

1993

## Welling v. Welling : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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WENDELL WILFORD WELLING,	:	
Plaintiff-Appellant,	:	Case No. 930659-CA
vs.	:	
CHRISTY MORRIS WELLING,	:	Priority 15
Defendant-Appellee.	:	Oral Argument Requested

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BRIEF OF APPELLEE

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APPEAL FROM THE DECREE  
OF THE FIRST JUDICIAL DISTRICT COURT  
OF CACHE COUNTY, THE HONORABLE GORDON J. LOW

---

**UTAH COURT OF APPEALS  
BRIEF**

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**JURISDICTION**

Jurisdiction is conferred on this Court by Utah Code Ann. §78-2a-3(2)(h) (Supp. 1992).

**ISSUES PRESENTED**

1. Whether the trial court erred in determining Mr. Welling's income for purposes of child support. The determination of whether the trial court exercised its discretion based on mistaken view of the law is reviewed de novo by this court. Gaw v. State, 798 P.2d 1130, 1134 (Utah Ct. App. 1990). The underlying support award is reviewed for abuse of discretion. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985).

2. Whether the trial court abused its discretion in determining that Ms. Welling had need of attorneys' fees and in granting an award of those fees? The award is reviewed for abuse of discretion. Crouse v. Crouse, 817 P.2d 836 (Utah Ct. App. 1991).

### **DETERMINATIVE PROVISIONS**

The following statutory provisions are determinative of this Appeal.

Utah Code Ann. §78-45-7.5(2) "Income from earned income sources is limited to the equivalent of one full-time job."

Utah Code Ann. §78-45-3 "Every father shall support his child; and every man shall support his wife when she is in need."

Utah Code Ann. §30-3-3(1) "In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony or division of property in a domestic case, the Court may order a party to pay the costs, attorneys fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action."

### **STATEMENT OF THE CASE**

A. Nature of the Case. This is an Appeal from an Order modifying a Divorce Decree and awarding Child Support in an increased amount.

B. Course of Proceedings and Disposition Below. Wendell and Christy Welling were divorced on October 24, 1984. (R. at 75.) Ms. Welling petitioned to modify the Decree of Divorce by document dated December 24, 1991 and filed December 31, 1991. (R. at 92.) Mr. Welling filed an Answer to the Petition and a Counter-Petition on January 28, 1992. (R. at 111.) Trial in this matter was held



on December 2, 1992. (R. at 161.) Ms. Welling filed a Petition for Clarification on June 3, 1993. (R. at 166.)

The Court by Memorandum Decision ruled on the Petition for Clarification on August 6, 1993. (R. at 202.) The Court, by the Honorable Judge Gordon Low, entered Findings of Fact, an Order and Judgment dated September 2, 1993. (R. at 209.) Mr. Welling filed his Notice of Appeal on September 29, 1993, which was received in the Logan District Court on September 30, 1993. (R. at 205.)

C. Statement of Facts.

This matter came for trial on December 2, 1992. (Tr. at 1.)<sup>1</sup> Evidence regarding Mr. Welling's employment was presented by Michael P. Shamo, Divisional Manager for Ethicon Endosurgery and Mr. Welling's direct supervisor. (Tr. at 36-37.) He first stated that absent further efforts, a person in Mr. Welling's position who simply drew his base salary would be terminated. (Tr. at 38.) He explained that a base salary at Ethicon is considered nothing more than an incentive to begin work, and that the company establishes quotas for sales which are expected of all salesmen. (Tr. at 39.) Ethicon does not pay Mr. Welling an hourly rate. They do not

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<sup>1</sup> The Transcript which the Trial Court provided to Appellate Counsel was not numbered in accordance with Utah Rule of Appellate Procedure 11(b). For ease of reference, Ms. Welling will refer to pages in the Transcript by their original page numbers.

require him to submit hours or compute a total amount of time he spends in work-related activities. (Tr. at 40.)

Mr. Shamo also testified regarding Mr. Welling's work habits. He was "very confident in his abilities." (Tr. at 41.) Mr. Welling has always been a "top performer" in Mr. Shamo's Division. (Tr. at 47.) Mr. Shamo further agreed that Mr. Welling was a "remarkable salesman" and declared that he "sets the standard for my Division as far as work ethic." (Id.) When asked whether he expected Mr. Welling to continue his working at his current rate for another ten years, he stated that he believed Mr. Welling would be able to keep pace. (Tr. at 51.) Finally, Mr. Shamo admitted that he did not know whether Mr. Welling's future earnings would increase, decrease or stay the same. (Tr. at 53.)

