenses Against the Person, which provide for criminal prosecution.

(2) A person who has obtained a protective order

pertaining to the same family member named in the protective order. 1991

30-3-6. Repealed.

1985

30-3-7. When decree becomes absolute.

(1) The decree of divorce becomes absolute:

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the parties who have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program is administered and have completed attendance at the mandatory course provided in Section 30-3-11.3 except if the court waives the requirement, on its own motion or on the motion of one of the parties, upon determination that course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties;

(b) at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending; or

(c) when the court, before the decree becomes absolute, for sufficient cause otherwise orders.

(2) The court, upon application or on its own motion for good cause shown, may waive, alter, or extend a designated period of time before the decree becomes absolute, but not to exceed six months from the signing and entry of the decree. 1992

30-3-8. Remarriage — When unlawful.

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmation of the decree. 1988

30-3-9. Repealed.

1969

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

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

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate. 1988

30-3-10.1. Joint legal custody defined.

In this chapter, "joint legal custody":

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

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

78-44-39. Duties under prior law — Property to be included in initial report.

(1) This chapter does not relieve a holder of a duty to report, pay, or deliver property arising before July 1, 1983. Such holder who fails to comply before that date is subject to the applicable enforcement and penalty provisions in existence at that time and those provisions are continued in effect for the purpose of this subsection, subject to Subsection 78-44-30(2).

(2) The initial report to be filed under this chapter for property that was not required to be reported before July 1, 1983, but which is subject to this chapter shall include all items of property that would have been presumed abandoned during the ten-year period prior to July 1, 1983, as if this chapter had been in effect during that period.

1983

78-44-40. Application and construction of chapter.

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

1983

CHAPTER 45**UNIFORM CIVIL LIABILITY FOR SUPPORT ACT**

Section	
78-45-1.	Short title.
78-45-2.	Definitions.
78-45-3.	Duty of man.
78-45-4.	Duty of woman.
78-45-4.1.	Duty of stepparent to support stepchild — Effect of termination of marriage or common law relationship.
78-45-4.2.	Natural or adoptive parent has primary obligation of support — Right of stepparent to recover support.
78-45-4.3.	Ward of state — Primary obligation to support.
78-45-5.	Duty of obligor regardless of presence or residence of obligee.
78-45-6.	District court jurisdiction.
78-45-7.	Determination of amount of support — Rebuttable guidelines.
78-45-7.1.	Medical and dental expenses of dependent children — Assigning responsibility for payment — Insurance coverage.
78-45-7.2.	Application of guidelines — Rebuttal.
78-45-7.3.	Procedure — Documentation — Stipulation.
78-45-7.4.	Obligation — Adjusted gross income used.
78-45-7.5.	Determination of gross income — Imputed income.
78-45-7.6.	Adjusted gross income.
78-45-7.7.	Calculation of obligations.
78-45-7.8.	Split custody — Obligation calculations.
78-45-7.9.	Joint physical custody — Obligation calculations.
78-45-7.10.	Reduction when child becomes 18.
78-45-7.11.	Reduction for extended visitation.
78-45-7.12.	Income in excess of tables.
78-45-7.13.	Advisory committee — Membership and functions.
78-45-7.14.	Child support obligation table.

Section

78-45-7.15.	Medical and dental expenses — Insurance.
78-45-7.16.	Child care expenses — Expenses not incurred.
78-45-7.17.	Child care costs.
78-45-7.18.	Limitation on amount of support ordered.
78-45-7.19.	Determination of parental liability.
78-45-8.	Continuing jurisdiction.
78-45-9.	Enforcement of right of support.
78-45-9.1.	Repealed.
78-45-9.2.	County attorney to assist obligee.
78-45-10.	Appeals.
78-45-11.	Husband and wife privileged communication inapplicable — Competency of spouses.
78-45-12.	Rights are in addition to those presently existing.
78-45-13.	Interpretation and construction.

78-45-1. Short title.

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

1987

78-45-2. Definitions.

As used in this chapter:

(1) "Adjusted gross income" means income calculated under Subsection 78-45-7.6(1).

(2) "Base child support award" means the award calculated using the guidelines before adjustments for uninsured medical expenses and work-related child care costs.

(3) "Base combined child support obligation table," "child support table," or "table" means the table in Section 78-45-7.14.

(4) "Child" means a son or daughter younger than 18 years of age and a son or daughter of any age who is incapacitated from earning a living and is without sufficient means.

(5) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and specifically includes periodic payment pursuant to pension or retirement programs, or insurance policies of any type. Earnings specifically includes all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets.

(6) "Guidelines" means the child support guidelines in Sections 78-45-7.2 through 78-45-7.18.

(7) "Joint physical custody" means the child stays with each parent overnight for more than 25% of the year, and both parents contribute to the expenses of the child in addition to paying child support.

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

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

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

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

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

(b) If income is imputed to a parent, the income shall be 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 40-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. 1990

78-45-7.6. Adjusted gross income.

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

(2) The guidelines do not reduce the total child support award by adjusting the gross incomes of the parents for alimony ordered in the pending proceeding. In establishing alimony, the court shall consider that in determining the child support, the guidelines do not provide a deduction from gross income for alimony 1989

78-45-7.7. Calculation of obligations.

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

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

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

(b) Calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income, and subtracting from the products the children's portion of any

monthly payments made directly by each parent for medical and dental insurance premiums

(c) Allocate monthly work-related child care costs equally to each parent.

(d) Calculate the total child support award by adding the noncustodial parent's share of the base child support obligation calculated in Subsection (2)(b) and the amount allocated in Subsection (2)(c). Include in the order both amounts and the total child support award.

