

1992

Janeane B. Delker v. Leon V. Delker : Brief of Appellee

Utah Court of Appeals

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John M. Bybee; Attorney for Appellant.

Recommended Citation

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UTAH COURT OF APPEALS

STATE OF UTAH

JANEANE B. DELKER, /
Plaintiff and / Appellate Case No. 920423-CA
Appellant, / District Court No. 860996098
vs. / Priority No. 16¹⁵
LEON V. DELKER, /
Defendant and /
Appellee, /

BRIEF OF RESPONDENT

Appeal from the Second Judicial District Court, Weber County
Judge Stanton M. Taylor

PETE N. VLAHOS, #3337
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Appellant

FILED
Utah Court of Appeals

FEB 9 1993


Mary T. Noonan

UTAH

920423-CA

UTAH COURT OF APPEALS

STATE OF UTAH

JANEANE B. DELKER,	/	
Plaintiff and	/	Appellate Case No. <u>920423-CA</u>
Appellant,	/	District Court No. <u>860996098</u>
vs.	/	Priority No. 16
LEON V. DELKER,	/	
Defendant and	/	
Appellee,	/	

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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Annotated Section 78-2a-3(2)(i), stating that the Court of Appeals has appellant jurisdiction over appeals from the District Court involving domestic relations cases, including but not limited to divorce and property division. Rule 3 of the Utah Rules of Appellant Procedure also indicates a procedure for taking appeals from Judgments and Orders of Trial Courts. This Brief follows the structural requirements outlined in Rule 24 of the Utah Rules of Appellant Procedure. This is an appeal by Janeane B. Delker, Plaintiff, from an Objection to a post divorce order on pre-trial.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the relief sought by appellant is barred by res judicata.
2. Whether an order which was set aside on the basis that notice of hearing was defective applies to all or part of the issues addressed in that order.
3. Whether section 78-45-7.2 of the Utah Code was improperly applied.
4. Whether Appellee is entitled to attorneys fees.

STANDARD OF REVIEW ON APPEAL

The standard of Review on Appeal is that the Appellant Court must reverse only if there is a misapplication or misunderstanding of the law, if the

evidence clearly preponderates against the findings or conclusions or if there is a serious inequity that must be rectified. That is English v. English, 565 P.2d 409, 410 (Utah 1977).

STATEMENT OF THE CASE

This is an appeal from an Objection to a post divorce Order on Pre-Trial brought by Appellant's (hereinafter referred to "Janeane") Petition to Modify, heard by Commissioner Maurice Richards and entered by the Honorable Stanton M. Taylor of the Second District Court of Weber County on February 14, 1992.¹ R., page 239 (Findings of Fact and Conclusions of Law).

After oral argument and proffers by respective counsels and after receiving exhibits, Judge Taylor upheld Commissioner Richard's Pre-Trial Order, finding that there had been no substantial change in circumstances to increase child support and that there was no substantial change of circumstances or other basis to make the child support retroactive. R., pages 247-249 (Order to Modify Decree of Divorce and Subsequent

¹ All references are to the pages of the original record as paginated by the Clerk of the District Court, pursuant to Utah Rules of Appellant Procedure, Rule 25(e). All documents in the record referred to will be found in the Appendix in chronological order. For purpose of clarity, the following abbreviations shall be adopted by Appellee:

R. refers to the record with its page number and title of the document in parenthesis.

T. transcript.

Orders). The Court further ordered that Appellee (hereinafter referred to as "Leon") continue to pay child support based upon his agreement with Janeane in August of 1990. R., page 248 (Order to Modify Decree of Divorce and Subsequent Orders).

STATEMENT OF FACTS

The parties herein were divorced through a Decree issued by the State of North Dakota in 1986. R., page 7 (Order). The North Dakota Court did not issue a decision regarding child support or custody of the parties' minor children, but declined to exercise jurisdiction to make these determinations, finding that the State of Utah was a more appropriate forum. R., page 7 (Order). Janeane filed a Petition to establish child support and custody of the three (3) minor children in the Second District Court of Weber County pursuant to the Order of the North Dakota Court. Leon received notice of a hearing scheduled on Janeane's Petition for September 9, 1986, but, in fact, that hearing was held on September 8, 1986. (this order will hereinafter be referred to as the "1986 hearing/order"). R., page 20 (Judgment in Petition for Award of Custody Under UCCJA). That Order required Leon to pay Janeane child support in the amount of \$116.00 per month per child. R., page 21 (Judgment in Petition for Award of Custody Under UCCJA).

Leon subsequently made a Motion to Vacate that Judgment, which was heard on June 3, 1988. The Domestic Relations Commissioner held that Janeane's notice to Leon for the hearing to determine custody of the minor children was defective, in that it advised Leon that the hearing was to be on September 9, 1986, when, in fact,

the matter was heard on September 8, 1986. R., page 28 (Amended Order on Defendant's Motion to Vacate Judgment). The Court further reserved other issues to be decided at pre-trial on August 8, 1988. R., page 29 (Amended Order on Defendant's Motion to Vacate Judgment). Further hearing was held on August 8, 1988 in front of Commissioner Maurice Richards, wherein the Court addressed custody and also addressed child support to the extent that they noted that child support would be abated by one-half (1/2) during the summer visitations with Leon. R., page 105 (Recommended Pre-Trial Order).

Child support had previously been set in 1981 by an administrative order issued through the Office of Recovery Services and which obligated Leon to pay child support in the amount of \$75.00 per month per child. This Order was purported to be changed at the 1986 hearing, which increased the child support to \$116.00 per month per child. R., page 21 (Judgment in Petition for Award of Custody Under UCCJA). As explained above, however, this Judgment was set aside due to the lack of proper notice to Leon. R., page 27-29 (Amended Order on Defendant's Motion to Vacate Judgment).

Janeane filed a Petition to Modify seeking, among other things, to increase child support, which Petition was filed on March 20, 1990. R., page 146 (Verified Petition for Modification or Judgment). Leon also filed

a Petition to Modify seeking custody of one (1) of the minor children and an adjustment of child support. This Petition was filed August 20, 1990. R., page 155 (Verified Petition). Hearing was held before Commissioner Maurice Richards on August 24, 1990. Child support was discussed at that hearing and Commissioner Richards specifically found that the Petition for an increase in child support should be dismissed on the basis that there is no substantial change in circumstances. R., page 161 (Commissioner's notes). Janeane filed an Objection to that recommendation. R., page 166 (Objection to Recommendations).

Notwithstanding the Commissioner's order that there was no substantial change in circumstances, the parties voluntarily agreed that child support be increased from \$75.00 per month per child to \$116.00 per month per child. R., page 169 (Recommended Pre-Trial Order and Recommended Order on Order to Show Cause). Janeane's objection was not heard until February 14, 1992 at which point the Court held that the matter was res judicata and that there was, in any event, no substantial change in circumstances justifying an increase in child support. R., page 247-249 (Order to Modify Decree of Divorce and Subsequent Orders).

SUMMARY OF ARGUMENT

Janeane raises three (3) separate issues in support of her contention that child support should be raised retroactive to the initial administrative order of 1981 or in the alternative, that child support be based upon the order entered in 1986, wherein Leon did not appear due to improper notice. Each of these arguments must fail because the issue regarding the increase of child support is res judicata. It was found to be res judicata by Commissioner Richards and that order was subsequently upheld by Judge Taylor.

Janeane argues that the 1986 order does not set aside child support, but only sets aside the order relative to custody. This argument fails, both on the basis that the matter is res judicata and on the basis that the matter was set aside because of improper notice to Leon. The Court's entire order would be inapplicable to Leon because the entire order would be set aside where the underlying problem is improper notice to a party.

Finally, Janeane's argument that the Court erred in applying Section 78-45-7.2 of the Utah Code in determining child support modification fails because the Court specifically finds that whether it considers Leon's actual change in income, or the change based upon the guidelines, no substantial change occurred. In other words, the Court specifically found that even when this

statute is not considered, there was no substantial change in circumstances.

Because the matter is barred by res judicata, Janeane's entire appeal must fail. If not, her appeal must still fail on the basis that it was proper for the Court to set aside the entire default order rather than portion of it as argued by Janeane and because the Court did not err in misapplying the statute regarding child support.

ARGUMENT

POINT 1: THE APPEAL MUST FAIL ON THE BASIS OF RES JUDICATA.

The doctrine of res judicata actually has two (2) branches, claim preclusion and issue preclusion. Claim preclusion bars the relitigation by the parties of a claim for relief that was once litigated on the merits and resulted in a final Judgment between the same parties or their privies. The same rule also prevents relitigation of claims that could and should have been litigated in a prior action, but werenot. Penrod v. Nu Creation Cream, Inc., 669 P.2d 873, 874. Collateral estoppel, or issue preclusion, prevents the relitigation of issues that have been once litigated and determined in another action, even though the claims for relief in the two (2) actions may be different. Penrod at 875. In the case at bar, Janeane's claim is barred by claim preclusion.

A. JANEANE'S CLAIM COULD AND SHOULD HAVE BEEN LITIGATED BUT WERE NOT.

As indicated above, the general rule is that claim preclusion bars relitigation of an action where that claim could and should have been litigated but were not. See also Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981). In the case at bar, Janeane had at least three (3) chances to litigate the issue regarding retroactivity of

child support, but failed to do so.

The first chance occurred on September 8, 1986 in a hearing before Judge John F. Wahlquist. This is the same hearing which was later set aside on the basis that Leon did not have proper notice. Notwithstanding what later occurred, the Court's order with regard to child support simply provided as follows:

It is further ordered, adjudged and decreed that \$116.00 per month per child paid by the Respondent to the Petitioner and for child support.

The only other provision with regard to child support makes mandatory income withholding available. A copy of this order entitled Judgment in Petition for Award of Custody Under UCCJA is attached hereto as Appendix "A".

If Janeane was seeking to have child support be retroactive to 1981 when the administrative order was signed by Leon and which set child support at \$75.00 per month, she should have presented it at that time. While there is no transcript or findings upon which the Court can determine whether the issue was raised or not, it should not matter. If the issue was raised at that hearing, it is clear that Judge Wahlquist ordered that child support be increased to \$116.00 per month from that point forward. If the issue of having child support retroactive to 1981 was not raised, then it is barred on the basis of claim preclusion because it should have been

raised. If it was raised, then it is also barred on the basis of claim preclusion because it had been litigated at that point and the Court entered an order which does not address retroactivity to 1981.

The second opportunity to raise the issue occurred on June 3, 1988. At that point, a hearing was held in front of Commissioner Maurice Richards on Leon's Motion to Vacate the Findings of Fact, Conclusions of Law and Judgment in Petition for Award of Custody. Janeane could have argued at this time that child support be retroactive to 1981 or that the 1986 order which set child support at \$116.00 a month, be applied, at least as to child support. However, all that is ordered in this hearing is with regard to setting temporary summer visitation and custody evaluations and reserves all other matters to August 8, 1988.

