

1992

Jo Ann Brooks (Nunley) v. Thomas N. Brooks : Reply Brief

Utah Court of Appeals

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~~IN THE COURT OF~~ APPEALS OF THE STATE OF UTAH

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| JO ANN BROOKS (NUNLEY), | : | |
| | : | |
| Plaintiff/Appellee, | : | Case No. 920733-CA |
| and Cross-Appellant, | : | |
| | : | |
| v. | : | Priority No. 15 |
| | : | |
| THOMAS N. BROOKS, | : | |
| | : | District Court 880904192 |
| Defendant/Appellant, | : | |
| and Cross-Appellee. | : | |

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APPELLANT AND CROSS-APPELLEE'S REPLY BRIEF

APPEAL FROM ORDER MODIFYING DECREE OF DIVORCE ENTERED
ON OCTOBER 2, 1992 IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

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FILED
Utah Court of Appeals

DEC 10 1993


Mary T. Noonan
Clerk of the Court

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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DETERMINATIVE AUTHORITY

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

- (1) As used in the guidelines "gross income" includes
 - a. prospective income from any source, including non-earned sources, except under Subsection (3); and
 - b. income from salaries, wages, commissions, royalties, bonuses, rents, gift from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers compensation benefits, unemployment compensation, disability insurance benefits and payments from "non means-tested" government programs.

. . .

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

. . . .

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

. . . .

(8) (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.

ARGUMENT I

THE COURT'S FINDINGS RELATING TO MR. BROOKS' INCOME ARE CLEARLY SUPPORTED BY ADMISSIBLE EVIDENCE. AS A RESULT, IT WAS NOT AN ABUSE OF DISCRETION TO FIND NO CHANGE OF CIRCUMSTANCES SUFFICIENT TO MODIFY MR. BROOKS' CHILD SUPPORT OBLIGATION. HOWEVER, THE SAME EVIDENCE ESTABLISHES THAT IT WAS AN ABUSE OF DISCRETION TO REQUIRE DEFENDANT TO PAY ONE-HALF OF THE MINOR CHILD'S PRIVATE SCHOOL EXPENSES IN ADDITION TO HIS CHILD SUPPORT.

Mrs. Nunley argues on appeal that the Court's findings relating to Mr. Brooks' income are clearly erroneous. To support this argument, Mrs. Nunley relies on what she alleges are unexplained deposits into his bank account and on her claim that the Court should have imputed income to Mr. Brooks. Neither argument is supported by the record.

To begin first with the deposits into Mr. Brooks' account, there is absolutely no basis to claim that these deposits were "unexplained". To the contrary, Defendant's Exhibit 11 is a detailed explanation of the source of all but approximately \$2,000.00 of the deposits at issue. It established as follows:

Deposits to checking account (5/16/88 - 7/17/90) \$173,650.68

Less proceeds from defendant's sale of home
in Los Angeles - 43,649.91

Less proceeds from defendant's second
mortgage loan from Ronnie Hansen - 15,000.00

Less credit card advances (6/16/88-7/17/90) - 17,687.59

Less loans from defendant's family
Brother - 2,025.50
Father - 23,000.00

Adjusted Balance (5/16/88 - 7/17/90) \$72,287.68

| | |
|---------------------------------------|--------------------|
| Less Pension Income | |
| 5/88 to 7/88 - 1,916.88 x 3 | - 5,750.64 |
| 8/88 to 7/89 - 1,992.77 x 12 | - 23,913.24 |
| 8/89 to 7/90 - 2,077.23 x 12 | - <u>24,926.76</u> |
| | \$ 17,697.04 |
| Less Pension adjustment check | |
| Insurance payment | - 4,000.00 |
| Security wages | - 3,462.00 |
| Tax refunds | - 789.00 |
| Trout (food reimbursement) | -750.00 |
| Insurance medicine (reimbursement) | - <u>1,051.00</u> |
| | \$ 7,646.04 |
| Less 6/15/90 Pension adjustment check | - <u>5,346.23</u> |
| | <u>\$ 2,299.81</u> |

Exhibit 11 is clear and unequivocal evidence supporting the Court's finding that, although the Court believed the parties did not reveal all of their income, any additional income earned by Mr. Brooks did not rise to the level of a substantial change of circumstances. (See Finding No. 10 R. 1056-57) In addition, many of the deposits upon which Mrs. Nunley seeks to rely are not even in the nature of income. Instead, they are proceeds from the sale of a house and loan proceeds. As such, they would not be considered in the Court's determination of child support in any event.

