

1993

Wendell Wilford Welling v. Christy Morris Welling : Brief of Appellant

Utah Court of Appeals

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Lyle W. Hillyard; Hillyard, Anderson and Olsen; Attorney for Plaintiff/Appellant.

David M. Cole; King and King; Attorney for Defendant/Respondent.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

| | | |
|--------------------------|---|---------------------------|
| WENDELL WILFORD WELLING, |) | |
| Plaintiff/Appellant, |) | |
| vs. |) | Case No. 930659-CA |
| |) | Trial Court No. 842022686 |
| CHRISTY MORRIS WELLING, |) | |
| Defendant/Respondent. |) | |

BRIEF OF APPELLANT

Appeal of a Modification of a Decree of Divorce
By The Honorable Gordon J. Low
First Judicial District Court
Cache County, Utah

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UTAH CC

APPEALS

UTAH

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DOCKET NO.

930659

Priority No. 15

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Utah Court of Appeals

FEB 07 1994

Mary Hoover
Mary
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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| WENDELL WILFORD WELLING, |) | |
| Plaintiff/Appellant, |) | |
| vs. |) | Case No. 930659-CA |
| |) | Trial Court No. 842022686 |
| CHRISTY MORRIS WELLING, |) | |
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IN THE UTAH COURT OF APPEALS

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| WENDELL WILFORD WELLING, |) | |
| Plaintiff/Appellant, |) | BRIEF OF APPELLANT |
| vs. |) | |
| CHRISTY MORRIS WELLING, |) | Case No. 930659-CA |
| Defendant/Respondent. |) | Trial Court No. 842022686 |

JURISDICTION OF THE COURT

The modification of the Divorce Decree from which this appeal is taken was signed by the Court on September 2, 1993. The Notice of Appeal was filed September 29, 1993.

This Court has jurisdiction over the appeal in this matter by virtue of the Constitution of Utah, Article VIII, Section 1 et seq., Utah Code Ann. § 78-2A-1 et seq., and Rule 3 R. Utah Ct. App.

NATURE OF PROCEEDINGS

This is an appeal from a modification of divorce decree signed and entered by Judge Gordon J. Low of the First Judicial District Court of Cache County, State of Utah.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred, given the occupation Mr. Welling maintained during the marriage of the parties which he specifically changed following the divorce to assume the new responsibility for a second family which now requires him to work substantially more hours per week and assume more responsibility and risk with the extra money received based on commissions in

setting Mr. Welling's earnings for the purpose of setting child support for the first family at \$7,000 per month rather than the \$3,000 a month he would have earned had he remained in the same type of employment with the same general duties and a normal 40-hour working week he was doing at the time of the divorce.

2. Whether the trial court erred in awarding Mrs. Welling any attorney fees and costs without finding she was unable to pay her own attorney fees and costs, especially in light of the arrearage judgment for child support based on the retroactive date of the order which would have given her sufficient money to pay her attorney and costs.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a modification of a divorce decree.

COURSE OF THE PROCEEDINGS

The parties were originally divorced on October 24, 1984. A modification of the divorce decree was entered September 2, 1993, and an appeal of the child support and costs of court was filed September 29, 1993.

DISPOSITION OF THE TRIAL COURT

The trial was held on December 2, 1992. After the presentation of the evidence and the hearing of testimony of the parties and Mr. Welling's supervisor, the trial court found that Mr. Welling's income for the last three years had averaged \$7,000 per month. The court further found as immaterial the fact that Mr. Welling had maintained a job during the marriage which required the normal 40-hour week and generated \$22,000 per year

in earnings and because of a conscious choice he made to be able to assume the responsibility for a second family had changed to a job that required a minimum of 60 hours per week and had a base salary of \$33,000 which was comparable to his prior earnings but generated substantially more earnings based on commissions that were dependant on the risk of success and the greatly increased working hours per week. The court further found Mrs. Welling was voluntarily under-employed and imputed her wages at \$1,075 per month based on the prior job she maintained. The court found the effective date of the order to be February 1, 1992, thus creating an arrearage from that date to the date of the hearing.

The court found that Mr. Welling's earnings represented 87% of the earnings of the parties and ordered him to pay 87% of the attorney fees and costs incurred, or his own attorney fees and costs plus \$590 of attorney fees and costs to Mrs. Welling's attorney.

STATEMENT OF FACTS

1. The parties were divorced on October 24, 1984.
2. During the course of the marriage, two children were born to the parties, to-wit: Michael Welling, born October 30, 1982, and Brandon Welling, born April 25, 1984.
3. That during this marriage and at the time of the divorce, Mr. Welling was employed as a management trainee at J.C. Penney's where he earned \$22,593 in 1984, the year of the divorce. (See Exhibit "A" admitted at the hearing and attached hereto as Exhibit 1, and Trial Transcript, page 8, lines 5-16.)