The third opportunity that Janeane had to litigate child support was at the hearing of August 8, 1988. At this point in time, it is clear that the Commissioner had set aside the default order entered in September of 1986, which changed the child support to \$116.00 a month. Notwithstanding this, it is also clear, based upon the Recommended Pre-Trial Order, that child support was discussed at least to the extent that child support would be abated by one-half (1/2) during the summer visitation. Janeane objected to the Commissioner's Recommended Order,

but limited her objections to the custody issue. Janeane could have and should have addressed the objections regarding retroactivity of child support and the setting aside of the child support order at the same time.

A fourth opportunity came for Janeane to address the issues of child support. This occurred on August 24, 1990. At this hearing, Janeane did object to the previous order regarding child support being set aside and did, apparently, argue about retroactivity of child support. In response to those arguments, Commissioner Richards specifically notes that at the time of the divorce, Leon earned \$2,109.00 per month and that at the time of that hearing, he earned \$2,324.00 per month. He further notes that Janeane's Petition to Modify was based on a change of circumstances and that Leon's obligation to pay child support was at \$75.00 per month. Based upon these factors, the Commissioner recommended that there was no substantial change in circumstances and that the Petition be dismissed. At that point in time, Leon voluntarily agreed to increase child support to \$116.00 per month per child.

Therefore, Janeane had the opportunity on September 8, 1986; June 3, 1988 and August 8, 1988 to raise the issue, but failed to do so. The issue was not raised until August 24, 1990, but clearly could and should have been raised prior to that time. "When there has been an

adjudication, it becomes res judicata as to those issues which were either tried and determined or upon all issues which the parties had a fair opportunity to present and have determined in the other proceeding." Mendenhall v. Kingston, 610 P.2d 1287, 1289 (Utah 1980).

POINT 2: THE ENTIRE 1986 JUDGMENT WAS SET ASIDE.

Janeane admits that the order and Judgment entered in 1986 was set aside based upon Leon's Motion to Vacate. However, Janeane asserts the argument that only the child custody issues were affected. This argument is without merit. The Court set aside the default order entered in 1986 on the basis that notice given to Leon was improper because the date was incorrect. This makes the entire 1986 Judgment and order void. The Utah Supreme Court has held that a Judgment is void and subject to collateral attack if a lack of jurisdiction in Court appears on the face of the record. Bowen v. Olson, 246 P.2d 602, 604 (Utah 1952).

In the Bowen case, Appellant was improperly served in an action to quiet title. Service was made by publication and by mailing a copy of the Summons. The facts showed that Plaintiff in the underlying case knew or could have known of an address to serve Appellant properly, but failed to do so. Appellant moved to set the default aside, but the lower Court dismissed the action because the Motion to Set Aside the Judgment was

not made within one (1) year after its entry, even though Plaintiff knew of the Judgment within the year. The Supreme Court reversed the Trial Court's dismissal of the Motion to Set Aside on the basis that a default Judgment was subject to collateral attack at any time when that Judgment is void because the Court lacked jurisdiction over the matter.

In the case at bar, the Court also lacked jurisdiction when default was entered against Leon in 1986. In short, the entire default order was set aside. That order cannot be partitioned to say that a portion of it was set aside and a portion not set aside because the entire order was void due to the defective notice. Regardless of the language of the order or the fact that custody was the primary issue as opposed to child support, the entire order was set aside. It is ridiculous to propose that the Court was correct in setting aside the default order with regard to custody because notice was defective, but to assert that the default order was valid with regard to child support, even though the matter was completely resolved in the same hearing. The notice was defective, whether it was dealing with child support, custody or both. As a result of the defective notice, any order made by the Court would be void and subject to being set aside.

POINT 3: THE TRIAL COURT DID NOT ERR IN FINDING THAT THERE WAS NO SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

Janeane argues that the Trial Court applied Section 78-45-7.2 of the Utah Code incorrectly in finding that there was no substantial change in circumstances. However, a review of the transcript at the hearing shows that the Court's finding was not based solely upon this section of the Utah Code. Judge Taylor, in issuing his decision, said as follows:

The case, while complex and convoluted and having gone through a lot of problems, from the stand point of the law, I think is fairly clear. On the child support modification, whether we consider the increase in his salary as being the determinative factor or whether we consider the support guidelines themselves to be the factor in either one of those analysis, the change is something less than 20%, which would not justify a finding of a substantial change in circumstance which would vest in the Court jurisdiction to make modifications.

For that reason, the Court, in finding this is not a substantial change, denies the Petition. (Emphasis added). T., page 37 and 38.

The Court then clearly considered a substantial change in circumstances from two (2) points of view. First of all, it did consider whether there was a 25% difference between what Leon was paying under the guidelines as opposed to what he should be paying under the current guidelines based on Section 78-45-7.2 of the

Utah Code. However, it is also clear that the Court looked at a substantial change based solely on Leon's actual change in income over time and found that regardless of which way you look at it, his income did not substantially change sufficient enough to change the amount of child support. Janeane's argument, therefore, must fail because the Court's findings are sufficient to show that there was no substantial change in circumstances even if Section 78-45-7.2 of the Utah Code is not considered.

POINT 4: APPELLEE SHOULD BE AWARDED ATTORNEY FEES ON APPEAL.

Pursuant to U.C.A. 73-27-56, in any civil action the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense was without merit and not brought or asserted in good faith. Utah Rules of Appellate Procedure, Rule 33 further states "if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs and/or reasonable attorney fees to the prevailing party.

A frivolous appeal is one not grounded in fact or warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law. U. Rules App. Pro. Rule 33. Appellant's argument is not

well founded. The entire matter has been ruled on two occasions to be barred by res judicata. There has been no inappropriate application of law. The child support portion of the order entered in 1986 was set aside just as all other portions of that order must be set aside as a result of the notice of hearing being defective.

This appeal is neither grounded in fact or warranted by existing law. As a result, appellee should be awarded his attorney fees and costs of appeal.

CONCLUSION

Janeane's argument must fail for three (3) reasons. First, the Court has held that her claim regarding child support was barred on the basis of res judicata. Claim preclusion provides that you cannot relitigate a claim that has previously been litigated or which should have and could have been litigated but was not. Janeane had at least three (3) opportunities to litigate the issues presented in her appeal prior to the hearing in front of Judge Taylor. She failed to do so at that time and she should not be able to relitigate the matter at this time.

Second, the entire default Judgment was previously set aside. The Judgment and order entered by Judge Wahlquist in 1986 was void because the notice given to Leon of the hearing was fatally defective. Once a Judgment is set aside, the entire Judgment is set aside. The notice cannot be defective for one purpose, i.e.,

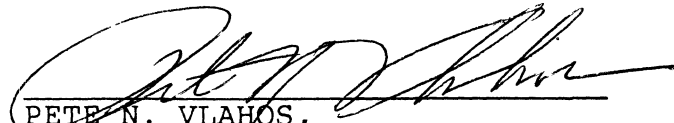
child custody and not be defective for another purpose, i.e., child support. If Leon did not have proper notice, then he did not have proper notice. The Judgment is void in its entirety and, in its entirety, is set aside.

Finally, the Court found that there was no substantial change in circumstances, but did not base this findings exclusively upon the statute referred to by Janeane. The Court was very careful and very clear against finding that it considered both the change in Leon's actual income and the change in the guidelines in determining that there was no substantial change in circumstances.

Based upon the above and foregoing reasons, the Trial Court's decision should be affirmed.

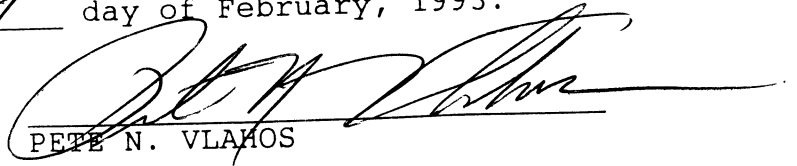
DATED this 9 day of February, 1993.

VLAHOS, SHARP, WIGHT & BRADLEY


PETE N. VLAHOS,
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that four (4) true and correct copies of the above and foregoing Brief of Respondent were posted in the mail and addressed to Attorney John M. Bybee, attorney for Appellant, at 795 24th Street, Ogden, Utah 84401 on this 9 day of February, 1993.


PETE N. VLAHOS

APPENDIX A

UTAH LEGAL SERVICES, INC.
RICHARD G. HAMP #4043
Attorney for Petitioner
385 - 24th Street, #522
Ogden, Utah 84401
Telephone: 394-9431

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

JANEANE BUCKLEY DELKER,)	
Petitioner,	)	JUDGMENT IN PETITION FOR
	)	AWARD OF CUSTODY UNDER
v.	)	UCCJA
LEON VERL DELKER,)	
Resondent.	)	Civil No. 96098

This matter having come on regularly for hearing on the 8th day of September, 1986, before the Honorable John F. Wahlquist, Judge of the above-entitled Court. The Petitioner was personally present before the Court and represented by her attorney of record, Richard G. Hamp of Utah Legal Services, Inc. The Respondent was neither personally present before the Court nor represented by counsel; however, a return of Personal Service being on file with the Court, Respondent's default was entered. The Petitioner was sworn and testified, the Court being fully advised herein, and having previously entered its Findings of Fact and Conclusions of Law:

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Petitioner, JANEANE BUCKLEY DELKER, be and hereby

COPY

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Delker v. Delker
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Civil No. 96098

is awarded custody of the minor children, to-wit: Christopher Eric Delker, Nichole Joy Delker, and Jacob Lee Delker, of this marriage with reasonable rights of visitation in the Respondent, LEON VERL DELKER.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that \$116 per month per child paid by the Respondent to the Petitioner and for child support.

IT IS FURTHER ORDERED, ADJUDGED AND DECREE that if the Respondent falls thirty or more days in arrears on his child support obligation, petitioner be and hereby is entitled to mandatory income withholding relief pursuant to Utah Code Ann. Sec. 78-45D-1 et. seq. (1985).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Respondent be and hereby is required to maintain health and dental insurance for the minor children of the parties if it is available through his place of employment. Further, Respondent is required to name said children as beneficiaries on his policy of life and accident insurance. In the event the Respondent's insurance does not fully cover the medical and dental expenses incurred for the minor children, then the Respondent is required to pay at least one half of all medical

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Deiker v. Deiker
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and dental expenses not covered by said insurance.

DATED this _____ day of _____, 1986.

APPROVED AS TO FORM:

ELLA VAN BERKOM

BY THE COURT:

District Court Judge

Date Entered:

300 24th Street
OGDEN, UTAH 84401
(801) 394-9431 WATS 1-800 662 2538

APPENDIX B

FILED IN THIS OFFICE ON JUNE 17, 1988

PETE N. VLAHOS, #3337
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IN THE DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

JANENE BUCKLEY DELKER,)	AMENDED ORDER ON
	)	DEFENDANT'S MOTION TO
Plaintiff,	)	VACATE JUDGMENT AND
	)	INTERIM PRE-TRIAL
vs.	)	RECOMMENDED ORDER
)	
LEON VERL DELKER,	)	CIVIL NO: 96098
)	
Defendant.)	