Mrs. Nunley also argues that the Court should have imputed income to Mr. Brooks consistent with his historical earning capacity. Although Mr. Brooks had worked on occasion since his medical retirement from the L.A. Police Department, at the time of trial, he was unable to do so due to medical restrictions imposed

by his doctors. Although Mrs. Nunley argues it was error to admit Mr. Brooks' own testimony as to his medical condition, it is clear that the testimony related to his personal experiences and information within his personal knowledge.

For example, Mr. Brooks testified about his heart attack on January 14, 1991, only three months prior to trial; his medical disability rating from the L.A. Police Department; his two surgeries since his retirement; his Post Traumatic Stress Syndrome; the medications he was currently taking, including nitroglycerin, cortisone sinequan, zanex, halcyon codeine and fiorinal; and his thyroid disease, ulcer disease and heart disease. (R. 119-1204)

All of this testimony is clearly within the personal knowledge of Mr. Brooks, and therefore it is admissible pursuant to Rule 602 of the Utah Rules of Evidence which states:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not consist of the witness' own testimony . . .

While the rule is made subject to the provisions of Rule 703 relating to expert testimony, the nature of Mr. Brooks' testimony was clearly within the provisions of Rule 602 because he experienced the heart attack and surgeries; he was retired based on his disability rating; and he knows what medications he takes and from what diseases he suffers. Mr. Brooks would point out to this Court that the trial court did strike his testimony where he and his counsel allegedly characterized the testimony (R. 1200) and

where Mr. Brooks' testimony consisted of hearsay evidence relating to the fact that the physician treating him after his heart attack said he only "had two minutes to live by the time they got the clot out." (R. 1200-1201) The remaining evidence was properly allowed and received by the Court, and it clearly supports a finding that Mr. Brooks was medically retired and unable to work. He was, therefore, not under-employed for purposes of imputing income to him to determine his child support obligation pursuant to Utah Code Ann. § 78-45-7.5 (1992).

Given that all deposits into his account were clearly explained and given the fact that Mr. Brooks was not under-employed pursuant to the statute, the Court's finding that Mr. Brooks' gross monthly retirement income was \$3,029.00, is accurate and clearly supported by the evidence.

From this point there can be no dispute that there was an insufficient basis to modify Mr. Brooks' child support obligation. Using the \$3,029.00 figure in the child support guideline work sheet, together with Mrs. Nunley's stipulated income of \$833 per month, Mr. Brooks' child support obligation would only be \$250.00 per month (R. 223). This amount is \$50.00 less than his \$300.00 per month obligation as set forth in the Decree of Divorce! Therefore, there is no factual or legal basis upon which the Court could have modified the Decree to increase Mr. Brooks' child support obligation. The decision was not an abuse of discretion and should be upheld.

Conversely, however, it was inconsistent and an abuse of discretion for the Court to use the very same evidence to modify the Decree of Divorce to require Mr. Brooks to pay for a portion of Michelle's private school expenses in addition to his child support obligation.

To begin with, there is no finding by the lower Court in this case that there was a substantial change of circumstances to warrant the modification. Such a finding would be clearly erroneous. First, although the original Decree was silent in this regard, the child was in private school at the time of the parties' divorce, and Mrs. Nunley was paying all costs associated therewith. Second, the lack of a substantial change of circumstances in the parties' financial circumstances sufficient to warrant an increase in Mr. Brooks' child support obligation translates directly into a lack of a change circumstances to warrant a modification in Mr. Brooks' obligation to pay a portion of the child's private school expenses. Third, although the Plaintiff seeks to rely on the cost differential between Westchester Private School in Los Angeles and Rolland Hall St. Marks to establish the necessary change of circumstances, it is anticipated that a private grade school would be more expensive than a private pre-school, and therefore such an increase could have been anticipated at the time of the entry of the Decree of Divorce. As a result, there is not, as Mrs. Nunley argues, any basis in the record to support any finding that there was a change in circumstances sufficient to support the Court's

order requiring Mr. Brooks to pay one-half of Michelle's private school expenses. Even if there was a substantial change of circumstances, the Court clearly erred in finding that Mr. Brooks had a financial ability to pay a portion of Michelle's private school expenses. Such a finding is necessary to support the Court's order. Instead, Mr. Brooks' income totalled \$3,029 per month, or approximately \$36,000 per year. From this amount he pays \$3,600 per year for child support plus one-half of the child's transportation costs from Utah to Montana for visitation. The Court's order requires him now to pay an additional amount of between \$3,000 to \$4,000 per year for private school expenses, and in excess of \$11,000 for arrearages in such expenses. This is clearly an abuse of discretion in light of Mr. Brooks' expenses which he submitted at time of trial totalling approximately \$4,300.00 per month. (See Exhibit 7)