4. That for the next two years, Mr. Welling made less than he did in 1984 while trying different jobs but paid his child support regularly and paid all of the marital debts that he had assumed in the divorce. (See Exhibit 1.)

5. That Mr. Welling wanted to earn additional money to support a new wife and family, but rather than choose a regular full-time job with a part-time job to supplement his earnings, he began working as a traveling salesman which required at least 60 hours per week with the added responsibility of travel with a guaranteed base salary to protect his first family with all the excess earnings conditioned on performance in the form of a bonus.

6. That Mr. Welling remarried in 1990 and is the father of a child born in 1992 as a result of that relationship. He has continued to make approximately \$33,000 per year as a base guaranteed salary plus bonuses based on the extra hours of work and successful performance. (See Exhibit 1.)

7. That the other salesmen working for the same company doing the same general work make between \$50,000 and \$60,000 based on their base plus bonuses with an average of 60-hours per week work. (See Trial Transcript, page 45, lines 1-6.)

8. That Mrs. Welling has worked one and a half years since the divorce and spent the balance of the time going to college.

SUMMARY OF THE ARGUMENT

1. That as a result of the trial court's failure to adequately differentiate the earnings of Mr. Welling between a base salary of \$33,000 which he is guaranteed and comparable with the regular full-time job he performed during the marriage of the parties by which their children would have been supported had the parties stayed married and the excess earnings in the form of a bonus generated by his increased efforts and assumption of risk in making those earnings, which he assumed after the divorce to be able to support his new family, the court improperly set child support using a wrong income earnings for Mr. Welling.

2. That the court erred in awarding Mrs. Welling \$590 of attorney fees and costs when there was no evidence of her need and where she was awarded an arrearage judgment large enough to cover those costs because of the retroactive nature of the order.

ARGUMENT

I

THE TRIAL COURT ERRED IN CONSIDERING ALL OF MR. WELLING'S SALARY, MUCH OF WHICH WAS GENERATED BY WORKING EXCESS HOURS PER WEEK AND BY ASSUMING RISKS IN HOW HE WAS PAID AT A NEW JOB SPECIFICALLY TAKEN AFTER THE DIVORCE SO HE COULD SUPPORT A SECOND FAMILY.

Utah law is very clear that for the purposes of setting child support, "income from earned income sources is limited to the equivalent of one full-time job." (emphasis added) Utah Code Ann. § 78-45-7.5(2).

There is no legislative definition or Utah court decisions that clarify what is meant by "equivalent of one full-time job."

Legislative history is also silent on the meaning of that phrase, except the term "40-hour" which was included in Sub. HB 203 between the word "one" and the word "full-time" as it passed the House in 1989, was deleted by a voice vote on the floor of the Senate on the 44th day of the session by a motion of the undersigned just prior to the bill being approved by the full Senate. (See Utah State Senate Journal 1989, page 754.) This amendment was later accepted by the House. There is no explanation on the record for the purpose and intent of this amendment, but the undersigned was a member of the Child Support Guidelines Task Force chaired by Judge Judith Billings that created the basis from which these guidelines were created. (See Child Support Guidelines, Utah Law Review 1990, beginning page 859.) The undersigned made the motion because the "40-hour" limitation was too narrow for jobs where over 40 hours were regularly expected and worked during a marriage which established a lifestyle of support of income upon which the family and the children were funded. On the other hand, the term "equivalent" limited the term "full-time work" to a reasonable comparable to what other people normally do to support their family. If only "full-time job" had been used, there could be no such comparison. If a type of job only required 10 hours a week or even 90 hours a week, it could be still considered "full-time" but certainly not

equivalent to other jobs unless the time set to earn the wages are equivalent to what a 40-hour week would normally generate.

The Court is left to the standard rules of statutory construction, that is: the plain meaning of the term taken within the context of the statute involved as historically applied and which fosters good social policy should be followed. Jensen v. Intermountain Health Care, 679 P.2d 903 (Utah 1984). For most people not self-employed, "full-time" would normally be measured by 40 hours. Generally anyone who works for another is paid extra for anything over 40 hours as overtime because time beyond that is not generally expected or required.

It is submitted that "equivalent of one full-time job" should generally be 40 hours unless the job in question normally requires a limited number of hours beyond that. The historical work pattern established and expected during the marriage should be considered. In other words, if a parent normally works four hours of overtime per week during the marriage where such overtime is expected or required and is generally available, that should be the standard. If the parent is working an excessive number of hours per week, say ten or more, especially in an effort to earn additional moneys to try to save the marriage, the court should follow the more reasonable level of the 40-hour week rather than hold the worker to the extraordinary schedule which is assured for a short specific purpose. The object of the large number of hours--to save the marriage--is now lost to the divorce and the short duration of the excess work should not be a penalty

to the spouse as he tries to begin a new life. If a parent voluntarily changes occupations after the divorce, so that he works extraordinary longer hours and makes more money to be able to assume the responsibility for a new family, he should be able to do that as long as his first family is protected by child support based on the same earnings they were receiving during the marriage. Each parent should be able to voluntarily help whomever they want just as they could choose to give one child more during their marriage.