This matter having come on regularly for hearing on the 3rd day of June, 1988, before the Honorable Maurice Richards, Commissioner of the Domestic Relations Court sitting without a jury, on the Defendant's Motion to vacate findings of fact, conclusions of law and judgment in petition for award of custody on Defendant's Verified Petition to Modify the Judgment, the Plaintiff appearing in person and with her attorney, Richard A. Hummel, the Defendant appearing in person and with his attorney, Pete N. Vlahos, representations having been made to the court concerning Defendant receiving effective notice of the trial, and the

Vlahos & Sharp
ATTORNEYS AT LAW
LEGAL FORUM BUILDING
2447 KIESEL AVENUE
OGDEN, UTAH 84401

court having heard argument dealing with visitation for the summer, verification of the decree and/or custody of the minor child, and the court being fully cognizant of all matters pertaining to therein, enters the following Recommended Order on Defendant's Motion to Vacate the Judgment of Petition for Award of Custody and the Interim Pretrial Order is set forth as follows:

THE COURT RECOMMENDS AS FOLLOWS:

1. That the Plaintiff's notice to the Defendant for the hearing to determine custody of the minor children was defective in that the Notice advised the Defendant to be in court on September 9, 1986 and the matter was heard on September 8, 1986.

2. That the Defendant shall be allowed to pick up the children on June 3, 1988 at 5:00 p.m. to take them back to Minot, North Dakota, provided however, that the Defendant shall return the children back by July 7 so the children may attend the Plaintiff's wedding, and the Defendant may then pick up the children on July 9, 1988 and return them back to Minot, North Dakota for the balance of his summer visitation.

3. That the matter shall be set one hour further pretrial on August 8, 1988 at 11:00 a.m.

Utahns & Minors
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OGDEN, UTAH 84401

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4. That the Defendant is entitled to have a home study conducted in his home in Minot, North Dakota, and also a psychological evaluation, provided however, that the Defendant shall be responsible initially for the expenses and who pays the final bill will be an issue at the time of trial.

5. That both parties and the children shall cooperate in any psychological evaluation and/or home study, either in North Dakota or in the State of Utah.

6. That Plaintiff shall be entitled to telephonic communication with the children at all reasonable times at Defendant's residence in North Dakota.

7. That all other matters not resolved herein shall be reserved to the pretrial scheduled for August 8, 1988 and the children are to be present on that day.

8. That the child support during the two-month visitation that Defendant has the children shall be abated in total.

DATED this ^{27th}~~13th~~ day of July, 1988.

/s/ MAURICE RICHARDS
HONORABLE MAURICE RICHARDS
Domestic Relations
Commissioner

APPROVED AS TO FORM:

Richard A. Hummel
RICHARD A. HUMMEL
Attorney for Defendant

AMENDED ORDER ON DEFENDANT'S

Maurice Richards
ATTORNEYS AT LAW
LEGAL FORUM BUILDING
2447 KIESEL AVENUE
OGDEN, UTAH 84401

O R D E R

The above and foregoing Amended Recommended Order approved by the District Court on this 28 day of July, 1988.

15/ Richard O. Hyde
DISTRICT COURT JUDGE
COUNTY OF WEBER } SS:

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
CERTIFICATE OF MAILING THIS 28 DAY OF July, 1988
RICHARD R. GREENE, COUNTY CLERK &
EX OFFICIO CLERK OF 2nd DIST. COURT,
BY Debra M. Nelson DEPUTY

I HEREBY CERTIFY that on this 9 day of July, 1988, I mailed a true and correct copy of the above and foregoing AMENDED ORDER ON DEFENDANT'S MOTION TO VACATE JUDGMENT AND INTERIM PRE-TRIAL RECOMMENDED ORDER by placing same in the U.S. Mail postage prepaid and addressed to the following:

Richard A. Hummel
Attorney for Plaintiff
Utah Legal Services, Inc.
385 24th Street, Suite 522
Ogden, Utah 84401

Karen Humphreys
SECRETARY

APPENDIX C

FILE COPY

PETE N. VLAHOS, #3337
VLAHOS, SHARP, WIGHT & WALPOLE
Attorney for Defendant
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: (801) 621-2464

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

JANENE BUCKLEY DELKER, nka)	
JANENE BUCKLEY DALTON,	)	RECOMMENDED PRE-TRIAL
	)	ORDER
Plaintiff,)	
)	
vs.)	
)	
LEON VERL DELKER,	)	CIVIL NO: 96098
)	
Defendant.)	

This matter having come on regularly for pre-trial on the 8th day of August, 1988, before the Honorable Maurice Richards, Commissioner of the Domestic Relations Court, and the Plaintiff appearing in person and with her attorney, Judith Mayorga, and the Defendant appearing in person and with his attorney, Pete N. Vlahos, and representations having been made by Plaintiff's attorney and Defendant's attorney, depositions taken in North Dakota having been submitted to the Court, Affidavits and other documents having been submitted by Plaintiff's counsel, the psychological report of the Defendant and the children having been

RECOMMENDED PRE-TRIAL ORDER 1

ATTORNEYS AT LAW
LEGAL FORUM BUILDING
2447 KIESEL AVENUE
OGDEN, UTAH 84401

submitted to the Court, and the Court having accepted all of said exhibits and having allowed the Defendant to withdraw the depositions at the conclusion of the hearing, and the Court being requested to speak with the three (3) minor children, and the Court having spoken with the three (3) minor children outside the presence of the parties and having spoken to them individually, and the Court being fully cognizant of all matters pertaining therein, enters the following Recommended Pre-Trial Order and is set forth as follows:

FINDINGS OF FACT

1. That the three (3) minor children love both their parents and like both the stepfather and stepmother of the respective parties.
2. That the children do not have friends at either place.
3. That both homes are comparable and that both parents and the respective stepparents get along well with the children.
4. That the Plaintiff has had the primary care of the children from the time of the divorce and that the Defendant has visited regularly.

5. That the children all feel better off with the Plaintiff but want to and like to visit their father, the Defendant herein.

6. That all of the children agree that they like both homes equally.

7. That the Defendant's parents, or the children's grandparents, reside in Utah and primarily in Weber County.

8. That the parties have agreed and stipulated that the Defendant's parents, or the children's grandparents, shall be entitled to the Defendant's normal structured visitation as the Court applies it.

9. That from the above and foregoing Findings of Fact, the Court enters its Pre-Trial recommendations as follows;

PRE-TRIAL RECOMMENDATIONS

1. That the Plaintiff shall retain the care, custody and control of the three (3) minor children.

2. That the Defendant shall have summer visitation of two (2) months each year, commencing the Monday following when the children are released from school and shall be entitled to pick up the children at 8:00 a.m. on the Monday following when the children are released from school and shall return them two (2) months later at 8:00 p.m.

3. That the Defendant shall have full access to all of the children's school records and/or medical records as needed.

4. That the Defendant's parents, or the children's grandparents, shall be entitled to the Defendant's visitation rights which the Court sets as follows:

(a) Every other weekend from Friday at 6:00 p.m. through Sunday at 6:00 p.m.

(b) Every other holiday exclusive of Christmas Eve and Christmas Day until 1:00 p.m. when they must remain in the custodial parent's home, and at 1:00 p.m. the grandparents shall be entitled to pick up the children for the balance of the day.

(c) That Defendant's parents are to have the children on Father's Day regardless of whose weekend, but that Plaintiff shall have the children for Mother's Day regardless of whose weekend.

5. That the child support shall be abated by one-half during the two (2) months summer visitation that Defendant has the children, provided however, that the Defendant shall be obligated to pay the costs of transportation to and from Plaintiff's residence in Layton, Utah.

6. That each of the parties shall assume and pay their own attorney fees and costs.

ATTORNEYS AT LAW
LEGAL FORUM BUILDING
2447 KIESEL AVENUE
OGDEN, UTAH 84401

STIPULATED ORDER

1. That Defendant and his attorney, Pete N. Vlahos, have stipulated that the Commissioner's Findings and Recommended Order shall become the Order of the Court, and that no trial be set in connection with this matter.

2. That the Court on its own finds that both parties have done an excellent job with the raising of these children and commends the parents and the respective stepparents in their raising of the children.

DATED this 17 day of ^{Oct}~~August~~, 1988.

MAURICE RICHARDS

HONORABLE MAURICE RICHARDS
Domestic Relations
Commissioner

APPROVED AS TO FORM:

Judith Mayorga

JUDITH MAYORGA
Attorney for Plaintiff

O R D E R

The above and foregoing Findings and Recommended Order and stipulated by the parties to be a Final Order, was

ATTORNEYS AT LAW
LEGAL FORUM BUILDING
2447 KIESEL AVENUE
OGDEN, UTAH 84401

signed by the above-entitled Court on this 18 day of Oct. August, 1988.

RONALD O. HYDE
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

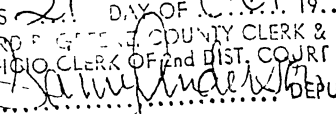
I HEREBY CERTIFY that on this _____ day of August, 1988, I mailed a true and correct copy of the above and foregoing RECOMMENDED PRE-TRIAL ORDER by placing same in the U.S. Mail postage prepaid and addressed to the following:

Judith Mayorga
Attorney for Plaintiff
Utah Legal Services, Inc.
385 - 24th Street
Ogden, Utah 84401

for purposes of ascertaining when said items were mailed to Plaintiff's counsel.


SECRETARY

STATE OF UTAH } ss:
COUNTY OF WEBER }

I HEREBY CERTIFY THAT THIS IS A TRUE COPY
OF THE ORIGINAL ON FILE IN MY OFFICE.
DATED THIS 21 DAY OF Oct. 1988.
RICHARD F. GATE, COUNTY CLERK &
EX OFFICIO CLERK OF 2nd DIST. COURT
BY  DEPUTY

APPENDIX D

SEP 20 1990

PETE N. VLAHOS, #3337
VLAHOS, SHARP & WIGHT
Attorney for Defendant
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: 621-2464

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

JANENE BUCKLEY DELKER, n/k/a	/	
JANENE BUCKLEY DALTON,	/	
Plaintiff,	/	RECOMMENDED PRE-TRIAL
	/	ORDER AND RECOMMENDED
vs.	/	ORDER ON ORDER TO
	/	SHOW CAUSE
LEON VERL DELKER	/	
Defendant.	/	Civil No. <u>860996098</u>
	/	Judge _____

This matter having come on regularly for hearing on the 24th day of August, 1990, before the Honorable Maurice Richards, Commissioner of the Domestic Relations Court, sitting without a jury, and the Plaintiff appearing in person and with her attorney, John M. Bybee, on Plaintiff's Petition to Modify the Divorce Decree, and the Defendant appearing in person and with his attorney, Pete N. Vlahos, on Defendant's Petition to Modify the Divorce Decree and on the Order to Show Cause, and representations having been

RECOMMENDED PRE-TRIAL
ORDER AND RECOMMENDED
ORDER ON ORDER TO SHOW
CAUSE

made by both counsel, and the Court having conversed with the minor child, Nichole, who was born on April 24, 1976, and the Court being fully cognizant of all matters pertaining therein, enters the following Recommended Pre-Trial Order and Recommended Order on Order to Show Cause and is set forth as follows:

RECOMMENDED PRE-TRIAL ORDER

1. That there is no substantial change of circumstances.

2 That the parties voluntarily agreed to stipulate that the child support be increased from \$75.00 per month per child to \$110.00 per month per child for the two (2) minor children that will reside with the Plaintiff.