Evidence regarding Mr. Welling's salary history and present income came directly from Mr. Welling. During 1990, he received a gross salary of \$65,127.78. (Tr. at 68.) In 1991 he received \$72,478.09. (Id.) Mr. Welling further testified that as of November 5, 1992, he had received \$95,000.00 in salary and that he expected to make approximately \$116,000.00 for the entire year. (Tr. at 69.) Prior to his employment at Ethicon, Mr. Welling worked for Lever Brothers as a Sales Representative managing a territory. (Tr. at 72.) During his employment with Lever Brothers, which began in 1985, he was paid a base salary and a "bonus." (Tr. at 72-73.) He worked approximately the same hours at that job as he worked for Ethicon at the time of trial. (Tr. at

73.)<sup>2</sup> Mr. Welling also received the use of an Ethicon company car, though he was required to pay an undisclosed sum of taxes for its use. (Tr. at 85-86.) Mr. Welling testified that he felt \$65,000.00 was a fair amount of income to be imputed to him for purposes of child support, and that he could make such an amount with reasonable efforts on his part. (Tr. at 82-83.)<sup>3</sup>

The Court found that Mr. Welling's income averaged \$84,000.00 over the course of the three previous years. (Tr. at 96.) The Court further found that in 1992, Mr. Welling would make approximately \$116,000.00. (Tr. at 97.) "That's \$30,000.00 he makes upon which he's not paying child support." (Tr. at 97.) The Court also noted that Mr. Welling had enjoyed the benefit of five years of income which was greater than that upon which he was paying child support. (Tr. at 99.)

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<sup>2</sup> The salary which he received at that job was approximately equal to other jobs for which he interviewed at the same time, and for which he would only have had to work 40 hours per week. (Tr. at 73.)

<sup>3</sup> Throughout his brief, Mr. Welling makes much of "accepting new responsibilities" in order to "maintain a new family." (See App. Br. at 4, 8, and 12.) This assertion is not supported by the record. In fact, Mr. Welling himself testified that he had worked previous jobs which required the same general hours as the one he held at the time of trial. (Tr. at 73.) These jobs were held as early as 1985, several years before Mr. Welling remarried (Mr. Welling was divorced in 1984 and remarried in 1990). (Tr. at 72.) There was no credible testimony that Mr. Welling accepted his present employment as a result of his re-marriage.

### **SUMMARY OF THE ARGUMENT**

The usual and customary definition of the statutory phrase "full-time" is sufficiently broad to encompass the non-traditional work patterns of salesmen, attorneys, doctors and other professionals who regularly work extended hours. The legislative history indicates the term "forty hours" were deleted from the final measure, a decision which supports a broad construction of the statute. Mr. Welling's historical work pattern has not changed significantly since 1985 and he received nearly \$116,000.00 in salary for the year 1992. Child support was awarded based upon a three year average of \$84,000.00. Such an outcome is not an abuse of discretion. The standard of living enjoyed during the marriage would limit alimony calculations, but is not relevant to child support determinations.

Mr. Welling has failed to marshal the evidence in support of the Trial Court's finding regarding Ms. Welling's need for attorneys' fees. That failure is fatal to his appellate claim. Further, the Court did, in fact, make findings with regard to attorney's fees, and those findings are adequately supported by substantial evidence in the record. The Court was within its discretion to determine that she stood in need of an attorneys' fee award. The Court properly disregarded a lump-sum payment of child support from its consideration of Ms. Welling's need because the payment was made subsequent to the time of trial. In addition, child support payments are not a proper source from which to

extract attorneys' fees. Finally, Ms. Welling is entitled to attorneys' fees on appeal as a prevailing party.

## **ARGUMENT**

### **POINT I**

#### **A REASONABLE STATUTORY CONSTRUCTION SUPPORTS THE TRIAL COURT'S DECISION.**

Trial court determinations of income for purposes of child support calculations are controlled by statute in Utah. "Income from earned income sources is limited to the equivalent of one full-time job." Utah Code Ann. §78-45-7.5(2). The phrase "full-time job" is not defined in the statute, nor has there been subsequent court interpretation of the phrase. Despite this, a review of the record in this matter indicates that the statute is sufficiently clear on these facts to provide adequate direction to the trial court.