This statutory policy to cap or limit the number of hours a person must work to support his children after a divorce is consistent with two other principles of law in this area. There is no limit on the income to be considered if it comes from non-earned sources. In other words, if the parent inherited money that generated income, the full amount could be considered by the court in setting child support. This appears reasonable because those earnings are not set by time of effort, which is limited to everyone. Also, if a person chooses to work a 40-hour job plus a second part-time job of 20 hours, only the income from the first would be considered. It does not make any rational sense to say, but if instead of two separate jobs, a parent expanded one job from 40 to 60 hours, the full amount in earnings are included to set child support.

It is difficult to compare this provision with the laws of other states because the exact wording, approach and policy behind them are different. ("Child Support Guidelines, 1990 ULR,

page 859). This article, written by Judge Billings after she chaired the Utah Judicial Council's Child Support Guidelines Task Force, gives the considerations by the group in creating the work product which became Sub HB 203 of the 1989 session. Judge Billings explains what approach the task force accepted and why:

The Task Force ultimately decided that the guidelines that considered both parents' incomes would be perceived as more fair and would better reflect the underlying policy that both parents should contribute to the well-being of their children.

Page 888.

With this approach, the statute protects the children and the parents by capping earned income at the equivalent of a full-time job and by setting a floor by imputing wages for unemployment and under-employment.

Other states have faced the challenges of a non-custodial parent whose unusual rigorous work schedule has set income at an abnormally high level. In re Marriage of Simpson, 14 Cal. Rept.2d 411, 841 P.2d 931 (Cal. 1992). The Supreme Court of California acknowledged that a reasonable work regimen, not an extraordinary regimen, should be the goal in applying the guidelines under the statutory term of "earning capacity", which is certainly less restrictive than "equivalent of one full-time job."

The record in this case is not as clear as intended because the trial court limited much of the case by deciding the issues during the opening statements and allowed much by proffer (page

30). The trial court had clearly made up its mind during the opening statement that the full earnings of Mr. Welling were going to be included, regardless of how they were made and the reason for his extraordinary work schedule as long as it was from one employer. The task in such a case is not easy or clear, but the California Court set forth the guidelines we should follow:

A reasonable work regimen, as opposed to an extraordinary regimen, however, is not readily or precisely determined and is dependent upon all relevant circumstances, including the choice of job available within a particular occupation, working hours, and working conditions. Established employment norms, such as the standard 40-hour work week, are not controlling but are pertinent to this determination. In certain occupations a normal work week necessarily will require in excess of 40 hours or occasional overtime and thus perhaps an amount of time and effort which may be considered reasonable under the circumstances. A regimen requiring excessive hours or continuous, substantial overtime, however, generally should be considered extraordinary.

Page 937.

The point missed by the trial court is that Mr. Welling carried a traditional full-time 40-hour job during the marriage of the parties. It was what he had been trained to do and was the choice of the parties upon which to base their lifestyle expectancy for the rest of their married life. They begat children and proceeded with that expectation until the divorce. Defendant left that job and voluntarily secured another type of employment to earn the money necessary to pay all the marital debts and still maintain his support payments. He made sure the children were supported as ordered and gave extra support as he

was able. He then developed a new occupation with the risk that his salary other than the base was no longer guaranteed and his work schedule would clearly exceed the normal 40-hours by an extraordinary amount. He did this by choice so he could assume responsibility for a new family. The trial court rejected this position at the beginning of the hearing and made it clear that he was not going to allow this father that choice. The trial court made the children from the first marriage beneficiaries of this extraordinary work pattern. Even Mr. Welling's offer in settlement of accepting a \$65,000 annual salary as his expected earnings so the commitments of his second family could be met was not accepted by the court.

II

THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES
AND COSTS TO DEFENDANT WITHOUT A FINDING THAT SHE
WAS IN NEED OF SUCH AN AWARD.

An award of attorney fees at a trial must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fee. See Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991). The trial court failed to address Mrs. Welling's need. In fact, she was awarded an arrearage judgment solely based on the retroactive effective date of the order. The final papers signed September 2, 1993, some nine months after the hearing, reflect that Mrs. Welling after the December 2, 1992 hearing was paid \$4,170 on the arrearage of \$7,711, leaving a balance owing

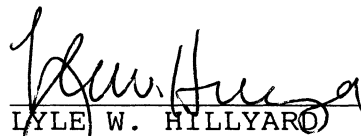
of \$3,541, thus providing her with ample funds to pay the \$1,000 in attorney fees and costs the court found reasonable.