Finally, although she offers no legal basis for it, Mrs. Nunley argues Mr. Brooks should be ordered to pay a portion of Michelle's private school expenses because he wants her in private school. However, this is not an accurate statement of Mr. Brooks' position because it is incomplete. Finding of Fact No. 18 relates to this issue and it states:

The Court finds that the Plaintiff has enrolled the minor child in a private school, Rolland Hall St. Marks, and that she has expended substantial sums of money to keep said child in a private school. The Court further finds that both Plaintiff and Defendant are desirous for their child to be enrolled in private school. The Court finds that the Defendant noted that he did not believe that he

had the ability to maintain the costs to maintain the minor child in private school. (R. 1059)

Contrary to the Court's indication that this was just a "note" by the Defendant, it was instead the position he maintained throughout this action. He testified that he would prefer to have Michelle in private school, but he could not afford it. (R. 1214-1219 and 1236-1239). It is axiomatic that there would have been no petition to modify or trial in this matter if Mr. Brooks both wanted his daughter in private school and had the ability to pay for such an education. Therefore, Mrs. Nunley's reliance on Mr. Brooks' "desires" is misplaced and is legally and factually insufficient to support the Court's decision in this regard.

Given the fact that there was no substantial change of circumstances in the child's enrollment in private school, no substantial change in the parties' financial condition warranting an increase in the Defendant's child support obligation, and given the Defendant's clearly established inability to afford to pay a portion of Michelle's private school expenses, this Court should vacate the order requiring Mr. Brooks to pay such expenses and the judgment for arrearages entered against the Defendant and enter its own order dismissing the Plaintiff's Petition to Modify on this issue with prejudice. In the alternative, this Court should remand this action to the trial court for a new trial and sufficient findings as to whether or not there has been a material change of circumstances warranting the modification and whether or not Mr.

Brooks has the financial ability to pay a portion of Michelle's private school expenses.

ARGUMENT II

THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO ALLOW DEFENDANT TO OFFSET HIS OBLIGATION TO PAY ONE-HALF OF MICHELLE'S PRIVATE SCHOOL EXPENSES WITH SOCIAL SECURITY BENEFITS RECEIVED BY MICHELLE AS A RESULT OF THE DEFENDANT'S DISABILITY.

In support of Mrs. Nunley's position that the Court could not, as a matter of law, apply the social security benefits received by Michelle toward satisfaction of the Defendant's obligation to pay her private school expenses, Mrs. Nunley relies on the provisions of 42 U.S.C. § 407(a). However, as outlined in Mr. Brooks' primary brief, § 407 is inapplicable to the facts of this case. It is clear from the case law that § 407 insulates debtors from the distraint action of a creditor to insure that the recipient has the financial resources necessary to meet their most basic financial needs for food and shelter. (See United States v. Devalle 704 F.2d 1513 (11th Cir. 1983).) This is clearly not at issue in this case.

Second, Mrs. Nunley also attempts to rely on case law from the states of California and New Mexico where such offsets are not allowed. Mr. Brooks recognizes that some states take this position. However, the Utah State Legislature has made its intention clear in this regard in Utah Code Ann. § 78-45-7.5 (1992). This statute clearly provides that:

Social security benefits received by a child due to the earnings of parent may be credited as child support to

the parent 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.

(Emphasis added.)

There can be no question but that Utah is aligned with the overwhelming majority of states which do allow just such a credit as the Defendant seeks in this case. The list of cases and jurisdictions which allow such a credit is set forth in Mr. Brooks' primary brief. Most recently, the State of Illinois joined these states in the case of In Re: Henry 1993 WL 421675 (Ill.) wherein the Supreme Court of Illinois held that:

[B]ecause social security dependent disability benefits are earned by the noncustodial parent, made on behalf of such parent, and, in fact, paid at least in part with contributions from the noncustodial parent's own earnings, payment of social security dependent disability benefits satisfies a noncustodial parent's child support obligation.

Id. at 6.

This approach is the more reasonable and equitable, and it is consistent with Utah statutory law.

