

1994

Michael Eugene Crookston v. Rebecca Ann Batio Crookston : Brief of Appellant

Utah Court of Appeals

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Willard R. Bishop; Attorney for Plaintiff/Appellee.

Utah Legal Services, Inc.; Stephen W. Julien; Attorneys for Defendant/Appellant.

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940190

IN THE COURT OF APPEALS

STATE OF UTAH

MICHAEL EUGENE CROOKSTON,

Plaintiff/Appellee,

vs.

REBECCA ANN BATIO CROOKSTON

n/k/a REBECCA ANN BATIO

CROOKSTON HACKING,

Defendant/Appellant.

Case No. 940190-CA

Priority No. 4

BRIEF OF APPELLANT REBECCA ANN BATIO CROOKSTON, N/K/A
REBECCA ANN BATIO CROOKSTON HACKING

Appeal from Order Overruling And Denying Objection To
Recommendation Of Commissioner

In the Fifth Judicial District Court
for Washington County, State of Utah

Honorable James L. Shumate
District Court Judge

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FILED

JUL 11 1994

COURT OF APPEALS

STATE OF UTAH

[illegible]

Priority No. 4

Honorable James L. Shumate
District Court Judge

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IN THE COURT OF APPEALS

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Plaintiff/Appellee,

vs.

REBECCA ANN BATIO CROOKSTON
n/k/a REBECCA ANN BATIO
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Defendant/Appellant.

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Case No. 940190-CA

Priority No. 4

BRIEF OF APPELLANT REBECCA ANN BATIO CROOKSTON HACKING
n/k/a REBECCA ANN BATIO CROOKSTON HACKING

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(i) (1992).

NATURE OF PROCEEDINGS

This is an appeal from the district court's order overruling and denying appellant's ("Hacking") objection to the recommendation of the domestic relations commissioner. The commissioner ruled that the custody of the parties' three minor children should be changed from Hacking to appellee ("Crookston"); that Hacking should pay child support based on an imputed minimum wage; and that Hacking should also pay Crookston's attorney fees.

STATEMENT OF THE ISSUES

1. Did the trial court err in changing the custody of the three minor children from Hacking to Crookston solely on the basis of the allegations in the petition and Hacking's failure to timely file an answer, rather than conducting an evidentiary hearing on whether a substantial change in circumstances existed and whether it would be in the best interest of the children to change custody.

2. Did the trial court err in failing to make any findings of fact or conclusions of law as to the steps taken in reaching the decision to change the custody of the minor children from Hacking to Crookston.

3. Did the trial court err in imputing a minimum wage to Hacking, for child support purposes, without conducting an evidentiary hearing on her earnings.

4. Did the trial court err in awarding Crookston attorney fees without taking any evidence on the financial situation of the parties and the reasonableness of the fee.

STANDARD OF REVIEW

The questions before the court raise the issue whether the trial court, which has broad discretion in child custody matters, abused its discretion in changing the custody of three minor children and awarding child support and attorney fees. Sukin v. Sukin, 842 P.2d 922 (Utah App. 1992); Roberts v. Roberts, 835 P.2d 193 (Utah App. 1992)

STATEMENT OF THE CASE

Crookston filed a petition with the district court to change the custody of the parties' three minor children from Hacking to himself. An answer was not timely filed and a default certificate was entered. Hacking moved the court to set aside the default certificate while Crookston moved the court to grant a default judgment. The commissioner granted the motion for a default judgment and that decision was upheld by the district court judge. The order transferred the custody of three minor children from Hacking to Crookston; awarded Crookston child support by imputing to Hacking the ability to earn a minimum wage; and awarded Crookston his attorney fees. The default judgment was granted without any evidence being taken on whether there had been a substantial change in circumstance justifying a change of custody, and if it would be in the best interest of the minor children to change their custody.

STATEMENT OF THE FACTS

In this action the essential facts are:

1. Crookston filed a petition to modify the decree of divorce on about May 4, 1992. The petition alleges that the custody of the parties' three minor children should be changed to Crookston because the children were living in an unstable environment, under poor living conditions, and because Hacking had interfered with Crookston's right to visit the children by not

keeping Crookston informed of their whereabouts. (Record on Appeal, pp. 160-65 and Addendum A.)

2. Hacking failed to timely file and answer to the petition. (Record on Appeal, p. 167.)

3. A default certificate was filed by Crookston on November 17, 1992. (Record on Appeal, p. 171 and Addendum A.)

4. A motion for default judgment was filed by Crookston on January 20, 1993. (Record on Appeal, pp. 178-80.)

5. Hacking filed an answer to the petition on February 18, 1993. The answer was filed prior to any default judgment being entered, but it was also filed without permission of the court. (Record on Appeal, pp. 187-88.) Hacking also filed a motion to set aside the default judgment. (Record on Appeal, p. 181 and Addendum A.) These documents were filed in behalf of Hacking by Richard S. Clark, II, ("Clark") an attorney from Provo.

6. Counsel for Crookston stated, in one of his affidavits, that he had waited a significant period before filing the default certificate because of representations made by Clark that an answer was forthcoming. (Record on Appeal, pp. 173-77.) Clark, in his affidavit, stated that it took some time to file an answer due, in part, to problems in keeping in contact with Hacking. (Record on Appeal, pp. 185-86.)

7. Crookston filed a memorandum in opposition to the motion to set aside the default judgment on March 15, 1993. (Record on Appeal, pp. 207-14.) In a further affidavit, counsel for Crookston detailed the problems he faced in getting Clark to take any action.