In addressing questions of statutory construction, courts first "look to the plain meaning of unambiguous statutory language." Pickett v. Utah Dept. of Commerce, 858 P.2d 187, 191 (Utah Ct. App. 1993). "Where statutory language is plain and unambiguous, appellate courts cannot look beyond the language to divine legislative intent, but must construe the statute according to its plain language." State v. Paul, 860 P.2d 992, 993 (Utah Ct. App. 1993). If the statute creates sufficient ambiguity to require court construction, the language is required "to give effect to legislative intent in so far as possible, and in doing so, [courts]

assume 'the Legislature used each term advisedly . . . .' State v. Masciantonio, 850 P.2d 492, 493 (Utah Ct. App. 1993) (citation omitted). Under either a plain meaning determination or under standard rules of construction, the trial court's determination to award child support based upon an average which was \$30,000.00 less than Mr. Welling's actual salary was within the court's discretion.

1. The plain meaning of the term "full-time" is sufficiently broad to include non-traditional work patterns.

Webster's defines the phrase "full-time" as "working or operating the customary number of hours in each day, week, or month." Webster's Collegiate Dictionary, 539 (1991). Merriam-Webster defines the phrase as "involving or working a full or regular schedule." The New Merriam-Webster Dictionary, 307 (1989). Other dictionaries define the phrase as "the length of time considered to constitute a complete work, as: a 40-hour work week is considered to be full-time." Living Webster Dictionary, 394 (1975). Review of various state and federal decisions regarding federal employment compensation law and other federal authority yields varying definitions. See Words and Phrases, Vol. 17A (Supp. 1993). In the vast majority of definitions, reference is made to the usual or normal work pattern involved.

Consideration of a normal 40-hour work week is entirely appropriate under a reasonable analysis. See In re Marriage of Simpson, 841 P.2d 931, 937 (Cal. 1992) ("Established employment norms, such as the standard 40-hour work week, are not controlling

but are pertinent to [establishing a reasonable work regimen]."). However, the trial court did not abuse its discretion in determining that the plain and ordinary meaning of the phrase "full-time" did not require rigid "40-hour" interpretation under the facts presented for review. Mr. Welling himself established at trial that his work pattern was normal for the eight other salesmen in the division. (Tr. at 37, 50, 56.) The record also indicates that Mr. Welling held other employment as early as 1985 which required approximately the same time commitment. (Tr. at 73.) At the time of trial, he was not paid an hourly rate at Ethicon, his hours were not restricted, he did not submit a time sheet of any kind, and no records of his hours were kept. (Tr. at 40.)

This testimony amply demonstrates that Mr. Welling's position was "full-time" within the meaning of the statute, that he had pursued that particular work schedule for many years, and that child support should be based upon an average of his previous three years. Since Mr. Welling went to great lengths at trial to demonstrate his work ethic and skills as a salesman, (Tr. at 41, 45, 47, 49, 51), the trial court's determination was not an abuse of discretion and should be upheld.

2. If statutory interpretation is required, the legislative history amply supports the suggested construction.

Common sense and the language of Utah Code Ann. §78-45-7.5(2) dictate that the Legislature did not intend to limit all earning activities to the equivalent of one 40-hour work week.

Rather, the statute implies a two-fold test which first considers what is normal in the industry or career the individual has chosen and then weighs the individual's historical work pattern in determining an appropriate level of support.

The language of the statute supports the suggested construction. Mr. Welling notes that the term "40-hour" was deleted by voice vote on the floor of the Senate. (App. Br. at 6.)<sup>4</sup> Rejection of the phrase clearly indicates the Legislature's intent to afford trial courts abundant discretion in determining what constitutes a full-time, career position. It is also apparent that had the Legislature desired to impose a strict 40-hour limitation, they would simply have left the language as proposed, rather than deleting the phrase "40-hours." It is not necessary to torture the final language of the statute to impose an artificial child support ceiling when such a limitation could easily have been retained with the language of the original draft.

Rather, this Court may correctly surmise that removal of the phrase was intended to enhance a trial court's ability to address society's broad range of pay structures which fall outside the parameters of a more rigid Legislative test. The unique needs of farmers, attorneys, court reporters, salesmen, salaried employees, tax preparers, accountants, university staff, physicians and other

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<sup>4</sup> The Court should not consider Counsel's suggestions regarding legislative intent, since they are not properly a part of the Record.



persons who regularly work extended hours are thus more easily met without diluting the Legislative norm of a "full-time" salary.