It is also important to note that the Defendant is not seeking to offset his base child support obligation, just the private school expenses which he has an inability to pay otherwise, and which clearly is a luxury item. Although Mrs. Nunley argues the Court's change of position on this issue was due to the Court's initial misperception about whether or not Michelle's benefits reduced Mr. Brooks' benefits, Findings of Fact numbers 20 and 21

clearly establish that the Court's refusal to allow the offset was based on the Court's belief it could not legally do so. The findings state:

20. The Court finds that subsequent to the trial in this matter, Plaintiff presented a letter, over the objection of the Defendant's counsel, from an employee of the Social Security Administration, dated July 12, 1991, indicating that the Court could not assign or determine how benefits paid to the minor child could be used. The Court was subsequently requested by counsel for Plaintiff to permit the filing of a Motion for Post-Trial Determination of this social security issue and the Court found that the matter should be submitted to it under Rule 4-501 of the Code of Judicial Administration. Defendant was to respond to that Motion within thirty (30) days after filing and no sooner than the 6th of September, 1991.

21. The Court finds, after review of the matters submitted to it under the "Motion for Post-Trial Determination," that contrary to its April 26, 1991 trial Minute Entry, it does not have the power to assign the social security auxiliary benefits received by the parties' minor child (by reason of Defendant's permanent disability) to meet the Defendant's obligation to pay one-half of the child's private-school expenses. The social security auxiliary benefits received by the minor child do not reduce the disability benefits otherwise due to or received by the Defendant and, in fact, said auxiliary benefits are for the minor child's use only and cannot be judicially assigned or designated for any other use. The Court finds that the Defendant should meet his obligation for one-half of the minor child's private school expenses from his own resources and not from the child's social security benefits.

(Emphasis added)

Given the provisions of Utah Code Ann. § 78-45-7.5 (1992), and the case law from an overwhelming majority of states, it is clear that the trial court erred as a matter of law in basing its decision not to allow the Defendant credit for the social security

benefits received by Michelle on its perceived legal inability to do so. Given this error, this portion of the Court's order must be reversed and the case remanded for a determination consistent with the law.

ARGUMENT III

THE TRIAL COURT DID ABUSE ITS DISCRETION IN ALLOWING THE PLAINTIFF TO SUBMIT EVIDENCE AFTER THE CONCLUSION OF TRIAL TO ESTABLISH AMOUNTS CLAIMED AND SOUGHT AT TRIAL.

In her primary brief, Mrs. Nunley argues that it was procedurally correct for the Court to allow the submission of her Affidavit relating to the amount of private school and medical and dental expenses incurred on behalf of the minor child over six months after the conclusion of trial because the Plaintiff filed a Motion for Clarification. However, Mrs. Nunley does not connect just how a Motion for Clarification cures her failure to submit essential evidence at the time of trial.

The term "clarification" implies that a dispute has arisen relating to issues already before and ruled on by the trial court. The damages which Mrs. Nunley sought to submit long after trial had never been before the Court. There was therefore, nothing to clarify, and it is procedurally irrelevant that the Affidavit was before the Court based upon a Motion for Clarification. Instead, since the Plaintiff was seeking a judgment for arrearages in private school and medical and dental expenses, the amount of those arrearages was a primary issue at trial, and the evidence should

have been submitted pursuant to Rule 43 of the Utah Rules of Civil Procedure which requires testimony to be presented orally at trial.

In addition, it is not entirely accurate to say that the Affidavit was submitted with the Motion for Clarification. Instead, the Affidavit was submitted over five months after the Motion for Clarification with a pleading entitled "Motion for Post-Trial Determination of Divorce Modification Issues."

Similarly, the Plaintiff cannot rely on Rule 60(b) of the Utah Rules of Civil Procedure because it was solely her own failure to present the evidence timely. A party's own failure to do something is not the type of "other reason" justifying relief as allowed in Rule 60(b)(7). The Affidavit would also not have been timely filed under Rule 60(b).

Finally, an additional hearing on these issues would not have been superfluous as Mrs. Nunley claims. The evidence was never subject to cross-examination, and the Court never had the opportunity to judge the credibility of the witness submitting it. In addition, as outlined in the Defendant's primary appellate brief, the objections raised by Mr. Brooks included the facts that: (1) some of the documents had absolutely no reference to the date the expense was purportedly incurred by Mrs. Nunley; (2) certain of the documents which did have dates, placed those expenses at a time prior to Mrs. Nunley's filing of her Amended Petition to Modify despite the Court's order that she was entitled to reimbursement only from that day forward; (3) certain of the documents were

illegible; and (4) there was no evidence with respect to whether or not medical and dental expenses had been submitted to an insurance carrier and what portion, if any, had been paid by the carrier. (R. 777-786). These are issues on which the trial court should have received testimony and subjected that testimony to cross-examination.