(Record on Appeal, pp. 192-97.)

8. In February, 1993, shortly after Clark filed an answer and other documents in behalf of Hacking, he was suspended from the practice of law. Clark apparently did not immediately notify Hacking or the court of that development.

9. The motions filed by both Crookston and Hacking were initially set for hearing in July, 1993, but the hearing was continued because it had been learned that Clark was suspended. (Record on Appeal, pp. 216-17.) Clark did not officially withdraw from the case until faxing a notice of withdrawal to the court on August 5, 1993. (Record on Appeal, p. 219.)

10. It appears that Clark did not inform Hacking, who was living in Oregon, of the events taking place in the case. Hacking maintains that she knew little about what was happening until receiving a notice of a hearing for November 18, 1993. It was only after that notice was received that Hacking discovered that Clark had been suspended and was no longer representing her. (Record on Appeal, pp. 239-41.)

11. The notice of hearing indicated that the pending motions previously scheduled for July 1993, were to be heard on November 18, 1993. (Record on Appeal, pp. 229-30.)

12. Hacking obtained the assistance of Utah Legal Services to represent her just prior to the November hearing. (Record on Appeal, p. 231.)

13. The hearing was set before the commissioner who ruled in favor of Crookston. The commissioner denied the motion to set

aside the default certificate and granted Crookston the relief prayed for in the motion for default judgment. (Record on Appeal, pp. 244-48, and November 18, 1993 Transcript, pp. 333-342 and Addendum B.) The effect of the order was to change the custody of the three minor children from Hacking to Crookston, and to grant Crookston child support and attorney fees, without any evidentiary hearing.

14. On November 26, 1993 Crookston filed an objection to the recommendation of commissioner. (Record on Appeal, pp. 250-52.) The objection was heard by the district court judge on February 22, 1994. The district court judge overruled and denied Hacking's objection. (Record on Appeal, pp. 262-63 and Addendum B.) Hacking has now appealed that order. (Record on Appeal, pp. 288-89.)

SUMMARY OF ARGUMENT

The trial court erred in changing the custody of the three minor children from Hacking to Crookston; in assessing Hacking a child support obligation based on minimum wage; and in assessing attorney fees, simply on the basis of the allegations raised in the petition and Hacking's failure to timely file an answer. The court should have set aside the default judgment; taken evidence on whether there had been a substantial change in circumstance justifying a change of custody; determine if it would be in the best interest of the minor children to change custody; and issued findings of fact and conclusion of law in support of the decision

reached.

ARGUMENT

Hacking takes the position that in determining whether to change custody of minor children from one party to another, the trial court must do the following:

1. Determine if there has been a substantial change of circumstance justifying a change of custody.

2. Determine if it would be in the best interest of the minor children to make a change.

3. If it determines that both conditions have been met, issue specific findings of fact and conclusions of law along with the order changing custody so that one may determine the basis on which the court reached its conclusions.

In Soltanieh v. King, 826 P.2d 1076, 1079 (Utah App. 1992) the Utah Court of Appeal stated:

Before modifying a custody or visitation order, a trial court must find there has been a material change in the circumstances upon which the earlier order was based, and a change in custody is in the best interests of the child. Becker v. Becker, 694 P.2d 608, 611 (Utah 1984); Hogge v. Hogge, 649 P.2d 51, 54 (Utah 1982). Where an original custody determination involved a thorough examination into the best interests of the child, a court should rigidly apply the two-step change in circumstances test in Hogge. Hardy v. Hardy, 776 P.2d 917, 922 (Utah App. 1989). However, when the custody award is premised on a default decree, the trial court has not made a thorough examination of the child's best interests. Therefore, the trial court may receive evidence as to the best interests of the child when determining whether to reopen the custody issue. See Cummings v. Cummings,

821 P.2d 472, 474 (Utah App. 1991). However, when the trial court does not apply the two-step process, "it still must conduct a separate analysis and make separate findings as to substantial change in circumstances." Id.

Further, in Sukin v. Sukin, 842 P.2d 922, 923-24 (Utah App. 1992) the Utah Court of Appeals pointed out the importance of issuing findings of fact and conclusions of law in saying:

Trial courts are given broad discretion in making child custody awards. Maughan v. Maughan, 770 P.2d 156, 159 (Utah App. 1989). The trial court's decision regarding custody will not be upset "absent a showing of an abuse of discretion or manifest injustice." Id. at 159. "However, to ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988). The findings must be sufficiently detailed "to ensure that the trial court's discretionary determination was rationally based." Martinez v. Martinez, 728 P.2d 994, 994 (Utah 1986). "Specificity of findings is particularly important in custody determinations. This is so because the issues involved are highly fact sensitive." Roberts v. Roberts, 835 P.2d 193, 195 (Utah App. 1992).

In this case the court changed the custody of the children solely on the basis of the allegations raised in Crookston's petition and Hacking's failure to timely answer it. The court took no evidence on whether there had been a substantial change of circumstance or if it would be in the best interest of the minor children to have their custody changed from one parent to another. No findings of fact or conclusions of law were issued.

It is submitted that there are few decisions more important than determining the custody of minor children, and that the court

should have set aside the default certificate, taken evidence on the issues, made a decision, and issued its findings of fact and conclusions of law in support of its order. The most important consideration is the best interest of the children, not whether a pleading has been timely filed. (See Utah Code Ann. § 30-3-10 (1989).)