3. Marital employment levels do not bar subsequent child support increases.

Mr. Welling also urges the Court to limit child support calculations to a work pattern "established and expected during the marriage." (App. Br. at 7.) The suggested limitation to the marriage time frame is more suited to alimony than to child support calculations. A clear difference exists between alimony and child support. Alimony is an attempt on the court's part to provide support for a receiving spouse "sufficient to maintain that spouse as nearly as possible at the standard of living enjoyed during the marriage." Noble v. Noble, 761 P.2d 1369, 1372 (Utah 1988). Using such a framework, a determination of the standard of living enjoyed by the parties during the marriage is appropriate. However, such a determination is not called for when addressing child support. The suggested standard would transform the parties' income at the time of the divorce into a ceiling on child support, making increases of any type unattainable. That outcome would not comport with the purposes of statutory support obligations enumerated in Utah Code Ann. §78-45-3. Petitions to modify and other procedural remedies that increase base calculations would become moot, a consequence which cannot have been the intention of the Legislature.

In short, Mr. Welling does not suggest, nor does it appear from the Record, that he would consider lowering his work hours or reducing his income. He simply wishes to insulate many thousands of dollars from child support calculations.<sup>5</sup> His proper remedy if he chooses to change professions is to request a modification, which would be readily available in appropriate circumstances. If he continues to work as he always has, and his income increases, his natural children should not be denied the benefits of his income.

#### POINT II

##### **THE UNDISPUTED EVIDENCE PRESENTED AT TRIAL SUPPORTS THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES.**

Utah Code Ann. §30-3-3 (1953, as amended) provides for an award of attorneys' fees in divorce actions. Utah Courts have carefully enumerated three factors to be considered by the Trial Court in determining whether attorneys' fees are appropriate:

1. The receiving spouse must have a financial need for the attorneys' fees,
2. The other spouse must have a financial ability to pay and,
3. The award must be reasonable in light of the work actually performed.

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<sup>5</sup> The Court properly pointed out that if Mr. Welling's income were to lower by \$30,000.00 in 1993, he would still not be paying child support in excess of the guidelines. (Tr. at 97.)

Morgan v. Morgan, 854 P.2d 559, 568 (Utah Ct. App. 1993); Bell v. Bell, 810 P.2d 489, 494 (Utah Ct. App. 1991). "Both the decision to award attorney fees and the amount of such fees are within the sound discretion of the trial court." Crouse v. Crouse, 817 P.2d 836, 840 (Utah Ct. App. 1991). Mr. Welling challenges only the first element considered by Utah Courts.

1. Mr. Welling has failed to properly marshal the evidence.

Mr. Welling argues that the Trial Court failed to address Ms. Welling's need. (App. Br. at 11.) He further asserts that her receipt of an arrearage of child support payments should have been considered in determining whether Ms. Welling was capable of providing her own attorneys' fees. Id. Neither of these arguments is supported by the record, nor has Mr. Welling properly marshaled the evidence in support of the Court's finding.

The Utah Supreme Court has established a strict requirement that where Findings of Fact are challenged, an appellant must marshal all evidence which supports the trial court before an appellate court will consider the challenge.

To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings, and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. [Citations omitted.] [Appellant] has not begun to carry that heavy burden. Nowhere does he marshal the evidence supporting his version of the facts, much less the evidence supporting

the trial court's findings. Under these circumstances, we decline to further consider [Appellant's] attack on the factual findings.

Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.

Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991). This requirement applies specifically in divorce matters and more particularly to child support calculations.

To mount a successful challenge to the trial court's finding with respect to the child support calculation, [Appellant] is required to marshal all the evidence supporting the court's finding and demonstrate that the evidence is insufficient to support that finding.

Watson v. Watson, 837 P.2d 1, 4 (Utah Ct. App. 1993). As noted below, the court made specific findings of fact with regard to attorneys' fees and considerable evidence supporting those findings appears in the record. Mr. Welling's failure to marshal the evidence in support of those findings provides an avenue through which this court may presume the lower court's determination to be correct, and proceed to consider the other issues raised on appeal.

## 2. The record fully supports the Trial Court's Award.

Consideration of the Record on Appeal also yields ample grounds for affirming the Trial Court's attorney's fee award. Mr. Welling does not refer to the language of the actual Findings of

Fact with regard to attorneys' fees. The Court specifically stated:

The court finds that the Defendant's attorney's fees are approximately One Thousand and no/100 Dollars (\$1,000.00), and the Plaintiff's attorney's fees are Two Thousand and no/100 Dollars (\$2,000.00). The Plaintiff earns eighty-seven percent (87%) of the parties' combined gross incomes, and therefore should pay (87%) of the attorney's fees incurred in prosecuting this action, and therefore, Defendant is granted a judgment against the Plaintiff of \$590.00 for attorney's fees.