3. That each party shall pay their own attorney fees and costs.

RECOMMENDED ORDER ON ORDER TO SHOW CAUSE

1. That the Defendant be awarded the care, custody and control of the minor child, Nichole, born April 24, 1976.

2. That Plaintiff be granted visitation rights as previously granted to the Defendant.

3. That Defendant is to have the care, custody and control of said minor children immediately.

4. That the Defendant shall have the minor child for one (1) year and at the end of the year, the parties, or either of them, can petition the Court to modify this Order.

5. That Plaintiff shall not be obligated to pay any support to the Defendant for the minor child, Nichole.

6. That Defendant voluntarily agreed to increase the child support for the two (2) children residing with the Plaintiff to \$116.00 per month per child even though no substantial change of circumstance.

7. That Plaintiff shall be obligated to pay the costs of transportation for visitation with the minor child, Nichole, from Defendant's residence to the Plaintiff's residence and back to the Defendant.

8. That each of the parties shall pay their own attorney fees and costs.

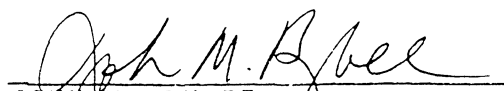
9. That either party can petition the Court prior to the expiration of one (1) year if they so desire.

DATED this 25 day of September, 1990.

MAURICE RICHARDS

MAURICE RICHARDS,
Domestic Relations Commissioner

APPROVED AS TO FORM:


JOHN M. BYBEE,
Attorney for Plaintiff


RECOMMENDED PRE-TRIAL
ORDER AND RECOMMENDED
ORDER ON ORDER TO SHOW
CAUSE

O R D E R

The above and foregoing Recommended and Stipulated Pre-Trial Order and Recommended Order on Order to Show Cause signed and approved by the District Court on this 26 day of September, 1990.

STANTON M. TAYLOR
DISTRICT COURT JUDGE

APPROVED AS TO FORM:


JOHN M. RYBEE,
Attorney for Plaintiff

CERTIFICATE OF MAILING

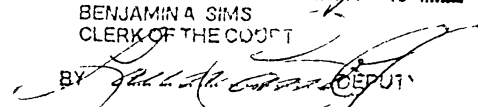
Mailed a copy of the above and foregoing to Attorney John M. Rybee, attorney for Plaintiff, at 47 North Main Street, Kaysville, Utah 84037 on this 10 day of September, 1990 for purposes of establishing when said Order was mailed to Plaintiff's counsel.

Secretary

STATE OF UTAH }
COUNTY OF WEBER } ss

I Herby Certify That This is A True Copy
Of The Original On File in My Office

DATED THIS 27 DAY of Sept 19 90
BENJAMIN A. SIMS
CLERK OF THE COURT

BY  DEPUTY

RECOMMENDED PRE-TRIAL
ORDER AND RECOMMENDED
ORDER ON ORDER TO SHOW
CAUSE

APPENDIX E

SECOND JUDICIAL DISTRICT
County of Weber - State of Utah

to
Part trial in pet to modify
FILE NO. 860996098
TITLE: (✓ PARTIES PRESENT) : COUNSEL: (✓ COUNSEL PRESENT)

JANEANE DELKER ✓ : JOHN BYBEE ✓
VS no income - 2 months & sales a 2 yr old child
LEON DELKER ✓ : PETE N VLAHOS ✓
23 24 :

A. ASHBY : CLEAR
TAPES : DIGIT :
J. HARTMAN :
MARRIED: August 29, 1974 : BAILIFF : DIVORCE FILED: June 11, 1986 : CHILDREN
HON. M. RICHARDS :
DATE: AUGUST 24, 19

at time of divorce - he earned \$2109
now he earns \$2324
at divorce she earned about 450 per mo
the petition to modify is based on change of circumstance
He pays 75 per mo support in a prior court order.
He has re-married (wife earns
2 find his substantial change of circumstances
but parties stipulated that support be
renewed & pet should be dismissed

SECOND JUDICIAL DISTRICT

County of Weber - State of Utah

075C

FILE NO.

96098

TITLE (PARTIES PRESENT) COUNSEL (COUNSEL PRESENT)

Taneane Delker ✓

Bybee ✓

Leon Delker ✓

Vlahos ✓

She has petition to modify in file for custody of her

in H

CLERK

HON.

TAPE _____ DIGIT _____

Today

DATE: Aug 24, 90

BAILIFF

3 kids

recalc age 14 - I heard this case in approx
1988 - I then the child recalc - wanted to live with
mom talked to recalc - lives w/ mother
he dad lives N. Dakota

she says she will have a better life with her dad.
she has been with dad for 2 months & is now back.
she says the more is her idea - not her dad.
she now has friends at dad's - likes back step for
find - says she has lived with mom for 4 yrs
& want to get to know her dad - & be with mom
for 2 hrs in summer -

I find the child is not doing real good -
school - her mother has a D - average (Chr
so I don't think the mother is helping them as
as she should

1/2 of her 22 other kids & no support

APPENDIX F

PETE N. VLAHOS, #0037
VLAHOS, SHARP & WIGHT
Attorney for Defendant
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: 621-2464

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

JANEANE BUCKLEY DELKER, (DALTON)	/	
Plaintiff,	/	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	/	
LEON VERL DELKER,	/	Civil No.: 96098
Defendant.	/	

This matter having come on regularly for trial on the 14th day of February, 1991, before the Honorable Stanton M. Taylor, one of the judges of the above entitled Court, sitting without a jury, on Objection Hearing filed by the Plaintiff at the Pre-Trial, an Objection on the Recommended Order on Order to Show Cause, and the Plaintiff appearing in person and with her attorney, John M. Bybee, and the Defendant appearing in person and with his attorney, Pete N. Vlahos, and the exhibits having been offered to the Court by the respective counsel, and the Court having asked the parties if these were the issues and both attorneys having answered in the affirmative and the facts being basically stipulated, and the Court being fully cognizant of all

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

VLAHOS, SHARP & WIGHT
ATTORNEYS AT LAW
Ogden, Utah

DELKER (DALTON) VS. DELKER
Civil No.: 96098

matters pertaining therein enters the following Findings of Fact:

1. That Plaintiff and Defendant were divorced in the State of North Dakota in 1986.

2. That the Plaintiff filed a Petition to establish child support and custody of the three minor children in the District Court of Weber County pursuant to an Order of the North Dakota Court.

3. That a hearing was scheduled on the Plaintiff's Petition for September 9, 1986, but in fact said hearing was held on September 8, 1986, and that the Commissioner has previously found that there was inadequate and improper notice given to the Defendant as to the date and time of the hearing.

4. That the Court on the September 8, 1986 hearing which has been previously vacated by the Court granted to the Plaintiff the custody of the three minor children and child support at the rate of \$116.00 per month per child.

5. That subsequent to said hearing, Motions and Affidavits were filed by the Defendant, along with a Memorandum to vacate the Order of September 8, and the Plaintiff also filed Affidavits and Memorandum the same.

6. That in the interim the Defendant also filed a Petition for custody of the minor children.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

DELKER (DALTON) VS. DELKER
Civil No.: 96098

7. That a hearing was held on the above matter on June 3, 1988, and at said date and time, the Court read and entered an Order vacating the Order of September 8, because the Notice was defective and granted to the Defendant the temporary custody of the children for purposes of having psychological evaluations.

8. That said matter was re-scheduled for August 8, 1988 at 11:00 A.M.

9. That the Court on August 8, 1988 entered a final Pre-Trial Order which all the parties agreed to wherein the Plaintiff was awarded the care, custody and control of the minor children, and the support remained as previously ordered by the Court which had been established by the Office of Recovery Services in which a written stipulation signed only by the Defendant had been entered in North Dakota Court.

10. That on or about March 14, 1990, the Plaintiff filed a Petition to Modify the Decree, asking for an increase in child support and asking that the Child Support Order entered in September, 1986 of \$116.00 per month per child be granted and that the Plaintiff be granted the judgement for the arrearages.

11. That the Defendant filed an answer to the Petition alleging various defenses including res judicata.

DELKEP (DALTON) VS. DFLKER
Civil No.: 96098

12. That in August, 1990, the Defendant filed a Petition to modify the Divorce Decree for the minor child, Nicky, born April 24, 1986 and also filed an Affidavit in order to show cause for temporary custody of the minor child.

13. That a hearing was held on all issues on August 24, 1990, and at that hearing, the Defendant was granted the care, custody and control of Nicky to be reviewed by the Court in a year and found no substantial change of circumstance to increase the child support.

14. That the Defendant, by stipulation in an effort to settle the matter, offered to increase the child support to \$116.00 per month per child for the two children remaining with the Plaintiff and now seek any child support for Nicky which the Defendant has custody of.

15. That said Order was entered and the Plaintiff objected.

16. That the Court finds that there is no substantial change of circumstance for which the Court can increase the child support of August, 1990 to the present.

17. That the Defendant has in fact been paying \$116.00 per month per child for the two minor children and not receiving any assistance from the Plaintiff per the agreement.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

DELKER (DALTON) VS. DELKER
Civil No.: 96098

18. That the Court finds that the Plaintiff's request for the arrearage of child support from September through and including the present is res judicata in that said matter has been decided by the Court previously by that Order being dismissed.

19. That the oldest child has a learning disability and will be eighteen (18) in December, and is only a sophomore.

20. That said child may or may not complete school and may not continue to go to school after his 18th birthday.

21. That the Defendant is current in his child support on the basis of \$116.00 per month per child for the two children residing with the Plaintiff.

22. That the Court finds that the Plaintiff's Objections are res judicata as indicated herein and no substantial change of circumstances indicated herein.

23. That the Plaintiff by agreement in open Court stated that the Defendant may have the permanent care, custody and control of Nicky, subject to the visitation rights as previously ordered by the Court.

24. That from the above and foregoing Findings of Fact, the Court arrives at the following Conclusions of Law:

DELKER (DALTON) VS. DELKER
Civil No.: 96098

1. That the Defendant is entitled to have the permanent care, custody and control of the minor child, Nicky, subject to visitation as herein after set forth.

2. That the Plaintiff's claim for arrearage child support from September 8, 1986 to and including the present is res judicata and is denied; that said matter had been previously determined by the Court.

3. That there has been no substantial change of circumstance to increase the child support, but that the agreement of the Defendant in August, 1990 to pay \$116.00 per month per child for the two children residing with the Plaintiff shall remain in full force and effect.

4. That the Plaintiff shall have no obligation to pay to the Defendant support for the minor child, Nicky.

5. That there has been no substantial change of circumstance to justify any increase nor any legal basis to make the Child Support Order retroactive to 1986, and said increase in child support shall only become effective with the Court Order of August 24, 1990.

6. That the Defendant shall continue paying support for the oldest child until the oldest child is eighteen (18) or graduates from high school; provided however, said child support shall not go beyond the child's nineteenth (19) birthday; and provided further, that if the oldest child

WILLIAMSON, GRIFFIN & ASSOCIATES
ATTORNEYS AT LAW
MEMPHIS, TENNESSEE

DELKER (DALTON) VS. DELKER
Civil No.: 96098

drops out of high school, the child support shall terminate when he reaches the age of eighteen (18) and shall terminate anytime after he turns eighteen (18) and terminates if he does not continue on with high school.