There is no question that the allegations raised by Crookston in his petition are serious, but they are only allegations. Also important is the old legal maxim that one cannot fry a pancake so thin that it does not have two sides. Hacking was never given the opportunity to present her side of the story.

This case was in limbo for a long time and Hacking and her former counsel may have contributed to that delay. Nonetheless, Crookston had the opportunity to set the matter for trial after Hacking filed an answer after the default certificate had been filed, but before the default judgment had been granted. It is highly unlikely that the trial court would have denied a request for trial setting though the answer was filed without first obtaining permission from the court. Instead, Crookston chose to pursue a default judgment for the next nine months. Taking that approach prevented any evidence from being presented on the best interest of the children.

The court not only determined that custody should be changed from Hacking to Crookston, but also that Hacking should begin paying child support on the basis that she was capable of earning a minimum wage. Utah Code Ann. § 78-45-7.5(7)(a) (1992), provides

that:

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.

In this case Hacking has never stipulated to an imputed income and no hearing has ever been held to determine if income should be imputed to her. The court simply imputed a minimum wage to Hacking on the basis of the allegations in the petition and her failure to timely file an answer.

The court also awarded Crookston attorney fees on the basis of the allegations in the petition and Hacking's failure to timely file an answer. Utah Code Ann. § 30-3-3 (1989) allows for the court to award attorney fees in child custody cases. The problem again is that the award was made without the benefit of an evidentiary hearing. If the court had allowed evidence to be taken on the custody issue, it would have been in a position to evaluate the child support and attorney fees allegations.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision of the trial court to grant Crookston a default judgment against Hacking solely based on the allegations in the petition and her failure to timely file an answer was an abuse of discretion and should be reversed. The default judgment should be set aside and the trial court instructed to take evidence on whether there has been a substantial change in circumstances justifying a change of custody and whether it would be in the best

interest of the children to make a change. The Court should also determine what, if any, child support and attorney fees should be awarded.

CERTIFICATE OF DELIVERY

I hereby certify that on this 31 day of July, 1994, I delivered two true and correct copy of the BRIEF OF APPELLANT REBECCA ANN BATIO CROOKSTON HACKING: to Willard Bishop, Attorney for Appellee, 36 North 300 West, P.O. Box 279, Cedar City, Utah 84721-0279.

A handwritten signature in cursive script, appearing to read "Stephen J. Galt", is written over a horizontal line.

ADDENDUM A

WILLARD R. BISHOP, P. C.
Willard R. Bishop - #0344
Attorney for Plaintiff
P. O. Box 279
Cedar City, UT 84721-0279
Telephone: (801) 586-9483

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

MICHAEL EUGENE CROOKSTON,)	
)	
Plaintiff,)	
	)	VERIFIED PETITION TO MODIFY
vs.	)	DECREE OF DIVORCE
)	
REBECCA ANN BATIO CROOKSTON,	)	Civil No. 884502229DA
)	
Defendant.	)	<i>#92088003</i>
)	

COMES NOW PLAINTIFF, who represents and petitions the Court as follows:

1. On or about September 13, 1990, the above-entitled Court executed its Decree of Divorce in this action.

2. Among other things, the Decree of Divorce awarded Defendant the care, custody, and control of the parties' minor children, being Brian Michael Crookston, Andrea Christine Crookston, and Kimberly Denece Crookston. Plaintiff was awarded reasonable rights of visitation, specified in detail in the Decree of Divorce.

3. The award of custody and visitation was accomplished by agreement, pursuant to a certain "Stipulation for Settlement". The custody and visitation questions in the case were not litigated.

4. Since the entry of the Decree of Divorce, circumstances with respect to the custody, visitation, and support of the children have changed substantially, as follows:

A. Defendant interfered with Plaintiff's rights of visitation with the children, by falsely informing Plaintiff of where she and the children were living, and thereafter, by leaving the State of Utah and not providing Plaintiff with the address of the children.

B. Defendant has wrongfully subjected the parties' minor children to numerous residents and school changes, as follows:

(1) At the time of entry of the Decree of Divorce, Defendant and the children were living with Defendant's mother in Provo, Utah. The children were attending Joaquin School in Provo.

(2) On or about October 31, 1990, Defendant absconded from the State of Utah, taking the children with her, and moved to Tacoma where she resided with one Scott Hacking, to whom she was not married. The children, of course, were required to change schools also.

(3) In or about the month of February of 1991, Defendant moved to Coos' Bay, Oregon, where she lived with either her mother or her grandmother. The children, of course, were once again required to change schools.

(4) In or about the month of March of 1991, Plaintiff returned to Provo to yet another residence, enrolling the children once again in the Joaquin School.

At this time, she lived with a friend by the name of "Cindy".

(5) In or about May of 1991, Defendant moved to yet another residence in Provo where she resided once again with Scott Hacking. This move required that the children be enrolled in Timpanogos Elementary School.

(6) At or about Thanksgiving in November of 1991, Defendant moved to 2537 South Lakecrest, #2 (1810 West), West Valley City, Utah 84120, where she lived once again with Scott Hacking. The children were required to change to the Redwood Elementary School.

(7) In or about early March of 1992, Defendant indicated her desire to move back to Coos' Bay, Oregon, which would require yet another change of residence and schools for the children.

(8) On or about March 16, 1992, Defendant absconded from the State of Utah, leaving no forwarding address and taking the children with her.