(R. at 211.) The Court further noted:

The Defendant is voluntarily unemployed, and the Court finds that she is capable of earning \$1,075.00 for purposes of computing child support.

(R. at 210.) These findings, when considered in light of the evidence presented at trial, adequately demonstrate the Court's consideration of Ms. Welling's need.

A proper marshaling indicates that Ms. Welling was unemployed at the time of the modification and that her imputed income was a mere 13% of the total income of the parties. (Tr. at 66-67, 99.) Ms. Welling testified that she had a tumor during a period between the divorce and Petition to Modify, that she had surgery the following year, and that she was pregnant during some portion of that time. (Tr. at 59-60.) She attended Weber State University during the years in question and remained occupied raising three children. (Tr. at 59-60, 67.) At the time of trial, Ms. Welling had incurred debts of Fifteen Thousand Dollars

(\$15,000.00) for college and living expenses. (Tr. at 60.) She stated she did not have the ability to pay her attorneys' fees. (Tr. at 62.) In fact, she testified that she had "paid \$700.00 so far [in attorneys' fees] and it's come out of our everyday living. We had to cut back on everything just to be able to come up with that money." (Tr. at 62.) This testimony was substantially undisputed, and clearly demonstrated Ms. Welling's need.

In addition, the only evidence produced at trial that Ms. Welling had other resources from which she could pay attorneys' fees consisted of passing mention of \$1200.00 which Ms. Welling received in 1989, child support received for a child by another marriage and an undisclosed amount of education grant money. (Tr. at 64, 66.) In exercising its discretion, the court could properly disregard these items, particularly in light of Mr. Welling's average monthly income of nearly \$10,000.00, from which he only paid \$300.00 per month in total child support. (Tr. at 88.)<sup>6</sup> Since

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<sup>6</sup> The trial court noted the inequity of the child support order which was in place at the time of trial:

"The Court: And yet you've been making \$65,000.00 now for three years and you've still been paying \$300.00 a month child support.

The Court: Well, regardless, that's what you have been averaging? When you received \$5,500.00 a month are you telling me that you've thought for the past three years that \$300.00 is a reasonable figure to provide for your two children when your income was \$5,400.00?

[Mr. Welling]: No, if I was receiving the money, that much a month, that's not what I would have sent.

The Court: Well, in fact, this year you have receiving almost \$10,000.00 a month; have you not?

[Mr. Welling]: Averaged.

no abuse of discretion has been shown, this Court should uphold the Trial Court's Findings and award of attorneys' fees.

3. Child support payments are not an appropriate source of attorneys' fees.

Appellant next asserts that Ms. Welling's receipt of an arrearage payment owed on back-due child support provides money from which attorneys' fees should have been paid. This circular argument does not merit serious consideration. It is well-settled that Findings of Fact are based on evidence adduced at trial and Appellate courts do not consider post-trial determinations or changes, absent a new legal proceeding. Courts simply do not consider post-trial evidence on appeal. See, Low v. Bonacci, 788 P.2d 512, 513 (Utah 1990). "With respect to the new evidence offered in Bonacci's brief, we do not consider new evidence on appeal"). The suggested funds had not been obtained at the time of trial and were not contemplated when the court received evidence. They cannot and should not be considered here.

Alternatively, were the Court to consider Mr. Welling's suggestion that a post-trial child support arrearage payment should limit Ms. Welling's attorneys' fee award, the suggested outcome

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The Court: And at \$10,000.00 a month you've continued only at \$300.00 for child support; does that seem fair and equitable to you?

[Mr. Welling]: No. That's why I understood there was going to be an increase."

(Tr. at 87, 88.)

would fail any reasonable test of equity. The theory would circumvent the stated and self-evident uses to which child support monies should be devoted. Child support payments support children. They are not intended to finance extended disputes between parents from which the children would derive little or no benefit.<sup>7</sup> As noted above, Ms. Welling convincingly demonstrated her urgent need for attorneys' fees at trial, and even had the court considered the back child support, the award would still have been amply justified. The attorneys' fee award should be upheld.

4. Ms. Welling is entitled to attorneys' fees on appeal.

Ms. Welling is also entitled to attorneys' fees on Appeal. "Ordinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal." Bell v. Bell, 810 P.2d 489, 494 (Utah Ct. App. 1991) (quoting Bert v. Bert, 799 P.2d 1166, 1171 (Utah Ct. App. 1990)). If the Court determines that Ms. Welling has substantially prevailed on Appeal, the matter should be remanded to the Trial Court for determination of a reasonable fee and award thereof.