The fact that the parties ultimately reached a stipulation as to the amounts due pursuant to the Court's ruling does not cure the fact that the Court should have excluded the evidence on the basis set forth above. Mr. Brooks expressly reserved his right to appeal this issue prior to participating in the stipulation to an amount of damages. (R. 477) The Court should have denied the Plaintiff's Motion for Clarification and the Plaintiff's Motion for Post-Trial Determination of Divorce Modification Issues and refused to consider all evidence not submitted at trial. Accordingly, this Court should vacate the judgment entered against the Defendant or remand the issue for a hearing consistent with the law.

ARGUMENT IV

THE COURT DID NOT ERR IN REFUSING TO ADJUST
DEFENDANT'S INCOME TO REFLECT A HIGHER AND
ARTIFICIAL "TAXABLE GROSS INCOME".

In support of Mrs. Nunley's position that the Court should have adjusted Mr. Brooks' tax free income to reflect a higher amount, Mrs. Nunley relies only on Rule 201 of the Utah Rules of Evidence. This Rule governs when the Court is required to take judicial notice of a fact. However, the concept of judicial notice

is not applicable to this issue and is, in fact, completely irrelevant. Instead, before the Court could take judicial notice of the calculation offered by the Plaintiff, the Court first had to make a legal determination as to whether the imputation of the additional amounts was legally appropriate. The Court correctly determined that it was not.

Utah Code Ann. § 78-45-7.5 (1992) governs the determination of a parties' gross income for purposes of computing a child support obligation. Subsection (1) states as follows:

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

- a. prospective income from any source, including non-earned sources, except under Subsection (3); and
- b. income from salaries, wages, commissions, royalties, bonuses, rents, gift from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers compensation benefits, unemployment compensation, disability insurance benefits and payments from "non means-tested" government programs.

(Emphasis added)

It is clear that the Court's use of Mr. Brooks' \$3,029.00 per month income was appropriate pursuant to this section. The income includes his pension benefits and his social security benefits, both of which are expressly included in the statutory definition of gross income. The statute does not differentiate between taxable and non-taxable gross income, and there is no legal authority upon which the Court may do so. The definition of gross income does not change simply because the recipient does not pay taxes on it.

In turn, it is gross income as defined by the statute which is to be used by the Court in determining a parties' child support obligation. As a result, the trial court was correct in refusing to consider the Plaintiff's calculations relating to what Mrs. Nunley calls Mr. Brooks' "taxable gross income" and in refusing to take judicial notice of the calculations submitted by the Plaintiff. The findings relating to Mr. Brooks' income and the Court's refusal to modify his child support obligation should be affirmed.

ARGUMENT V

IT WAS NOT AN ABUSE OF DISCRETION TO ORDER THE PARTIES TO SHARE EQUALLY THE COSTS OF TRANSPORTATION FOR DEFENDANT'S VISITATION WITH THE PARTIES' MINOR CHILD.

Finally, Mrs. Nunley argues that it was an abuse of the trial court's discretion to order her to pay one-half of the costs of transporting the minor child for visitation with the Defendant. The allocation of responsibility for these types of costs and expenses is within the discretion of the trial court pursuant to Utah Code Ann. § 30-3-5 (Supp. 1993). In this case, the original decree required Mrs. Nunley to pay all transportation costs associated with Mr. Brooks' visitation with the minor child. Although not expressly stated in the parties' Decree, the lower court in this case found this provision was based on Mrs. Nunley's ability to provide for no or low cost travel benefits to Michelle as a benefit of her employment with Trans World Airlines. Since

Mrs. Nunley had left her employment at TWA voluntarily, the lower court found that there had been a material change of circumstances on this issue on the basis that the Plaintiff could no longer provide the flight benefits.

Contrary to Mrs. Nunley's argument on appeal, the issue was properly before the lower court both on the Plaintiff's Petition to Modify the Decree to require Defendant to pay all such costs and on the Defendant's Counter-Petition to enforce the Decree of Divorce and seeking judgment for amounts he alleged Mrs. Nunley was required but had failed to pay under the Decree.