C. Prior to the entry of the Decree of Divorce, Defendant's housekeeping habits were acceptable. Since then, however, those habits have deteriorated to the point that the children are not kept clean and their clothing and environment emit bad odors.

D. On or about March 4, 1992, Plaintiff remarried. He now resides in a home purchased by him at 8845 South 630 East, Sandy, Utah 84070, and can provide the children with a living

environment superior to that of Defendant, and can provide the children with a stable, two-parent home, where they will not be required to make constant moves and constant changes of school.

5. The change of custody from Defendant to Plaintiff is in the best interest of the parties' minor children.

6. Although it was anticipated at the time the Decree of Divorce was entered that Defendant would obtain employment, she has remained unemployed. Insofar as Plaintiff knows, Defendant receives aid from AFDC. Scott Hacking, with whom she is living without benefit of clergy, receives some form of disability payments.

WHEREFORE, Plaintiff prays as follows:

1. That the Decree of Divorce in this matter be modified as follows:

A. To change custody of the parties' minor children from Defendant to Plaintiff, subject to rights of reasonable visitation in Defendant.

B. To provide for child support to be paid by Defendant to Plaintiff, in accordance with the applicable guidelines.

2. That Plaintiff be awarded his attorney fees, costs of court, and such other and further relief as the Court deems appropriate under the circumstances of this case.

3. Such other and further relief as the Court deems proper.

DATED this 20th day of March, 1992.


MICHAEL EUGENE CROOKSTON

32 NOV 17 AM 11 14
 WASHINGTON COUNTY
 BY _____

STATE OF UTAH

Civil No. 884502229DA

THE STATE OF UTAH TO DEFENDANT REBECCA ANN BATIO CROOKSTON:

In this action, Defendant REBECCA ANN BATIO CROOKSTON having been regularly served with process, and having failed to appear and answer Plaintiff's "Petition to Modify Decree of Divorce" on file herein, and the time allowed by law for answering having expired, the default of said REBECCA ANN BATIO CROOKSTON, in the premises is hereby duly entered according to law.

WITNESS THE CLERK OF SAID COURT, with the seal thereof attached, this

17th day of November, 1992.

~~CLERK OR DEPUTY CLERK~~

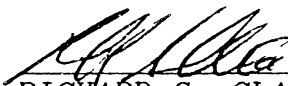
RICHARD S. CLARK II.
Attorney at Law
1805 North Oakridge Lane
Provo, Utah 84604
(801) 377-3820

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

MICHAEL EUGENE CROOKSTON,)	
Plaintiff,	)	MOTION TO SET ASIDE DEFAULT JUDGMENT
vs.)	
REBECCA ANN BATIO CROOKSTON	)	Civil No. 884502229DA
Defendant.)	

COMES NOW DEFENDANT, by and through her attorney Richard S. Clark II. and motions the court to set aside the default judgment pursuant to rule 60 (b) for the reasons set forth in the memorandum and affidavit of counsel attached hereto.


DATED this 12 day of ~~January~~ February, 1993.



RICHARD S. CLARK II
Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true and correct copy of the within and foregoing document to Willard R. Bishop at P.O. Box 279 Cedar City, Utah 84721-0279.



ADDENDUM B

1 ST. GEORGE, UTAH; THURSDAY, NOVEMBER 18, 1993

2 -oOo-

3
4 THE COURT: 884502229, Michael Eugene Crookston
5 versus Rebecca Ann Batio.

6 Mr. Julien?

7 MR. BISHOP: I haven't seen him this morning,
8 Your Honor.

9 THE COURT: We're having tremendous trouble
10 getting this matter resolved, aren't we?

11 MR. BISHOP: I followed the Court's
12 instructions. I'm here, and I wish to proceed.

13 THE COURT: He has filed a motion for
14 continuance.

15 Were you given a copy of that?

16 MR. BISHOP: I got a copy, yes. And I strongly
17 object to it.

18 THE COURT: I do too. Absent some indication in
19 writing from a trained medical person indicating that she
20 can't travel, I -- I don't see any reason to perpetuate
21 this nonsense.

22 MR. BISHOP: No.

23 THE COURT: Mr. Julien, I have your motion to
24 continue, and I was just advising counsel this has just
25 been what appears to me a delaying action on the part of

1 the defendant.

2 MR. JULIEN: Well, my motion for continuance was
3 only a -- sort of a lukewarm motion. I only said that I
4 was unprepared to respond to allegations in the --

5 THE COURT: You know, something in -- in writing
6 from a trained medical person saying she can't travel might
7 have bent the Court a little bit. But just her saying,
8 "I'm too sick to travel" is not going to cut it.

9 MR. JULIEN: All right.

10 MR. BISHOP: Fine. I'd like to move forward if
11 I can, then, Your Honor.

12 There are presently --

13 THE COURT: Can I just sign this? Will that
14 solve it?

15 MR. BISHOP: Sure. You bet.

16 THE COURT: This is an order overruling and
17 denying the motion to set aside default judgment.

18 MR. JULIEN: Okay. I don't get to say -- say my
19 position in this case?

20 THE COURT: Yeah. You can tell me your
21 position.

22 MR. JULIEN: All right. I'd like to for the
23 record.

24 THE COURT: I haven't signed it yet. I just
25 asked if that would decide the problem of addressing each

1 of these issues that have already been addressed.