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<sup>7</sup> This interpretation would also create loopholes through which to dilute child support obligations. For example, as in this case, a delinquent father would be allowed to make a strategic lump sum payment at an advantageous moment, thus avoiding or diminishing a later award of attorneys fees.



**CONCLUSION**

WHEREFORE, Appellee requests that the Court uphold the Findings, Conclusions and Order of the Trial Court, award costs, interest and attorneys' fees on Appeal, remand for determination of a reasonable attorneys' fee, and grant any other relief which the Court deems appropriate.

DATED this 19th day of April, 1994.

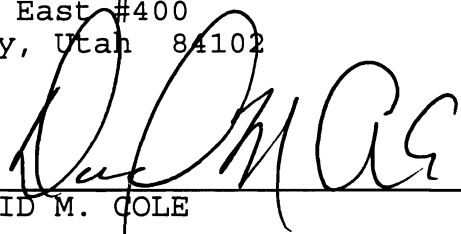
  
\_\_\_\_\_  
DAVID M. COLE, Esquire  
KING & KING  
Attorneys for Defendant-Appellee

**MAILING CERTIFICATE**

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 19th day of April, 1994, to:

Lyle W. Hillyard, Esquire  
HILLYARD, ANDERSON & OLSEN  
Attorneys at Law  
175 East 1st North  
Logan, Utah 84321

Clerk of the Court  
Utah Court of Appeals  
230 South 500 East #400  
Salt Lake City, Utah 84102

  
\_\_\_\_\_  
DAVID M. COLE

## **ADDENDUM**

**EXHIBIT A**

**Determinative Provisions**

### **78-45-3. Duty of man.**

Every father shall support his child; and every man shall support his wife when she is in need.

### **30-3-3. Award of costs, attorney and witness fees — Temporary alimony.**

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

**78-45-7.4. Obligation — Adjusted gross income used.**

Adjusted gross income shall be used in calculating each parent's share of the child support award. Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines.

**History:** C. 1953, 78-45-7.4, enacted by L. 1989, ch. 214, § 6. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1989, ch. 214 be-

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

- (1) As used in the guidelines "gross income" includes:
  - (a) prospective income from any source, including nonearned sources, except under Subsection (3); and
  - (b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.
- (2) Income from earned income sources is limited to the equivalent of one full-time job.
- (3) Specifically excluded from gross income are:
  - (a) Aid to Families with Dependent Children (AFDC);
  - (b) benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid, Food Stamps, or General Assistance; and
  - (c) other similar means-tested welfare benefits received by a parent.
- (4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.
  - (b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.
- (5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.
  - (b) Each parent shall provide suitable documentation of current earnings, including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year to provide verification of earnings over time and shall document income from nonearned sources according to the source. Verification of income from records maintained by the Office of Employment Security may be substituted for employer statements and income tax returns.

- (c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.
- (6) Gross income includes income imputed to the parent under Subsection (7).
- (7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.
- (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.
- (c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.
- (d) Income may not be imputed if any of the following conditions exist:
- (i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;
  - (ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;
  - (iii) a parent is engaged in career or occupational training to establish basic job skills; or
  - (iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.
- (8) (a) Gross income may not include the earnings of a child who is the subject of a child support award, nor benefits to a child in the child's own right, such as Supplemental Security Income.
- (b) Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

**History:** C. 1953, 78-45-7.5, enacted by L. 1989, ch. 214, § 7; 1990, ch. 100, § 5.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, added the last sentence in Subsection (5)(b), in Subsection (7)(b) substituted "If income is imputed to a

parent, the income shall be based" for "Income shall be imputed to a parent based," and made a stylistic change in Subsection (7)(c).

**Effective Dates.** — Laws 1989, Chapter 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

## NOTES TO DECISIONS

### ANALYSIS

Modification of award.  
Cited.

#### Modification of award.

When the parties had agreed to the amount of child support before the effective date of the child support guidelines, the trial court erred in modifying child support when no petition to modify had been filed and in modifying the

support amount without finding that a material change of circumstances had occurred since the previous order had been entered. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990) (applying § 78-45-7.2(1)(b) prior to 1990 amendment regarding impact of guidelines on existing support orders).