(3) The base combined child support obligation table provides combined child support obligations for up to ten children. For more than ten children, additional amounts shall be added to the base child support obligation shown. The amount shown on the table is the support amount for the total number of children, not an amount per child. 1990

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

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

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

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

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

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

(5) Allocate combined monthly work-related child care costs equally to each parent.

(6) Calculate the total child support award by adding the base child support award calculated in Subsection (4) and the amount allocated in Subsection (5). Include both amounts and the total child support award in the child support order. 1990

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

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

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

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

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

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

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

(6) Allocate the combined work-related child care costs of the parents equally to each parent to obtain the other parent's tentative child care obligation.

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

(i) adding the base child support award calculated under Subsection (5); and

(ii) adding the amount of the child care obligation allocated to the obligor in Subsection (6).

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

(i) adding the base child support award calculated under Subsection (5), and

(ii) subtracting the amount of the child care obligation allocated to the obligee in Subsection (6).

(8) Include the amounts determined in Subsections (7)(a) and (b) and the two total child support awards in the child support order. 1990

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

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

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

78-45-7.11. Reduction for extended visitation.

(1) The child support order shall provide that the base child support award be reduced by 50% for each child for time periods during which the order grants specific extended visitation for that child for at least 25 of any 30 consecutive days. Only the base child support award is affected by the 50% abatement. The amount to be paid for work-related child care costs may be suspended if the costs are not incurred during the extended visitation.

(2) For purposes of this section the per child amount to which the abatement applies shall be calculated by dividing the base child support award by the number of children included in the award. 1990

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

If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount may be ordered, but the amount ordered may not be less than the highest

level specified in the table for the number of children due support. 1989

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

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

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

(b) two representatives recommended by the Judicial Council;

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

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

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

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

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

(3) The committee members serve without compensation. Staff for the committee shall be provided from the existing budgets of the Department of Human Services and the Judicial Council. The committee ceases to exist no later than the date the subsequent committee under this section is appointed. 1990

78-45-7.14. Child support obligation table.

The following is the Base Combined Child Support Obligation Table:

BASE COMBINED CHILD SUPPORT OBLIGATION (Both Parents) (Adjusted for FICA, and federal and state taxes) ¹										
Monthly Combined Adj. Gross Income	1	2	3	4	Children		7	8	9	10
Less than					5	6				
\$200	\$20	\$28	\$30	\$31	\$32	\$33	\$34	\$35	\$35	\$36
200	23	34	35	35	36	36	37	38	38	39
225	25	38	39	39	40	40	41	41	42	42
250	28	42	43	43	44	45	46	46	47	48
275	51	67	67	68	69	69	70	70	71	71
300	56	73	73	74	75	76	76	83	84	85
325	60	78	79	80	81	82	83	83	85	86
350	65	84	85	86	87	88	89	89	90	91
375	69	90	91	92	93	94	95	96	97	98
400	74	96	97	98	99	100	101	102	103	104
425	78	102	103	104	105	106	107	108	109	110
450	83	108	109	110	111	112	113	114	116	117
475	87	114	115	116	117	118	120	121	122	123
500	92	120	121	122	123	125	126	127	128	129
525	96	126	127	128	129	131	132	133	135	136
550	100	131	133	134	135	137	138	139	141	142
575	105	137	139	140	141	143	144	146	147	149
600	109	143	145	146	148	149	150	152	153	155
625	114	149	151	152	154	155	157	158	160	161
650	118	155	157	158	160	161	163	164	166	168
675	123	161	162	164	166	167	169	171	172	174
700	127	167	168	170	172	174	175	177	179	180

(2) The need to include child care costs is not presumed, but may be awarded on a case by case basis if

OPERATION OF THE COURT'S

- (ii) duration and depth of desire for custody;
- (iii) ability to provide personal rather than surrogate care;
- (iv) significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes;
- (v) reasons for having relinquished custody in the past;
- (vi) religious compatibility with the child;
- (vii) kinship, including in extraordinary circumstances stepparent status;
- (viii) financial condition;
- (F) any other factors deemed important by the evaluator, the parties, or the court.

NOTES TO DECISIONS

ANALYSIS

Use of evaluator's report
Cited

mit a written report to the court, thereby contemplating the use of such a report by a trial court in child custody determinations. *Linam v King*, 804 P 2d 1235 (Utah Ct App 1991)

Use of evaluator's report.
Subdivision (2) permits an evaluator to sub-

Cited in *Merriam v Merriam* 799 P 2d 1172 (Utah Ct App 1990)

Rule 4-904. Repealed.

Repeals. — Rule 4-904, providing for the promulgation of child support guidelines, was repealed in 1989

Rule 4-905. Domestic pretrial conferences and orders.

Intent:

To establish a uniform procedure for conducting pretrial conferences in contested domestic matters.

To provide for uniformity in pretrial orders in contested domestic matters.

Applicability:

This rule shall apply to the district courts which have court commissioners.

Statement of the Rule:

(1) Court commissioners shall conduct pretrial conferences in all contested matters seeking divorce, annulment, paternity or modification of a decree of divorce.

(2) At the pretrial conference, the commissioner shall discuss the issues with counsel and the parties, may receive proffers of evidence, and may receive evidence if authorized to do so by the presiding district judge.

(3) Following the pretrial conference, the commissioner shall issue a pretrial order which shall include:

(A) the issues stipulated to by the parties;

(B) the issues which remain in dispute; and

(C) the commissioner's recommendations as to the disputed issues.

(4) The commissioner may designate one of the parties' counsel to reduce the pretrial order to writing pursuant to Rule 4-504.

(5) The disputed issues identified in the pretrial order shall remain at issue for purposes of trial.

(Added effective March 31, 1992.)