2 MR. BISHOP: Yes, it would.

3 THE COURT: Okay.

4 MR. JULIEN: Okay. I have filed a supplemental
5 memorandum -- I suppose the Court has that -- outlining the
6 background as I see it in my brief appearance in this
7 case.

8 The way it looks to me is that you have a
9 petition to modify the decree of divorce filed by
10 Plaintiff. I have it on May 4th, 1992. Then you have
11 service upon Miss Crookston shortly thereafter.

12 Mrs. Crookston does not timely file an Answer,
13 and so a default certificate was filed November 17th, 1992,
14 by Mr. Bishop, and then you have Mr. Bishop filing a motion
15 for default judgment on January 20th, 1993. And then you
16 have after that an Answer filed by Mrs. Crookston on
17 February 18th, 1993, by her attorney, Mr. Clark, and then
18 you also have a -- a motion to set aside the default
19 judgment filed on that same day.

20 So the way I look at it is as of February 20th,
21 1993, you've got the petition, you've got the Answer and no
22 default judgment. So it would seem to me at that point in
23 time, you would think, "Okay. Here's the petition; here's
24 the Answer. No default judgment. Let's go ahead with the
25 trial."

1 THE COURT: Yes.

2 MR. JULIEN: But Mr. Bishop or his -- probably
3 at the insistence of his counsel -- or of his client, files
4 a memorandum in opposition to setting aside the default
5 judgment. I'm sorry. A memorandum opposed to the motion
6 to set aside the default judgment. And that thing has been
7 pursued now for nine months.

8 And so it appears to me that what's happened
9 here, we have the plaintiff doing everything he can to try
10 and get custody of the minor children changed from
11 Mrs. Crookston to him on the basis of a default
12 certificate. Had there simply been a motion to proceed to
13 trial, this case may have been over by now.

14 And -- and the concern I have is we are talking
15 here about the custody of children. Of what greater issue
16 can there be than that? And where's the logic in changing
17 custody from one person to another on the basis of
18 allegations simply raised in a petition?

19 THE COURT: I agree with you, Mr. Julien, but we
20 can't get your client into a court of law. And we haven't
21 been able to for two years.

22 MR. JULIEN: Okay. I can't respond to that,
23 because I wasn't present.

24 THE COURT: No. Obviously she doesn't value the
25 custody of her children as much as you do, because all

1 she's done is stall.

2 I agree that this issue should be tried on the
3 merits to see what is in the best interests of the
4 children. But if she won't come to court, we can't do it.
5 And if she doesn't come to court, we could have a trial,
6 and they'd win anyway.

7 MR. JULIEN: But there's never been -- been an
8 actual trial setting that I'm aware of. Of course I'm not
9 aware of much in this case.

10 THE COURT: The -- the technical difficulty I
11 have, Mr. Bishop, is that -- is that judgment has never
12 been entered.

13 MR. BISHOP: That's right. That's true.

14 THE COURT: So how could we set aside something
15 that's never been entered?

16 MR. BISHOP: That's right. That's their motion
17 to set aside the default judgment.

18 Probably, as Mr. Julien has pointed out, what
19 Mr. Clark should have done, as he indicated to me he would
20 do on the telephone and never did do, was to file a motion
21 to set aside the default. That was never done.

22 I'd like to take a few minutes if I could to lay
23 out some background. And Mr. Julien hasn't been in this
24 case from day one, and so he doesn't know a lot of --

25 THE COURT: We have, haven't we?

1 MR. BISHOP: Yes, we have.

2 Back in 1988, Mrs. Crookston took the kids and
3 ran. Disappeared. She didn't tell Mr. Crookston where she
4 was going. At that time, a Complaint was filed. There was
5 an Order to Show Cause issued. We were here, and we had a
6 hearing on the 21st of December of 1988 on the issue of
7 visitation. Mrs. Crookston came in, and she made some
8 rather serious allegations of physical abuse of the
9 children. And we had a very extended hearing with detailed
10 evidence, and as a result, the Court made some very
11 specific findings.

12 In fact, that never occurred. What she was
13 trying to do was she was trying to take normal family
14 difficulties and claim that they resulted in physical
15 abuse. And as a result of that, Mr. Crookston was -- did
16 get some visitation.

17 Then at that time, Utah Legal Services was
18 involved, but it was Susan White that was representing
19 Mrs. Crookston at that time.

20 The matter proceeded with some interrogatories,
21 and then the parties tried to reconcile. They moved back
22 in together, and they were in together until, oh, I guess
23 early 1990. There was another separation, and at that
24 time, the matter did proceed to a divorce, and there was
25 some visitation awarded.

1 Now, the decree of divorce was entered in
2 September of 1990. Within a month of the entry of the
3 decree of divorce, Mrs. Crookston took the kids and ran
4 again. Disappeared. Left no notice as to where she was
5 going. No address where -- where he would be able to
6 contact the kids. The record shows that at or about the
7 time of the divorce, that she was making statements to
8 Mr. Crookston "I and the children should" -- "would be
9 better off if we could go and start a new life all without
10 any contact from you." And that's what she tried to do.
11 She tried to take off and cut off all contact of
12 Mr. Crookston with the children.

13 There was a petition to modify filed in early
14 1991, because of the fact that she was interfering with the
15 visitation rights by running and not letting him know
16 where -- where she was with the children. We couldn't find
17 her address. We had to come to court. We had to get the
18 Court to authorize us to issue a subpoena duces tecum to
19 the Offices of Family Services so we could obtain an
20 address and make contact. And at that point, after we made
21 contact, believe it or not, she moved back from Washington
22 where she had disappeared and moved back to Provo. And
23 that petition was at that point rather dropped, because
24 they were able then to have contact and have visitation.