7. That each of the parties shall assume and pay their own attorney fees and costs.

8. That the previous Order entered by the Court in connection with the above matter concerning visitation and abatement of child support as filed while the Defendant's visitation shall remain in full force and effect.

9. That the Commissioner's Recommended Order and Pre-Trial Order is approved except as modified by the Court at this hearing.

DATED this _____ day of May, 1992.

STANTON, M. TAYLOR,
District Court Judge

APPROVED AS TO FORM:

JOHN M. BYBEE,
Attorney for Plaintiff

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

DELFER (DALTON) V. S. DELFER
Civil No.: 96093

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Findings of Fact and Conclusions of Law was posted in the United States mail, postage prepaid and addressed to Attorney John M. Bybee, attorney for Plaintiff, at 795 24th Street, in Ogden, Utah 84401 pursuant to the Rules of Court 4-506 by allowing three (3) days for mailing and five (5) days prior to submission of same to the Court for signature of mailing same on this 19 day of May, 1992.

John M. Bybee
Secretary

APPENDIX G

PETE N. VLAHOS, #3337
VLAHOS, SHARP & WIGHT
Attorney for Defendant
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
Telephone: 621-2464

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

JANEANE BUCKLEY DELKER,	/	ORDER TO MODIFY
(DALTON)	/	DECREE OF DIVORCE
Plaintiff,	/	AND SUBSEQUENT ORDERS
vs.	/	
LEON VERL DELKER,	/	Civil No.: 96098
Defendant.	/	

This matter having come on regularly for trial on the 14th day of February, 1991, before the Honorable Stanton M. Taylor, one of the judges of the above entitled Court, sitting without a jury, and the Plaintiff appearing in person and with her attorney, John M. Bybee, and the Defendant appearing in person and with his attorney, Pete N. Vlahos, and the exhibits having been offered to the Court, and proffers of evidence having been made by both counsel, and argument having been made, and the Court being apprised that the parties basically agreed to the facts surrounding the matter, and the Court having reviewed the documents and the Court file having heard the argument of the respective

ORDER TO MODIFY
DECREE OF DIVORCE
AND SUBSEQUENT ORDERS

FOR PUBLICATION IN THE
OFFICIAL GAZETTE OF INDIA
AT TORNEYS AT LAW

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

2. That the Plaintiff's claim for arrearage child support from September 8, 1986 to and including the present is judicata and is denied; that said matter had been previously determined by the Court.

4. That the Plaintiff shall have no obligation to pay the Defendant support for the minor child, Nicky.

ORDER TO MODIFY
DECREE OF DIVORCE
AND SUBSEQUENT ORDERS

DELKER (DALTON) VS. DELKER
Civil No.: 96098

6. That the Defendant shall continue paying support for the oldest child until the oldest child is eighteen (18) or graduates from high school; provided however, said child support shall not go beyond the child's nineteenth (19) birthday; and provided further, that if the oldest child drops out of high school, the child support shall terminate when he reaches the age of eighteen (18) and shall terminate anytime after he turns eighteen (18) and terminates if he does not continue on with high school.

7. That each of the parties shall assume and pay their own attorney fees and costs.

8. That the previous Order entered by the Court in connection with the above matter concerning visitation and abatement of child support as filed while the Defendant's visitation shall remain in full force and effect.

9. That the Commissioner's Recommended Order and Pre-Trial Order is approved except as modified by the Court at this hearing.

DATED this _____ day of May, 1992.

STANTON, M. TAYLOR,
District Court Judge

ORDER TO MODIFY
DECREE OF DIVORCE
AND SUBSEQUENT ORDERS

DELKER (DALTON) VS. DELKER
Civil No.: 96098

APPROVED AS TO FORM:

JOHN M. BYBEE,
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Order to Modify Decree of Divorce and Subsequent Orders was posted in the United States mail, postage prepaid and addressed to Attorney John M. Bybee, attorney for Plaintiff, at 795 24th Street, in Ogden, Utah 84401 pursuant to the Rules of Court 4-506 by allowing three (3) days for mailing and five (5) days prior to submission of same to the Court for signature by mailing same on this 19 day of May, 1992.

John M. Bybee
Secretary

ORDER TO MODIFY
DECREE OF DIVORCE
AND SUBSEQUENT ORDERS

U.S. District Court
Northern District of California
San Francisco, California
94102-1099

TRANSCRIPT

1 IN THE SECOND JUDICIAL DISTRICT COURT

2 IN AND FOR WEBER COUNTY

3 STATE OF UTAH

4 JANEANE B. DELKER,)

5)

6)

Plaintiff,)

CASE NO. 860996098

7)

vs.)

OGDEN, UTAH

8)

LEON V. DELKER,)

FEBRUARY 14, 1992

9)

10)

Defendant.)

11

12 HEARING

13

HONORABLE STANTON M. TAYLOR, PRESIDING

14

15

APPEARANCES:

16

FOR THE PLAINTIFF: MR. JOHN M. BYBEE
Attorney at Law
795 24th Street
Ogden, Utah 84401

17

18

19

FOR THE DEFENDANT: MR. PETE N. VLAHOS
VLAHOS, SHARP & WIGHT
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401

20

21

22

23

24

25

1 THE COURT: Okay. This is Dalton
2 versus Delker. Is the petitioner prepared to
3 proceed?

4 MR. BYBEE: Yes, Your Honor.

5 THE COURT: Mr. Vlahos, is the
6 defendant prepared to proceed?

7 MR. VLAHOS: Yes, Your Honor.

8 THE COURT: You may proceed.

9 MR. VLAHOS: Your Honor, I do have a
10 brief opening statement. If counsel does, too,
11 that's fine.

12 MR. BYBEE: Yes. I -- I have an
13 opening statement, Your Honor.

14 THE COURT: Okay.

15 MR. BYBEE: This is a -- for
16 clarification, there's been a lot of proceedings in
17 this case -- this is a petition by the -- or, yeah,
18 by the plaintiff for modification of the child
19 support award.

20 At approximately the same time -- or a little
21 after we filed the Petition to Modify Child Support,
22 defendant filed a Petition for Modification of Child
23 Custody for one of the children.

24 At an Order to Show Cause that was held at the
25 same time as the pretrial, the Commissioner

1 recommended that the custody of that particular child
2 be changed. And although we filed an objection to
3 that recommendation, we are not pursuing that. We
4 are not pursuing the custody issue at this time. We
5 have no problems with leaving the one child that is
6 with the defendant; and the other two children are
7 with the plaintiff.

8 So what we're here on then is just purely the
9 child support modification. Now, I went through
10 the -- the file this morning and made copies of
11 pertinent items that I need to bring to the Court's
12 attention. They've been marked as exhibits, but
13 they're all copies out of the court file. And I did
14 that because there's so much in the file. I wanted
15 to clarify it for Court and counsel.

16 Exhibit Number Two -- I'll go through these in
17 order. Exhibit Number Two -- and I'll try and do it
18 chronologically. So chronologically, Exhibit Number
19 Two and Exhibit Number One, and then Three, Four and
20 Five.

21 Exhibit Number Two is a copy of the Order in
22 the file from North Dakota saying that North Dakota
23 did not have custody -- or jurisdiction of the
24 custody matter between these two parties and it
25 should be heard in Utah.

1 Again, a little more background. These
2 parties -- he was living in North Dakota, she was
3 living in Utah at the time of the divorce. They both
4 had filed actions. And so that was the reason for
5 that particular Order.

6 The next thing is Number One is a Stipulation
7 and Agreement signed by Mr. Delker -- who was the
8 plaintiff in North Dakota -- and not signed by Mrs.
9 Delker. This comes in July of '86.

10 And the reason that I made a copy of this for
11 the Court is down second paragraph from the bottom it
12 talks about \$75 per month per child in child support,
13 and refers to a Utah Order. That particular Utah
14 Order was a order made by Recovery Services
15 administratively in 1981 when these parties first
16 separated that he was to pay \$75 per month per child.

17 Okay. Next one, Number Three, this is dated,
18 signed October of 1986, wherein it sets child support
19 at \$116 per month per child. Apparently -- there was
20 not a copy in the court file, and so I did not make a
21 copy for this morning. Apparently, the divorce was
22 granted in North Dakota in the summer of '86, which
23 did not refer to child custody or child support or
24 any of those items. And so the only matter that was
25 taken care of in Utah then was the child custody and

1 child support. Okay. That's the third item.

2 Number Four, as some background for Number
3 Four, apparently there was some misunderstandings,
4 miscommunications, typo errors on the hearing for
5 child custody. It was set to be in Utah in September
6 of '86.

7 The defendant, Mr. Delker, filed a petition in
8 '88 saying: I didn't get proper notice, and the
9 notice I got said September 9th. It was actually
10 held on September 8th.

11 And there was affidavits filed back and forth
12 and -- and the upshot of all of that was that there
13 was a hearing held in June of 1988 wherein the
14 judge -- the Commissioner recommended that the child
15 custody portion of the Decree be set aside, that
16 visitation be ordered, that a child custody
17 evaluation be ordered. And if you'll look in
18 Paragraph -- Paragraph Eight of that particular
19 Order, the only thing it says about child support is
20 that during the two month visitation that the
21 defendant had the children in North Dakota there
22 would be no child support. So that's Number Four.

23 Then we go to Number Five which is signed in
24 October -- yeah, October of '88. This was the
25 pretrial hearing held on August 8th, 1988, before the

1 Commissioner. The Commissioner recommended, after
2 reviewing all of the custody evaluation and
3 affidavits and letters and everything that's in the
4 file, that the plaintiff continue having custody of
5 the children; that Mr. Delker was, of course, to have
6 visitation.

7 And, again, the only thing said about child
8 support is in Paragraph Number Five, that during the
9 two months summer visitation, the child support will
10 reduce by one-half.

11 And then the next activity in the file is when
12 I, on behalf of the plaintiff, filed a Petition to
13 Modify the Child Support.

14 Now, we have -- and then we -- and they filed
15 their Petition for Change of Custody, and then we
16 went to a pretrial in August of 1990 on our Petition
17 to Modify and their Order to Show Cause and Change of
18 Custody.

19 At that time the position was taken by counsel
20 for defendant and the Court that child support was at
21 \$75 a month. In fact, that's what he had been
22 paying, \$75 per month per child since the divorce had
23 been entered. We had asked for a modification based
24 upon increase in income.

25 The defendant's position was -- was that based

1 upon the statute then enacted that his income had not
2 changed by more than 25 percent -- 25 percent
3 since -- since 1986 to 1990 and so he was not -- or
4 we were not entitled to a child support modification.
5 And, in fact, the Commissioner recommended that our
6 petition be dismissed on the modification.

7 Then they went into the custody portion, his
8 Order to Show Cause, and gave custody to -- of the
9 one child to Mr. Delker. Then the Commissioner
10 recommended that he pay 116 per child per month for
11 the remaining two children. And that's where we've
12 been since then.