**Cited in** *Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991).

**EXHIBIT B**

**Order and Judgment (including Findings of Fact)**

Lyle W. Hillyard #1494  
HILLYARD, ANDERSON & OLSEN  
Attorneys for Plaintiff  
175 East 1st North  
Logan, UT 84321  
(801) 752-2610

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

---

WENDELL WILFORD WELLING,	)	
Plaintiff,	)	ORDER AND JUDGMENT
vs.	)	
CHRISTY MORRIS WELLING,	)	Civil No. 842022686
Defendant.	)	

---

The above-entitled matter came on regularly for Trial on Defendant's Petition to Modify Decree of Divorce before the Honorable Judge Gordon J. Low in the above-entitled court on the 2nd day of December, 1992, at 9 o'clock a.m. Defendant was personally present and represented by Jean Robert Babilis of Jean Robert Babilis & Associates and the Plaintiff was personally present and represented by Lyle W. Hillyard of Hillyard, Anderson & Olsen. The Judge having heard testimony taken, the Court does make and enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The court finds that the Plaintiff should be awarded one-half, or five (5) weeks, of the children's summer vacation. The court eliminates the first and last week of summer, which leaves ten (10) weeks to be divided equally between the parties.

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Clerk No. 842022686  
#66  
SEP 2 1993



The same formula applies to Christmas and other major holidays. In addition, the court finds that due to the great geographical distance between the parties, the Plaintiff should be awarded visitation with the children, upon giving the Defendant reasonable notice of no less than two weeks where possible, when he is in town. The parties should generally follow the recommendations as outlined by the Commissioner on the attached visitation guidelines.

2. the court finds that the Defendant should be awarded the use of her pre-marital surname, to-wit: MORRIS.

3. The court finds that the Plaintiff provided the Defendant with a 1988 Oldsmobile in exchange for the right to claim the parties' two children as dependents for tax purposes for the years through 1990 through 1995.

4. The court finds that the Plaintiff's income has averaged \$84,000.00 over the past three years, and therefore, that is the figure to be used when calculating child support for the parties' two minor children. The Defendant is voluntarily unemployed, and the court finds that she is capable of earning \$1,075.00 for purposes of computing child support. The court finds that the Plaintiff has remarried, has a child born as issue of his current marriage, and incurs work-related day care expenses.

5. The court finds that the Defendant should be granted a judgment against the Plaintiff in the sum of Seven Thousand Seven Hundred Eleven Dollars and no/100 (\$7,711.00) for child support arrearages from February 1, 1992 through and including the month

of December, 1992, which represents the amount above and beyond the original child support order of \$300.00 per month, which has been made by the Plaintiff.

6. The court finds that the Defendant's attorney's fees are approximately One Thousand Dollars and no/100 (\$1,000.00), and the Plaintiff's attorney's fees are Two Thousand Dollars and no/100 (\$2,000.00). The Plaintiff earns eighty seven percent (87%) of the parties' combined gross incomes, and therefore should pay (87%) of the attorney's fees incurred in prosecuting this action, and therefore, Defendant is granted a judgment against the Plaintiff of \$590.00 for attorney's fees.

Based on the above and foregoing, and for good cause appearing, it is hereby ORDERED, ADJUDGED AND DECREED that the Decree of Divorce entered October 24, 1984, may be modified as follows:

1. The Plaintiff is awarded one-half, or five (5) weeks, of the children's summer vacation. The Plaintiff is awarded visitation with the children, upon giving the Defendant reasonable notice of at least two weeks where possible of when he will be in town. The parties should generally follow the recommendations as outlined by the Commissioner on the attached visitation guidelines.

2. The Defendant is awarded the use of her pre-marital surname, to-wit: MORRIS.

3. The Plaintiff is awarded the right to claim the parties' two children as dependents for tax purposes for the years through

1990 through 1995 in exchange for a 1988 Oldsmobile. Thereafter, the tax dependency of the children shall belong to the Defendant. The Plaintiff may have the option to buy the exemptions, so long as he is current and timely in his child support payments each year, by paying to the Defendant the tax loss by not being able to claim the children on her and her future husband's tax returns each year. The parties are ordered to exchange tax returns and indicate their incomes and work histories.

4. The Plaintiff is ordered to pay child support in the sum of Five Hundred Dollars and 50/100 (\$500.50) per month per child, or One Thousand One Dollar and no/100 (\$1,001.00) per month, beginning with the month of February, 1992. Said child support is due one-half on the 5th and one-half on the 20th of each month, and shall terminate when each child turns eighteen (18) years of age or graduate with their regular high school class, whichever occurs last.