25 Well, things looked to be all right until she

1 disappeared again. This time in 1992. Didn't leave any
2 address. Mr. Crookston was able to track her down through
3 a search that he made, and we filed the second petition.

4 But what we have is a continual effort on her
5 part to avoid the Court's order; to avoid visitation; to do
6 whatever she can to terminate the relationship between that
7 father and his children.

8 Now, she was served personally with this
9 petition. If you'll look, there have been no less than
10 five different times since this petition was filed that she
11 was given notice in writing or her attorney was given
12 notice in writing to get an Answer filed, or if not, her
13 default would be entered. It never happened.

14 Now, the talk about the -- that an Answer has
15 now been filed is not correct. There's an Answer in the
16 file, but it can't have been filed, because the default was
17 entered first. In order to file an Answer, now she has to
18 obtain permission of the Court. That has never been done.

19 Given these circumstances --

20 THE COURT: Then there's the question of the
21 validity of the Answer because of the status of her
22 attorney?

23 MR. BISHOP: Yes.

24 MR. JULIEN: I -- I did some checking on that.
25 Mr. Clark was apparently suspended in February of '93. The

1 Answer was filed in February of '93. I'm -- I'm assuming
2 that he filed the Answer just prior to, but I don't know.

3 MR. BISHOP: So that's the situation. We think
4 that under the circumstances of this case, that we are
5 entitled to judgment.

6 MR. JULIEN: I just have one other -- one other
7 comment, and then I'm done. I -- I agree. If -- if
8 everything Mr. Bishop says is true, we certainly have a
9 substantial change in circumstance. But can you say for
10 certain that it's still in the best interest of the
11 children to transport -- for them -- from the plaintiff to
12 the -- from the defendant -- from the plaintiff to the
13 defendant or from the defendant to the plaintiff -- what am
14 I? The defendant or the plaintiff?

15 THE COURT: A default is a default.

16 MR. BISHOP: You're the defendant.

17 MR. JULIEN: Okay. Sorry.

18 THE COURT: A default is a default.

19 MR. JULIEN: Well, you've got a default
20 certificate. If that's all you need, why do you have to
21 file a default judgment?

22 THE COURT: We need to change this order,
23 Mr. Bishop, to say motion to set aside default, not default
24 judgment. And then --

25 MR. BISHOP: Okay. I used that because that was

1 the term of his motion.

2 THE COURT: And then you may file your judgment.

3 MR. BISHOP: Thank you. I'll do that.

4 THE COURT: Wait a minute. You have your
5 judgment attached.

6 MR. BISHOP: Yes. I provided one.

7 THE COURT: Okay.

8 MR. BISHOP: All right.

9 THE COURT: Thank you.

10 MR. JULIEN: Now, is that the one we're going to
11 be -- are you -- you're signing -- are you signing -- just
12 in case there were any appeal taken, is there, then, a
13 judgment being signed by the Court today?

14 THE COURT: Yes.

15 MR. JULIEN: Okay. All right. Thank you.

16 (Whereupon, the proceedings in the
17 above-entitled matter were concluded.)

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CLERK OF COURT

BY _____

WILLARD R. BISHOP, P. C.

Willard R. Bishop - #0344

Attorney for Plaintiff

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Telephone: (801) 586-9483

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

MICHAEL EUGENE CROOKSTON,

Plaintiff,

vs.

REBECCA ANN BATIO CROOKSTON,

Defendant.

**ORDER OVERRULING AND DENYING
MOTION TO SET ASIDE DEFAULT**

JUDGMENT *msl*

Civil No. 884502229DA

Honorable Marlynn B. Lema

This matter having come before the Court on July 15, 1993, pursuant to Plaintiff's "Notice of Hearing", and Plaintiff having appeared by and through his attorney of record, Mr. Willard R. Bishop, and Defendant not having appeared personally, but the Commissioner having been contacted by attorney for Defendant, Mr. Richard S. Clark, II, during which contact counsel for Defendant informed the Court that he could not represent Defendant and would forthwith file a "Notice of Withdrawal of Counsel", and the Court having continued all pending motions based upon the representation that such a notice of withdrawal would be filed, and no such notice of withdrawal having been

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filed, and good cause appearing, the Court having considered the files and records of the case,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's "Motion to Set Aside Default Judgment" should be and it hereby is, overruled and denied.

RECOMMENDED this 18th day of ~~August~~ *November*, 1993.

BY THE COURT:


MARLYNN B. LEMA
Domestic Relations Commissioner

1993 JUL 15 PM 1 09

BY *W.R.B.*

WILLARD R. BISHOP, P. C.
Willard R. Bishop - #0344
Attorney for Plaintiff
P. O. Box 279
Cedar City, UT 84721-0279
Telephone: (801) 586-9483

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

_____)	
MICHAEL EUGENE CROOKSTON,)	
)	
Plaintiff,	)	DEFAULT JUDGMENT
)	
vs.)	
)	
REBECCA ANN BATIO CROOKSTON,	)	Civil No. 884502229DA
	)	Honorable Marlynn B. Lema
Defendant.)	
_____)	