Also contrary to Mrs. Nunley's assertions, it was not an abuse of discretion under all of the facts and circumstances of this case to order each party to share these costs equally. Although Mrs. Nunley argues that Mr. Brooks had the greater ability to pay them, the evidence before the Court established that Mr. and Mrs. Nunley's gross income had been in excess of \$80,000 for the years 1986 through 1989, inclusive and Mrs. Nunley's business had gross sales of \$251,120.00 in 1990. She had voluntarily left her employment with TWA to undertake this business, and Mr. Brooks' argued at trial that he believed the low cost flight benefits were still available as an airline courtesy to Mrs. Nunley through her current husband. Therefore, the parties both had an ability to pay these costs. Further, the parties have joint custody of their daughter and at the time of trial, Mrs. Nunley was refusing to allow Mr. Brooks to exercise his visitation unless he paid all

costs associated therewith. Therefore, the lower Court was well within its discretion in ordering each party to pay one-half of the child's visitation costs and expenses. This Court should affirm the order.

ARGUMENT VI

THIS COURT SHOULD AWARD MR. BROOKS HIS
ATTORNEY'S FEES AND COSTS INCURRED IN
DEFENDING THE CROSS-APPEAL.

Mr. Brooks believes and therefore alleges that the issues on which Mrs. Nunley has chosen to cross appeal are frivolous and without legal and factual basis. Specifically:

1. It is clear that Mr. Brooks' total gross income is \$3,029.00 per month. As set forth in Argument I herein, all deposits into his bank account were explained, and there can be no question that the medical testimony by Mr. Brooks was within his personal knowledge and experience. Using this figure, Mr. Brooks' child support obligation under the guidelines is approximately \$50.00 less than his obligation pursuant to the Decree. No modification was warranted.

2. There is no legal basis and none is offered by Mrs. Nunley upon which to argue that the Court should compute a "taxable gross income" in excess of Mr. Brooks' actual gross income for purposes of determining his child support obligation.

3. Mrs. Nunley argues that her obligation to pay visitation transportation costs terminated upon her leaving her employment with TWA. However, nowhere does the Decree of Divorce expressly so

state. Instead, the issue was before the Court on Mrs. Nunley's own Petition to Modify. The decision that the parties share the costs equally is well within the district court's discretion.

Because these issues are not well founded in law or fact, and because these arguments are frivolous, Mr. Brooks alleges the cross-appeal was filed simply to harass him for filing his own appeal. Mr. Brooks requests this Court award him his costs and fees incurred in defending against the cross appeal pursuant to Rules 33 and 34 of the Utah Rules of Appellate Procedure.

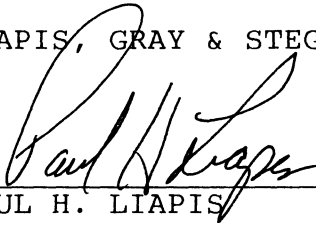
CONCLUSION

The finding that Mr. Brooks' gross monthly income was \$3,029.00 is well supported by admissible evidence submitted at trial. From that point, it is clear that there was no substantial change of circumstances sufficient to warrant a modification of his child support obligation. The order should be upheld. However, the same facts clearly establish no change of circumstances to warrant the Court's order requiring Mr. Brooks to pay a portion of his daughter's private school expenses, and clearly establish his financial inability to pay those expenses. The order and arrearages should be vacated and the petition dismissed. In the alternative, Mr. Brooks is entitled to apply social security benefits received by the minor child as a result of his disability toward this obligation, and he is entitled to a hearing on the expenses claimed prior to entry of a judgment. Under this alternative, the case must be remanded for a new trial. Finally,

the Court did not abuse its discretion in requiring the parties to share equally the visitation transportation costs of the minor child.

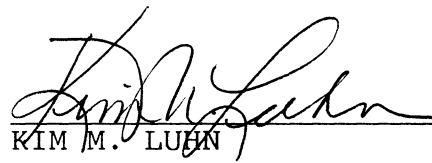
RESPECTFULLY SUBMITTED this 10th of December, 1993.

LIAPIS, GRAY & STEGALL



PAUL H. LIAPIS

GREEN & LUHN



KIM M. LUHN

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the above and foregoing APPELLANT AND CROSS-APPELLEE'S REPLY BRIEF were duly hand delivered, addressed to:

RANDALL J. HOLMGREN, ESQ.
50 West Broadway, Suite 1111
Salt Lake City, Utah 84101

DATED this 10th day of December, 1993.


KIM M. LUHN