CONCLUSION

This case will allow the Utah law to be clarified as to what is meant by the limit on earned income to the equivalent of one full-time job. This case shows a man who has changed his occupation after the divorce and voluntarily assume an extraordinary schedule of hours worked and risks of salary assumed. This is certainly more than the equivalent of one full-time job both by past work schedule and what is normal person expected. His first family should be supported as they were accustomed and expected by his base salary but to punish this father's sacrifice to support a second family is not equitable. Mrs. Welling has funds to pay her own attorney fees and costs and the court made no finding otherwise. Therefore, this Court should reduce Mr. Welling's earned income to \$33,000 per year his guaranteed base for the purpose of setting child support and find that no award of attorney fees and costs to Mrs. Welling should be made.

RESPECTFULLY SUBMITTED this 7th day of February, 1994.

HILLYARD, ANDERSON & OLSEN



LYLE W. HILLYARD

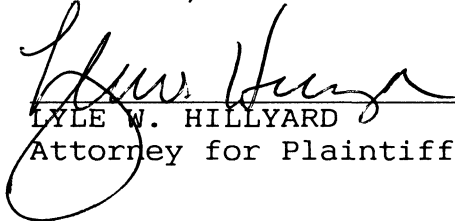
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, postpaid, to the following this 7th day of February, 1994:

David M. Cole
Attorney for Defendant/Respondent
330 North Main Street
P. O. Box 320
Kaysville, UT 84037

HILLYARD, ANDERSON & OLSEN



LYLE W. HILLYARD
Attorney for Plaintiff/Appellant

ADDENDUM

| | |
|--------------------------------------|---|
| Order | A |
| Exhibit "A" Income History | B |

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

ATTACHMENT A

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:

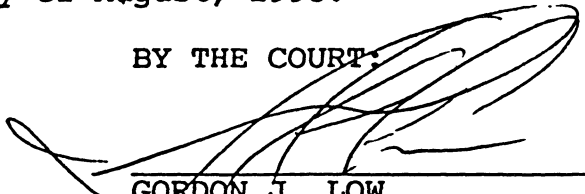
1. That Exhibit A of Defendant's Petition be modified as shown on Plaintiff's Exhibit D and be submitted to the Court for signature, a copy of which is attached as Exhibit A to this order and by this signing shall become entered by the court as its order in the December 2, 1992, hearing.

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 September, 1993.

BY THE COURT:


GORDON J. LOW
District Court Judge

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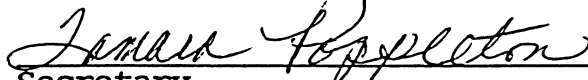
DATE: 9/3/93
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CERTIFICATE OF MAILING

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

e:\lwh\pl\welling.ori

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 AND JUDGMENT |
| Plaintiff, |) | |
| 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.

Case No. 842022686
 #66
 SET 2 1993
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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.

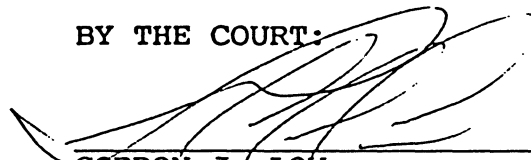
5. The Defendant is awarded a judgment against the Plaintiff in the sum of Seven Thousand Seven Hundred Eleven Dollars and no/100 (\$7,711.00), minus Four Thousand One Hundred Seventy Dollars and no/100 (\$4,170.00) which he paid in December, 1992, as and for child support arrearages from February 1, 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~~ ^{September}, 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

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Exhibit "A"
Income History

Wendell

| | <u>Penney's 1984</u> | <u>Lever 1985</u> | <u>Lever 1986</u> | <u>Olympic 1987</u> |
|-------------|--------------------------|-----------------------|-----------------------|-------------------------|
| Base Salary | \$22,593.08 | \$18,000 | \$19,000 | \$29,000 |
| Bonus | <u>0</u> | <u>3,615</u> | <u>2,422</u> | <u>4,100</u> |
| Total | \$22,593.08 | \$21,615 | \$21,422 | \$33,100 |

| | <u>Ethicon 1988</u> | <u>Ethicon 1989</u> | <u>Ethicon 1990</u> | <u>Ethicon 1991</u> |
|-------------|-------------------------|-------------------------|-------------------------|-------------------------|
| Base Salary | \$29,000 | \$28,424 | \$31,304 | \$33,358 |
| Bonus | <u>9,003</u> | <u>12,565</u> | <u>32,815</u> | <u>39,120</u> |
| Total | \$38,003 | \$40,989 | \$64,119 | \$72,478 |

| | <u>1992 YTD</u> |
|-------------|-----------------|
| Base Salary | \$ 32,640 |
| Bonus | <u>66,890</u> |
| Total | \$ 99,530 |