13 Now, our problem here today is, first of all,
14 as far as the statute is concerned, it was my
15 understanding of the statute at that time that if you
16 were using the guidelines to change child support,
17 there had to be at least a 25 percent change in the
18 child support before you could get that modification.

19 Counsel's position was -- and the Court agreed
20 with him -- that there had to be a 25 percent change
21 in income. So that's the reason he recommended no
22 change in the child support.

23 Second issue is, we -- and I may be wrong. I
24 mean, this is up for the Court to make a decision.
25 The facts are pretty well not disputed. Mr. Delker

1 has a certain income; Mrs. Dalton now does not have
2 any income. There's no dispute as to those facts.

3 MR. VLAHOS: Oh, yeah, there is,
4 Counsel. Go ahead.

5 MR. BYBEE: Oh, okay. Excuse me.
6 So a finding can be made on that issue.

7 The other issue is, is we would like a finding
8 from the Court today that the child support from 1986
9 through 1990 was \$116 per month per child and that
10 we -- if there is an arrearage there that we need to
11 do then an Order to Show Cause for child support
12 arrearage for the difference between the \$75 he was
13 paying and the 116.

14 So we have the two issues before the Court.
15 We'd like relief on both of them and we would leave
16 that in the discretion of the Court.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 MR. VLAHOS: If the Court please,
20 there is some very substantial differences in
21 connection with this matter. Let me explain to the
22 Court what happened in this particular case.

23 There should be an affidavit in the file
24 signed by both my client, his attorney in
25 California --

1 MR. BYBEE: North Dakota.

2 MR. VLAHOS: -- or North Dakota,
3 excuse me.

4 THE COURT: California was
5 yesterday.

6 MR. VLAHOS: Yeah. California was
7 yesterday; North Dakota is today. I apologize, Your
8 Honor.

9 THE COURT: We tried a child custody
10 case all day yesterday and we're both a little
11 punchy.

12 MR. VLAHOS: That's probably true,
13 Your Honor.

14 Let me tell you what happened. There was a
15 hearing -- my client received a Notice for a Hearing,
16 I think it was September the 9th in 1986, if I'm not
17 mistaken. My client had retained an attorney in
18 North Dakota, and my client fully intended on being
19 here on September the 9th.

20 And low and behold, the hearing was held on
21 September the 8th. My client has always driven from
22 North Dakota here to contest this matter. And when
23 he called the clerk -- or his attorney called the
24 clerk, whatever, they said, well, that hearing was
25 today, tough.

1 You know, so his attorney immediately filed --
2 and it should be on file -- an affidavit by the
3 attorney, a motion, and then there was a Motion to
4 Vacate that entire order.

5 Now, during the interim, you'll -- the file
6 again will show there were memos filed by both
7 plaintiff and defendant in that particular case. The
8 end result was we didn't come to a hearing on that
9 until 1988. In 1988, the Commissioner found that the
10 man did not get proper notice, and has never -- never
11 had proper notice for that hearing.

12 Now, the Order says custody of the children,
13 but the Order is in regard -- I think if you'll look
14 at the Commissioner's notes -- and I prepared the
15 Order, I'll take responsibility for that -- the
16 Commissioner set the whole thing aside because there
17 was no notice. You've got an improper notice in this
18 particular case.

19 There are affidavits in the file. I've -- my
20 problem is I've got two files with me and I've got
21 another file that thick because at the same time
22 these were going on, there was also a Petition to
23 Modify the custody of the children, and all this was
24 being heard.

25 The end result is we had a hearing in June of

1 '88. My client got custody of some children for a
2 few months. The Court was to make a final
3 determination. There was some psychological
4 evaluations in North Dakota, here; depositions were
5 taken in North Dakota, here.

6 Then we had a pretrial in August of 1988. At
7 that time the Commissioner spoke with the children.
8 The children wanted to go with their dad, wanted to
9 spend the summer with their dad or a substantial
10 period of time, and wanted to stay with their mother.

11 At that time the Commissioner made an Order,
12 and that Order was that the children stay with the
13 mother in connection with this particular case.

14 Now, that Order has stayed in place until
15 these proceedings started, for this particular
16 situation. Now, we have exhibits to show what my
17 client's income was at the time of divorce, we have
18 exhibits to show what it was at the time of the
19 pretrial hearing and what it is today.

20 His total increase from the time of the
21 divorce to the present has been 12 percent. That's
22 been his total increase in reference to this matter.
23 I think the evidence will show further that my client
24 is clear -- is current in all payments.

25 Now, if you'll look at the pretrial order

1 entered in 1990, the Commissioner found -- found no
2 substantial change of circumstance. My client agreed
3 voluntarily, to see if we could put the matter to
4 rest once and for all, that he would agree to pay the
5 116 forward, and he has.

6 So bear in mind, this man has paid faithfully
7 every dime he was ever ordered to pay. Bear in mind
8 that he pays 116 for the two children that are with
9 Mrs. Delker, who's now remarried, and has not asked
10 for any support for the child he's had custody of the
11 entire time since the hearing.

12 Now, our position is, one, Your Honor, this is
13 res judicata in that when we had a hearing in 1988
14 after the Commissioner had set aside the prior Order
15 because of no proper notice. I don't think you can
16 have a judgment entered where a person has not been
17 given adequate notice. I think you'll find in the
18 file that is absolutely correct. So the Commissioner
19 set that aside.

20 Then we had all this -- all the other matters,
21 and at that time, all these issues were decided.
22 That becomes res judicata, Your Honor. And then,
23 like I said, from then -- then we move on to what's
24 occurred in 1990 when counsel filed his petition.

25 Now, I don't think you can sit back four years

1 and say, all of a sudden, ah ha, I want to go back in
2 and make this thing retroactive, when we've been to
3 court at least a half a dozen times for various
4 matters. Never raised.

5 At all times Mrs. Delker was represented by
6 counsel. At no time did she represent herself. So I
7 would submit to this Court two things: One, I think
8 if you'll read the Commissioner's notes -- and if
9 there's a Scribners error, I think there's allowance
10 for it.

11 The Commissioner set the whole Order aside
12 that was entered in 1986 because there was no proper
13 notice. And I don't think you can get a judgment
14 with no proper notice. That's like saying, you
15 appear in court -- well, exactly what happened. You
16 appear in court on the 9th, we get a judgment on you
17 on the 8th, and whether you appear on the 9th, that's
18 tough because it was -- a judgment was granted on the
19 8th.

20 That's exactly what happened in this case. So
21 I submit, Your Honor, that the Commissioner's finding
22 that there was no substantial change of circumstance
23 is correct. My client has been voluntarily paying
24 \$116 per month per child and is willing to continue
25 doing that. Clearly, I have -- clearly, the one

1 child wants to remain with his -- with her dad, so I
2 don't see that as a problem.

3 That's our position, Your Honor, and I have
4 various documents relative to that. And I just want
5 the Court to be aware that this Order that was
6 entered in 1986, the 8th of September, there were
7 affidavits filed by my client, his attorney, and
8 motions filed by his attorney, and that's why I don't
9 have them, but I -- in that file, it will clearly
10 reflect this was not sat on two years. It was done
11 immediately. Thank you.

12 I can have my secretary, Your Honor, get the
13 other thick brown file if you want and bring it over
14 here, but I just didn't have enough space to bring
15 it.

16 THE COURT: Frankly, my dear
17 Scarlet.

18 MR. VLAHOS: Uh?

19 THE COURT: I don't want to look at
20 your file.

21 MR. VLAHOS: Well, I mean to bring
22 over those documents.

23 THE COURT: No, no, no. That's
24 fine.

25 MR. VLAHOS: As a matter of fact, I

1 have a copy of the Commissioner's notes in my file.

2 THE COURT: Well, the Commissioner's
3 notes are in the Court's file and the Court has had
4 an opportunity to examine them.

5 MR. VLAHOS: Okay. Okay.

6 THE COURT: Yeah.

7 MR. BYBEE: Your Honor, may I amend
8 my opening statement?

9 THE COURT: Why don't you amend your
10 opening statement.

11 MR. BYBEE: There is one additional
12 matter that needs to be brought up and that goes on
13 what Mr. Vlahos says. He says everything was set
14 aside, and obviously by the copies I've given the
15 Court, there is no other order concerning child
16 support.

17 If the Court, for instance, was to take the
18 position that there had to be a 25 percent change and
19 that the proper order was \$75 per month per child,
20 that doesn't go to 1986. That goes to 1981 when that
21 first -- that amount was first entered.

22 So if the Court was to find, yeah, \$75 per
23 month per child is the correct amount -- you know, I
24 find as a matter of law that through all these
25 documents that it wasn't 116, it was \$75 per month

1 per child, then our change of circumstances doesn't
2 go back to 1986. It goes back to 1981 when that
3 Order was first entered. That -- that's the other
4 issue. If that's what the judge -- if the Court
5 finds then --

6 THE COURT: Now, let me ask a
7 question -- not to interrupt you.

8 MR. BYBEE: Okay. That's fine.

9 THE COURT: But I'll interrupt you,
10 I guess.

11 The divorce was granted in North Dakota.

12 MR. BYBEE: Right.

13 THE COURT: Presumably the North
14 Dakota Decree did not make an order concerning child
15 support.

16 MR. BYBEE: That's correct.

17 THE COURT: The \$75 was based upon
18 an administrative order of the Office of Recovery
19 Services, presumably sometime after the divorce; is
20 that correct?

21 MR. BYBEE: No, no, no. That was
22 made in 1981, five years before the divorce.

23 MR. VLAHOS: Well, the stipulation
24 is dated July 10th of '86 that my client signed,
25 which is in the court files in the State of North

1 Dakota.

2 MR. BYBEE: Right.

3 MR. VLAHOS: And that's the
4 stipulation that counsel indicated. That's the
5 Order --

6 THE COURT: But that was based upon
7 the \$75 ORS Order of an earlier date.

8 MR. BYBEE: Right. Right. Right.

9 THE COURT: So the divorce was
10 actually not granted or obtained until '86.

11 MR. BYBEE: That's correct, Your
12 Honor.

13 THE COURT: Okay.

14 MR. VLAHOS: But the Stipulation,
15 which is part of the file, states -- and I quote --
16 that the plaintiff should --

17 THE COURT: I've read it.

18 MR. VLAHOS: Okay.

19 MR. BYBEE: And, of course, that
20 Stipulation was not signed by Mrs. Delker and it was
21 just an exhibit. I'm not even sure why it was an
22 exhibit. It was a North Dakota document that was put
23 as an exhibit into a Utah case. And I wasn't
24 representing Mrs. Dalton at that time so I don't know
25 why they put that in there since it was not signed by

1 her.

2 THE COURT: Do you have a copy of
3 the Decree from North Dakota?

4 MR. BYBEE: I don't.

5 MR. VLAHOS: And I didn't bring one,
6 Your Honor.

7 MR. BYBEE: I think Mr. Dalton has a
8 copy.

9 MR. DALTON: Which Decree are we
10 looking for?

11 MR. BYBEE: From North Dakota --
12 Decree of Divorce from North Dakota.

13 (Mr. Dalton tenders document to Mr. Bybee.)