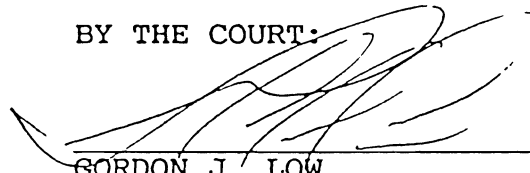
5. The Defendant is awarded a judgment against the Plaintiff in the sum of Seven Thousand Seven Hundred Eleven Dollars and no/100 (\$7,711.00), minus Four Thousand One Hundred Seventy Dollars and no/100 (\$4,170.00) which he paid in December, 1992, as and for child support arrearages from February 1, 1992, to and including the month of December, 1992, which represents the amount above and beyond the original child support order of \$300.00 per month, for a total judgment of Three Thousand Five Hundred Forty One Dollars and no/100 (\$3,541.00).

6. The Defendant is awarded a judgment against the Plaintiff in the amount of Five Hundred Ninety Dollars and no/100 (\$590.00) as and for a contribution toward Defendant's attorney's fees and costs in bringing this action.

7. All prior orders of this court not modified herein shall remain in full force and effect.

Dated this 2 day of ~~August~~ <sup>September</sup>, 1993.

BY THE COURT:

  
\_\_\_\_\_  
GORDON J. LOW  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER AND JUDGMENT was mailed, postpaid, to Defendant's attorney, Jean Robert Babilis, at 4185 Harrison Boulevard, Suite 300, Ogden, Utah 84403, this \_\_\_\_ day of August, 1993.

\_\_\_\_\_  
Secretary

e:\lwh\pl\welling.ord

**EXHIBIT C**

**Order**

Lyle W. Hillyard #1494  
HILLYARD, ANDERSON & OLSEN  
Attorneys for Plaintiff  
175 East 1st North  
Logan, UT 84321  
(801) 752-2610

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

---

WENDELL WILFORD WELLING,	)	
	)	ORDER
Plaintiff,	)	
vs.	)	
CHRISTY MORRIS WELLING,	)	Civil No. 842022686
Defendant.	)	

---

BASED on the Court's Memorandum Decision dated the 6th day of August, 1993, it is hereby Ordered:

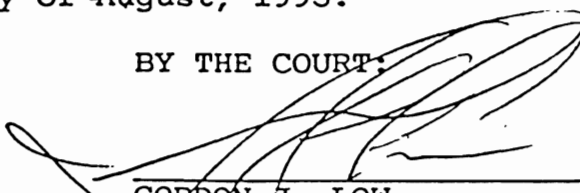
1. That Exhibit A of Defendant's Petition be modified as shown on Plaintiff's Exhibit D and be submitted to the Court for signature, a copy of which is attached as Exhibit A to this order and by this signing shall become entered by the court as its order in the December 2, 1992, hearing.

2. That Defendant's request for additional attorneys fees and costs is denied and Plaintiff's request that attorneys fees be abated is also denied.

3. That Defendant's request for a wage assignment is denied.

Dated this 2 day of <sup>September</sup> ~~August~~, 1993.

BY THE COURT:

  
GORDON J. LOW  
District Court Judge

PRO-FILMED

RE: 9/3/93

Case No. 842022686  
#65

SEP 2 1993

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER was mailed, postpaid, to Defendant's attorney, Jean Robert Babilis, at 4185 Harrison Boulevard, Suite 300, Ogden, Utah 84403, this 13 day of August, 1993.

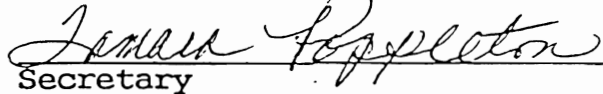
  
Secretary

EXHIBIT C

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Order

**EXHIBIT D**

**Current Mailing Certificate**

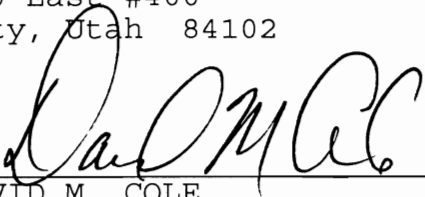


MAILING CERTIFICATE

I hereby certify that two true and correct copies of the Addendum, Exhibits A, B, C, and D were mailed to the following, postage prepaid, this 28<sup>th</sup> day of April, 1994, to:

Lyle W. Hillyard, Esquire  
HILLYARD, ANDERSON & OLSEN  
Attorneys at Law  
175 East 1st North  
Logan, Utah 84321

Clerk of the Court  
Utah Court of Appeals  
230 South 500 East #400  
Salt Lake City, Utah 84102

  
\_\_\_\_\_  
DAVID M. COLE