This matter came on regularly for hearing before the Honorable Marlynn B. Lema, Domestic Relations Commissioner, on July 15, 1993, pursuant to Plaintiff's "Motion for Default Judgment", brought up by Plaintiff's "Notice of Hearing". Plaintiff MICHAEL EUGENE CROOKSTON did not appear personally, but was represented by his attorney of record, Mr. Willard R. Bishop, and Defendant REBECCA ANN BATIO CROOKSTON did not appear personally, and was not represented by counsel. The Court had been contacted by attorney for Defendant, Mr. Richard S. Clark, II, who indicated that he could not represent Defendant and, as a result, would forthwith file a "Notice of Withdrawal of Counsel". Over the objections of Plaintiff's attorney, the Court continued hearing in

connection with Plaintiff's "Motion for Default". The matter now having been brought back before the Court by Willard R. Bishop, Plaintiff's counsel, and it appearing that despite the representations of Richard S. Clark, II, that he would file a notice of withdrawal of counsel, no such notice of withdrawal has been filed, and good cause appearing,

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

1. That default judgment should be and hereby is, entered in favor of Plaintiff Michael Eugene Crookston and against Defendant Rebecca Ann Batio Crookston, in connection with Plaintiff's "Verified Petition to Modify Decree of Divorce" on file in this action.

2. That the care, custody, and control of Brian Michael Crookston, Andrea Christine Crookston, and Kimberly Denece Crookston, the parties' minor children, should be and it hereby is, awarded to Plaintiff Michael Eugene Crookston, subject to rights of reasonable visitation in Defendant.

3. That Defendant Rebecca Ann Batio Crookston should be and she hereby is, required to pay to Plaintiff, reasonable child support in accordance with the applicable guidelines, based upon Plaintiff's current gross income of \$2,464.76 per month, and imputed income to Defendant at the minimal wage rate of \$4.25 per hour, 40 hours per week, 4.3 weeks per month, for an imputed wage of Defendant in the amount of \$731.00

per month. Upon presentation of a completed, "Child Support Obligation Worksheet (Sole Custody)", using three children and the wages stated, Plaintiff shall be entitled to have the Court execute an "Order of Child Support" in the appropriate amount.

4. That Plaintiff should be and he hereby is, awarded judgment for his reasonable attorney fees and costs of Court, \$361.98 attorney fees as shown by the Affidavit of Willard R. Bishop, and \$55.00 court costs, totaling \$416.98; together with interest upon the declining balance of said judgment at the judgment rate of 5.72% per annum, from and after the execution of this document until paid in full.

RECOMMENDED this 18th day of ~~August~~ ^{November}, 1993.

BY THE COURT:


MARLYNN B. LEWIS
Domestic Relations Commissioner


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Willard R. Bishop - #0344
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IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

MICHAEL EUGENE CROOKSTON)	
)	
Plaintiff,	)	ORDER OVERRULING AND DENYING
	)	OBJECTION TO RECOMMENDATION
vs.	)	OF COMMISSIONER
)	
REBECCA ANN BATIO CROOKSTON,	)	Civil No 894502229DA
	)	Honorable James L. Shumate
Defendant.)	
)	

The above-entitled matter came on regularly for hearing before the Court on Tuesday, February 22, 1994, pursuant to Defendant Rebecca Ann Batio Crookston's "Objection to Recommendation of Commissioner". Defendant Rebecca Ann Batio Crookston did not appear personally, but was represented by her attorney of record, Mr. Stephen W. Julien, Esq. of Utah Legal Services, Inc. Plaintiff Michael Eugene Crookston appeared personally and was represented by his attorney of record, Mr. Willard R. Bishop. Argument was had. The Court having reviewed the files and records of the case, having heard oral argument and having determined that the files and records of the case show the consistent color of the efforts of Defendant to frustrate Plaintiff's

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parental rights insofar as the children of the parties are concerned, and having determined that the decision of the Honorable Marlynn B. Lema, Domestic Relations Commissioner, insofar as it pertains to the "Order Overruling and Denying Motion to Set Aside Default" and the "Default Judgment" entered in this matter on November 18, 1993, is correct in all respects, from both procedural and substantive standpoints, and good cause appearing,

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

1. That the "Objection to Recommendation of Commissioner" filed by Defendant Rebecca Ann Batio Crookston should be and it hereby is, overruled and denied.

2. That the "Order and Overruling Denying Motion to Set Aside Default" and the "Default Judgment" executed by the Honorable Marlynn B. Lema, Domestic Relations Commissioner, November 18, 1993, and entered on the same date, should be and hereby are, adopted as the order and decision of the Court; provided, however, that

pursuant to Rule 6-401(4), Utah Code of Judicial Administration, said decisions have been the order of the Court from the time of their entry, not having been modified.

DATED this 7 day of Mar ~~February~~, 1994.

BY THE COURT:


JAMES L. SHUMATE, District Judge

APPROVED AS TO FORM.

WILLARD R. BISHOP
Attorney for Plaintiff

STEPHEN W. JULIEN
Attorney for Defendant

ADDENDUM C

30-3-1. Procedure — Residence — Grounds.

NOTES TO DECISIONS

ANALYSIS

irreconcilable differences.
jurisdiction, district courts

Irreconcilable differences.

Because Subsection (3)(h) does not set forth a specific fault of the defendant, in contrast to the other subsections, it can be inferred that subsection (3)(h), unlike the other provisions, is intended to be a no-fault provision. There-

fore, no fault need be proven to apply Subsection (3)(h). *Haumont v. Haumont*, 793 P.2d 421 (Utah Ct. App. 1990).

Jurisdiction, district courts.