14 MR. BYBEE: Yes.

15 THE COURT: Would you show that to
16 Mr. Vlahos? (Tenders document to Mr. Vlahos.)

17 MR. VLAHOS: Well, this is Findings
18 of Fact --

19 MR. BYBEE: And Order for Judgment.

20 MR. VLAHOS: -- and Conclusions of
21 Law. I don't see that as a judgment.

22 THE COURT: They may -- they may
23 delineate it differently than we do, if it says
24 Order.

25 MR. VLAHOS: The Court -- and I

1 can't tell you if this is the Divorce Decree, Your
2 Honor. The only thing it says here: In The Matter
3 of the Care, Custody and Control, et cetera, subject
4 to jurisdiction of the State of Utah, including
5 visitation rights. But I can't tell you whether this
6 is the Decree because it says Findings of Fact and
7 Conclusions of Law.

8 MR. BYBEE: Do you have anything
9 else?

10 MR. DALTON: No.

11 THE COURT: May I see it?

12 MR. BYBEE: The last -- yeah. The
13 last thing it says, "Let judgment be entered
14 accordingly".

15 THE COURT: So there probably is a
16 separate judgment. This should be the Findings of
17 Fact. And this was entered sometime in '86.

18 MR. BYBEE: Right.

19 So -- so our point is we either have \$116 per
20 month from September of '86, or we have 75 per month
21 from 1981. If the 116 is correct, then we have a
22 child support arrearage issue. If the 75 is correct,
23 then the modification issue is not what he was
24 earning in '86, but what he was earning in '81.

25 So we have an either/or type of position here.

1 MR. VLAHOS: Well, except for one
2 thing. The Commissioner found that in '86 -- which
3 is the time of the divorce -- is when the figures
4 were used, whatever that may be. You can't go beyond
5 the Decree.

6 So what you're looking at is the Commissioner
7 had the information before him. Counsel wasn't there
8 in reference to it.

9 MR. BYBEE: Right.

10 THE COURT: Hold on just a second,
11 please, Mr. Vlahos.

12 MR. VLAHOS: Okay. I apologize.

13 THE COURT: I'm taking a look at
14 some things in the file and I'm having difficulty
15 listening and reading at the same time.

16 MR. VLAHOS: Okay.

17 THE COURT: September 8th -- that's
18 the one you say you didn't get notice of; is that
19 correct, Mr. Vlahos?

20 MR. VLAHOS: He never -- he got
21 notice, Your Honor, but for the 9th.

22 THE COURT: The 9th. And that would
23 be understandable. The previous hearing was for
24 August 9th, and, presumedly, they made a mistake
25 on the -- transposing.

1 It's kind of fun to read through this file.
2 One of the -- well, it's nice to hear the kids saying
3 really nice things about everybody. You know, they
4 like their parents and they like their in-laws and
5 their step-parents and that's -- that's wonderful.
6 You don't see that often. So you're both to be
7 complimented in that regard.

8 So I understand it, it is the position of the
9 parties -- the petitioner feels that the \$75 was
10 instituted in 1981 by the Administrative Order, and
11 then subsequently was changed by the divorce -- or
12 the Decree of Judge Wahlquist in '86 to 116.

13 MR. BYBEE: That's correct.

14 THE COURT: And then there was a
15 subsequent Order based upon an agreement in '90 when
16 there was a change of custody situation.

17 MR. BYBEE: '88.

18 THE COURT: '88.

19 MR. VLAHOS: No. The change of
20 custody was in '90. You're right. The '88 --

21 THE COURT: That's where the 116
22 came up again.

23 MR. VLAHOS: Correct.

24 THE COURT: Yeah. At that point the
25 judge ordered 116 for the two children and --

1 MR. BYBEE: The remaining two.

2 THE COURT: -- and no reciprocating
3 support for him.

4 MR. BYBEE: Right.

5 THE COURT: And then your position,
6 Mr. Vlahos, is the '86 Decree was set aside by Judge
7 Hyde's subsequent Order.

8 MR. VLAHOS: Well, by Commissioner
9 Richards in reference to it because --

10 THE COURT: Well, by Judge Hyde
11 actually confirming the Order.

12 MR. VLAHOS: Yes.

13 THE COURT: And the only portion of
14 the Commissioner's recommendation that was objected
15 to was the custody issue.

16 MR. VLAHOS: I think the total thing
17 was objected to by the affidavits on file by my
18 client and his attorney. They prepared those in
19 North Dakota and forwarded them here, and I wasn't
20 involved until later.

21 THE COURT: But the objection was by
22 the petitioner based upon the change of custody
23 situation.

24 MR. VLAHOS: Yeah, but the total
25 thing is what I'm saying, Your Honor, because of no

1 notice.

2 THE COURT: Yeah, but the Order by
3 Judge Wahlquist -- right. So that was set aside.

4 MR. VLAHOS: I think this Court
5 would have to set it aside as a matter of equity when
6 there was improper notice to the parties.

7 THE COURT: Well, I think the effect
8 of Judge Hyde's confirmation of the Commissioner's
9 Order is to set it aside.

10 MR. VLAHOS: And we're willing to
11 pursue -- to leave it as is, with her still not
12 having to pay any money. And he is current.

13 THE COURT: Okay. Let me -- let me
14 ask just for a proffer on a couple of points that may
15 resolve some of the issues, at least in my own mind.
16 Let me get the most current schedule here.

17 MR. VLAHOS: If you're asking what
18 the current support would be, I compute it at just --

19 THE COURT: Well, let's -- let's do
20 this kind of a computation. The -- the petitioner
21 apparently doesn't have an income now, is taking care
22 of the family.

23 MR. VLAHOS: My understanding is,
24 Your Honor, she told my client she's going to work at
25 Hill Field at the Officer's Mess or the mess there.

1 That's why I said, I dispute the fact she's not
2 working, but I think imputed income can be entered.

3 THE COURT: Well, yeah, I was going
4 to suggest perhaps the appropriate way, even if she
5 wasn't working, probably would be fair to impute
6 income, since she's made a decision not to work, to
7 take care of the family.

8 MR. BYBEE: We were going to show
9 her 1986 tax return when she did last work. And her
10 gross income for 1986 was \$3,016. That was prior to
11 her marriage to Mr. Dalton.

12 THE COURT: What -- what I would
13 probably --

14 MR. VLAHOS: Yeah.

15 THE COURT: -- be inclined to do,
16 would be impute minimum wage which is --

17 MR. BYBEE: 737 a month.

18 THE COURT: Yeah, 737, 736,
19 something in that area. Let's say 737.

20 MR. VLAHOS: Your Honor, I've done
21 that and I can give the Court some figures, if the
22 Court wants. I've already done it.

23 THE COURT: All right. Why don't
24 you do that. Why don't you tell me the basis of your
25 conclusion.

1 MR. VLAHOS: My client's current
2 income -- and that includes his most recent pay
3 stub -- he has an hourly rate. It's 13.95 or 2,418
4 per month. I've computed that out and his gross
5 income --

6 THE COURT: Well, let me -- hold on
7 just a second and let me -- let me do some figuring
8 quietly on my own and then we'll talk about it.

9 MR. VLAHOS: His gross is 2,418 a
10 month. That's on a four and a third week basis.

11 THE COURT: I'm not sure I have a
12 current schedule. What is the current schedule?
13 It's not the '89 one.

14 MR. BYBEE: No, it's not. There's
15 one in the Commissioner's office, if you'd like me to
16 get that.

17 MR. VLAHOS: I have it. Is that
18 what you're looking for?

19 THE COURT: Yeah. What's the most
20 current one?

21 MR. VLAHOS: This one here.

22 THE COURT: I was looking at mine
23 yesterday, but I must have put it in the papers.

24 MR. VLAHOS: Well, it's the same
25 one. I don't think it's been changed.

1 Your Honor, I've taken his income -- like I
2 said, it comes out to 2,418, and I've taken her at
3 736, for a combined income of 3,154. That relates to
4 76 percent that my client would pay. The child
5 support on the three children is 742, or 187.98 per
6 month per child.

7 Mrs. -- well, I don't know what her new name
8 is and I apologize --

9 MR. BYBEE: Dalton.

10 MR. VLAHOS: -- Delker would be
11 obligated to pay 24 percent of 742, and that's \$178.
12 And she would be paying 59.36 per month per child.

13 Since my client has -- since there are two
14 children living with Mrs. --

15 MR. BYBEE: Dalton.

16 MR. VLAHOS: -- Dalton, excuse me.
17 Dalton. My client would be ordered to pay 187.98
18 twice which is 375.96, minus 59.36, which is her
19 portion for the one which is a net 316.60.

20 My client has health and accident insurance,
21 half of which is for the children. That runs about
22 \$35 a month. The bottom line is 281.60 as opposed to
23 232.

24 The Commissioner ordered -- if you'll take it
25 on a basis of her income, I can represent to the

1 Court -- and I have an exhibit. He is exactly the
2 same thing he was right after in '86, a wage
3 grade 10 - step four, except he's now a step five.

4 But at the time of the divorce -- which I
5 think is the period you have to consider -- he has
6 had a gross income of 12 percent, and I've given it
7 by the year, up to and including the present. If it
8 will assist the Court I'd offer this --

9 THE COURT: Mr. Vlahos, please. I'm
10 really trying to do some thinking and figuring on my
11 own. I'd prefer that I be able to do that.

12 This is your copy, Mr. Vlahos.

13 MR. VLAHOS: Thank you, Your Honor.

14 THE COURT: Now, let me -- let me
15 kind of go through the figures as I've -- as I've
16 perceived them. Figuring the obligation that would
17 be assessable under the present schedule at the
18 present time, based upon both of their incomes --
19 see, if -- see, if I'm -- we've got, basically, 736
20 or 737. For sake of argument, let's say 736 income
21 imputed to the petitioner.

22 You've got 2,418 which the parties apparently
23 agree is his gross income per month. Right?

24 MR. BYBEE: Assuming I can see a pay
25 stub, I would agree on that. Assuming that's

1 correct, there's no problem.

2 THE COURT: Yeah.

3 MR. VLAHOS: He'll testify under
4 oath that's what it is.

5 THE COURT: If you have a pay
6 stub --

7 MR. VLAHOS: I don't have one, Your
8 Honor, and he didn't bring one with him.

9 THE COURT: Anyway, the total of
10 that would be 3,155. If you run 3,155 for three
11 children, the schedule would reflect \$747, right?

12 MR. VLAHOS: 742 was what I show,
13 but I could be in error.

14 THE COURT: Let me -- let's see.
15 3,155. My schedule, and, in fact, your schedule, I
16 think, would reflect 747, Mr. Vlahos. Why don't you
17 check that. That's 3,155.

18 MR. VLAHOS: Well, I apologize. I
19 don't have my glasses on. Whatever the schedule
20 says, I have no problem with.

21 THE COURT: Okay. Anyway, it's in
22 that area someplace.

23 Now, if you -- if you divide the -- in
24 determining what each share is then you -- you divide
25 the 736 by 3,155 which would give you her percentage

1 share. As I recall, it was 23.3 percent or something
2 like that. Somewhere between 23 and 24 percent.