When purported marriage is void ab initio under § 30-1-2, a trial court lacks subject matter jurisdiction to enter a divorce decree. *Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Brigham Young Law Review. — No-Fault divorce and the Divorce Conundrum, 1991 Y.U.L. Rev. 79.

A.L.R. — Insanity as defense to divorce or separation suit — post-1950 cases, 67 A.L.R.4th 277.

Divorce and separation — effect of court order prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 A.L.R.4th 929.

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 in the claim or defense. The court, in its discretion, may award no fees or reduced fees against a party if the court finds the party is impecunious or errs 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.

History: C. 1953, 30-3-3, enacted by L. ch. 137, § 1.

Repeals and Reenactments. — Laws 1993, ch. 2, § 10 repeals former § 30-3-3, Utah Annotated 1953, allowing a court to order

either party to pay for the separate support and maintenance of the adverse party and the children, and enacts the present section, effective May 3, 1993.

30-3-7. When decree becomes absolute.

(1) The decree of divorce becomes absolute:

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

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

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

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

History: L. 1909, ch. 109, § 2; 1913, ch. 49, § 1; C.L. 1917, § 3002; R.S. 1933 & C. 1943, 40-3-7; L. 1957, ch. 55, § 1; 1969, ch. 72, § 5; 1985, ch. 33, § 1; 1992, ch. 98, § 2.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added the sub-

section designations and made related stylistic changes and, in Subsection (1)(a), added the language at the end of the subsection beginning with "if both the parties who have a child or children."

30-3-8. Remarriage — When unlawful.

NOTES TO DECISIONS

Cited in Van Der Stappen v. Van Der Stappen, 815 P.2d 1335 (Utah Ct. App. 1991).

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

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

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

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall

take that evidence into consideration in determining whether to award custody to the other parent

History: L. 1903, ch. 82, § 1; C.L. 1907, § 1212x; C.L. 1917, § 3004; R.S. 1933 & C. 1943, 40-3-10; L. 1969, ch. 72, § 7; 1977, ch. 122, § 5; 1988, ch. 106, § 1; 1993, ch. 131, § 1.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, added Subsection (3)

NOTES TO DECISIONS

ANALYSIS

Award proper
Change of custody
— Burden of proof
Children's choice
Custody evaluation reports
Factors in determining best interests of child
— Moral character
— Sexual abuse
Findings required
Inadequate findings
Jurisdiction
Modification
Primary caretaker
Cited

Award proper.

Award of custody of three children, ages 14, 8, and 6, to the father was affirmed, where both parents were found to be well qualified for custody, but the oldest child wished to live with the father and the younger children wished to remain with their older sibling *Moon v Moon*, 790 P 2d 52 (Utah Ct App 1990)

Change of custody.

In change-of-custody cases involving a nonlitigated custody decree, a trial court, in applying the changed-circumstances test, should receive evidence on changed circumstances and that evidence may include evidence that pertains to the best interests of the child. In ruling, the trial court should give stability and continuity the weight that is appropriate in light of the duration of the existing custodial relationship and the general welfare of the child. The findings of fact should show that the court considered stability as a factor in the custody decision and indicate the weight the court gave it. *Elmer v Elmer*, 776 P 2d 599 (Utah 1989)

Courts should exercise caution in disturbing custody awards during the early reconstructive months after a divorce. It is ordinarily best to let the dust settle for a time, lest temporary factors incident to readjustment be mistaken for material changes. *Thorpe v Jensen*, 817 P 2d 387 (Utah Ct App 1991)

Circumstances of the noncustodial parent ordinarily do not bear upon the issue of whether a change of custody is appropriate. Such fac-

tors, aside from exceptional circumstances, are not relevant to the court's inquiry. *Thorpe v Jensen*, 817 P 2d 387 (Utah Ct App 1991)

The fact that the mother had been generous in sharing physical custody with the father was not a ground to change physical custody, if anything, it supported leaving primary physical custody with the mother, as it showed that she had lived up to the responsibilities of a custodial parent. *Crouse v Crouse*, 817 P 2d 836 (Utah Ct App 1991)

The fact that the children have started school does not indicate a substantial change in circumstances because only changes not contemplated by the parties at the time of divorce are relevant to the substantial change test. *Crouse v Crouse*, 817 P 2d 836 (Utah Ct App 1991)

— Burden of proof.

The burden of proof lies with the party seeking the change of custody. That party must first show that there has been a change in circumstances upon which the original custody award was based that materially affects the custodial parent's parenting ability or the functioning of the custodial relationship and that justifies reopening the custody question. If a substantial change of circumstances can be shown, the party must then show that the requested change is in the best interest of the children. *Thorpe v Jensen*, 817 P 2d 387 (Utah Ct App 1991)

Children's choice.

During the course of trial on a noncustodial parent's petition for modification of a divorce decree, seeking permanent custody of the children, it was inappropriate for the court to place as much reliance as it did on an eleven-year-old boy's statement (made to the judge alone in chambers without counsel present) that he preferred to live with his father, the petitioner. *Cummings v Cummings*, 175 Utah Adv Rep 23 (Ct App 1991)

Custody evaluation reports.

Rule 4-903(2), Utah Code of Judicial Administration, permits an evaluator to submit a written report to the court, thereby contemplating the use of such a report by a trial court in child custody determinations. *Linam v King*, 804 P 2d 1235 (Utah Ct App 1991)

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-3. Court of Appeals jurisdiction.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

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).