3 MR. VLAHOS: I come out 24 percent.

4 THE COURT: Yeah. I think if we
5 rounded it off correctly we'd come up with 24. The
6 actual figure was 23.3 percent or something.

7 If you multiply those figures out then, 23
8 percent of 747, you come up with \$174, which would be
9 her share. And the balance would be \$543, which
10 would be his share for the three children.

11 Is that consistent with your figures, Mr.
12 Vlahos? Roughly, 174 and 543?

13 MR. VLAHOS: I've got 563.92, but
14 it's so close that, you know, it's not going to vary
15 very much.

16 THE COURT: Yeah. Now, if you
17 figure the -- the schedule then, the total obligation
18 each of them have is the 174 and the 543 for the
19 three children. He has two -- or she has two of the
20 children and he has one of the children. Her share
21 then --

22 MR. BYBEE: Excuse me, Your Honor.
23 Your figures are 174 and 543?

24 THE COURT: Yeah.

25 MR. BYBEE: But that only adds up to

1 717. It wouldn't add up to 747.

2 THE COURT: That's what I said, if
3 my mathematics are correct. I wonder how I did that.
4 Well, let's look. Let me run those again. 3,155 --
5 (Figuring amounts.)

6 I take it back. It's 573, isn't it?

7 MR. BYBEE: Uh uh.

8 MR. VLAHOS: Did Your Honor take 76
9 percent of 747?

10 THE COURT: Well, it's -- it's
11 actually a little over 76. 76.3 or something like
12 that.

13 MR. VLAHOS: Okay. Fine. I
14 didn't -- I didn't carry it out that far.

15 THE COURT: Yeah. I just ran the
16 figures right on out. So it's 174 and 573. Then her
17 share of one of the children would be the 174 divided
18 by three, right?

19 MR. BYBEE: (Nods head up and down.)

20 THE COURT: So her -- her
21 obligation -- child support obligation back to the
22 defendant would be \$58 for the one child that he has.
23 Then his obligation would be for the two children,
24 which would be two-thirds of 573, right -- or 382.

25 You deduct her obligation from his obligation.

1 Under the present schedule that would be 382 minus --
2 minus 58 for \$324, which would be his obligation
3 under the present schedule.

4 MR. VLAHOS: Minus the health and
5 accident insurance.

6 THE COURT: Yeah, whatever he's
7 paying for health and accident.

8 MR. VLAHOS: And it's roughly \$35.

9 THE COURT: Okay. So we're talking
10 just a little under \$300. Right?

11 MR. VLAHOS: 289, I guess.

12 THE COURT: Uh huh. Let's figure it
13 exactly, if we're going to. Thirty-five, did you
14 say?

15 MR. VLAHOS: Yes, and some odd cents
16 beyond that, Your Honor. They take out 34.67 per pay
17 day. Half of that is for him, the other half is for
18 the children. You've got four and a third pay days,
19 but it's -- you know, it's a dollar, dollar and a
20 half and I'd just soon round it off.

21 THE COURT: Okay. So that would be
22 289. And he, under the previous Commissioner's
23 recommendation from '90, would be paying at the
24 present time 232?

25 MR. VLAHOS: Yes, Your Honor. And

1 he is current with those payments.

2 MR. BYBEE: I want to give you a
3 slight correction on that. Office of Recovery
4 Services show he's \$66 in arrears.

5 THE COURT: Okay.

6 MR. VLAHOS: Well --

7 THE COURT: Pretty close.

8 MR. VLAHOS: No. Let me tell you
9 how that comes about and let's correct it right now.
10 The way the government works, they're paid every two
11 weeks, so they divide it by 26 weeks --

12 THE COURT: Twenty-six weeks.

13 MR. VLAHOS: And it's being reduced
14 each month, but the two extra pay days will catch it
15 up.

16 THE COURT: They do that in court,
17 too.

18 MR. VLAHOS: And I think you'll find
19 out he's current or will be current at the end of
20 year.

21 MR. BYBEE: Okay.

22 THE COURT: Okay. You divide 57 by
23 the 289, come up with about something less than 20
24 percent.

25 MR. BYBEE: What were those last

1 figures?

2 THE COURT: Well, his obligation to
3 her under the new support guidelines -- based upon
4 their incomes and deductions and additions and so
5 forth -- would be \$289.

6 MR. BYBEE: Right.

7 THE COURT: There is a -- if you --
8 if you subtract what he's presently paying, which
9 is --

10 MR. BYBEE: Oh, which is 232.

11 THE COURT: -- 232, you come up with
12 \$57.

13 MR. BYBEE: Okay.

14 THE COURT: And if you figure that
15 on a percentage basis, there's only -- well, it's
16 19.7 percent or something difference between what
17 he's paying, and under the new guidelines what he
18 would pay.

19 There seems to me to be two specific issues:
20 an arrearage issue, depending on at what point we
21 assess the 116; and -- and whether there's a
22 substantial change of circumstance that would justify
23 a modification of the present support level.

24 MR. BYBEE: Now, the -- we're not
25 seeking to modify 232. We're seeking to modify

1 whether it was 116 per child for three children, or
2 75 per child for three children back in August of
3 1990. The 232 that he's paying now was the
4 Commissioner's recommendation based upon him
5 receiving one child and her receiving two children.

6 So our modification is not of the 232, it's
7 the 116 or 75.

8 THE COURT: Well, except that the
9 Commissioner's Order concerning the 232 based upon
10 the change of circumstance, the child going to him,
11 would be an Order of the Court; and, therefore,
12 that -- that's, basically, what we would be
13 modifying.

14 If -- if we were going clear back, you know,
15 of course -- obviously we'd be modifying the \$75, but
16 it sounds to me like the Commissioner's already done
17 that. There was jurisdiction for that based upon the
18 substantial change involving the change of custody
19 which obviously opens up the whole thing so that we
20 can modify all aspects that seem to be inequitable in
21 view of the change.

22 So that the -- the -- the ongoing order --
23 well, all right. Does everybody agree that
24 essentially what has been presented to the Court
25 would be the evidence that was going to be presented

1 by the -- by the parties?

2 MR. VLAHOS: Basically, correct,
3 Your Honor, except --

4 MR. BYBEE: Yes.

5 MR. VLAHOS: -- I do have the
6 exhibit that shows his income in '86, '90, and even
7 with his current rate, which I'm willing to give you.
8 And like I said, I've calculated it out --

9 THE COURT: Why don't you hand that
10 to Mr. Bybee and he'll have an opportunity to examine
11 it.

12 (Mr. Vlahos tenders document to Mr. Bybee.)

13 MR. VLAHOS: There's a 12 percent --

14 THE COURT: 12 percent from when to
15 when?

16 MR. VLAHOS: From '86 to the
17 present. I -- I -- in 1981, Your Honor, I don't
18 think my client even can recall what his income was.

19 THE COURT: I don't think what
20 happened in '81 is probably a relevant issue anyway.

21 MR. VLAHOS: And, also, I'd point
22 out to the Court that the Notice is improper. For
23 one thing, it's improper. For another thing, we came
24 into court in '88. The Court ruled on that. I think
25 that's res judicata at that point.

1 And we all agree, that was the Order provided
2 that both parties agreed to have the pretrial order
3 be a part of the Order. And it's set forth in that
4 Order.

5 THE COURT: The '88 -- or the --

6 MR. VLAHOS: '88.

7 THE COURT: That was the --

8 MR. BYBEE: Custody.

9 THE COURT: That was the \$75 order.

10 MR. VLAHOS: That was -- yeah.

11 Everything was an issue at that point.

12 MR. DALTON: With all due respect,
13 Your Honor, in '88 --

14 (Off-the-record discussion between Mr. Bybee
15 and Mr. Dalton.)

16 THE COURT: I know. I know.

17 All right. Let's take a five-minute recess.

18 MR. BYBEE: Okay.

19 (WHEREUPON, at this time there's a recess,
20 after which proceedings resume in open court as
21 follows:)

22 THE COURT: Okay. Well, let me
23 preface my comments by a statement that I hope that
24 what happens here today is not going to effect the
25 sense of cooperation that I've sensed in the raising

1 of your children. And -- and in that regard, you're
2 doing fine.

3 And I guess on behalf of society, I'd like to
4 say to you thank you because, in candor, all day
5 yesterday I was faced with a situation where the
6 parents in the situation were not -- had not been
7 able to reconcile themselves to the fact that they
8 didn't like each other very much, and the impact that
9 that was having on the child.

10 Mr. Vlahos was involved in that trial and I'm
11 sure that he will be inclined to agree that the child
12 was not in as good a position, psychologically, as
13 apparently your children are. And I would like to
14 compliment you for that.

15 The -- the case, while complex and convoluted
16 and having gone through a lot of problems, from the
17 standpoint of the law, I think is -- is fairly clear.
18 On -- on the child support modification, whether we
19 consider the increase in his salary as being the
20 determinative factor or whether we consider the
21 support guidelines themselves to be the factor, in
22 either one of those analysis, the change is something
23 less than 20 percent, which would not justify a
24 finding of a substantial change of circumstance which
25 would vest in the Court jurisdiction to make

1 modifications.

2 For that reason, the Court in -- in finding
3 this is not a substantial change, denies the
4 petition.

5 Concerning the -- the other mess, it appears
6 very complex, but the Court, after listening to the
7 proffers, would find, number one, the \$75 per month
8 figure was established through Recovery Services in
9 the year -- in the early '80's; that Judge Wahlquist,
10 in his 1986 Decree, did change that to 116.

11 The problem with that was that the defendant
12 in the case had not been given proper notification.
13 As a result of that, the -- that decree was set aside
14 in, as I recall, '88, and there was not a subsequent
15 modification of the continuing support of \$75 per
16 month until the 1990 recommendation in conjunction
17 with the change of custody.

18 So the Court finds that the support, from the
19 date of their separation to the modification by the
20 Commissioner -- which was approved by Judge Hyde --
21 would be \$75 per month per child. That would be 116
22 from that date to the present.

23 And if there is any arrearage or anything that
24 we need to talk about, I guess you could do that by
25 way of affidavit, Mr. Bybee, and the Court could

1 reconcile those issues, if that is -- that appears to
2 be appropriate.

3 MR. VLAHOS: Your Honor, I think
4 Your Honor is aware of how they take this out, and I
5 think at the end of year each, I think you'll find
6 that he is current.

7 THE COURT: Yeah. It's based on 26
8 pay periods, and I think that's the way they work it.
9 And the fact he might be, you know, 25 or 30 or \$60
10 behind now because he hasn't yet got that -- the
11 third pay check in a particular month, we would
12 consider that to be current.

13 MR. BYBEE: The 116 per child was
14 since August of '90. Is that what the Court found?

15 THE COURT: I think that was -- that
16 was the date of that Order.

17 MR. BYBEE: Right. Right.

18 THE COURT: That's right. And I --
19 and understand that that 116 for the two -- you know,
20 each for two children is based upon the idea that she
21 isn't paying anything back to him.

22 MR. VLAHOS: Yes, we understand
23 that. We have no problem with that.

24 MR. BYBEE: Right.

25 THE COURT: Okay. Right. Okay.