

1994

Janet Bowcutt v. Don Leslie Bowcutt : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Rosemond G. Blakelock; Attorney for Appellee.

Don Leslie Bowcut; Appellant, Acting pro se.

Ron Wilkinson; Guardian Ad Litem for minor child David Bowcutt.

Recommended Citation

Brief of Appellee, *Bowcut v. Bowcut*, No. 940361 (Utah Court of Appeals, 1994).

https://digitalcommons.law.byu.edu/byu_ca1/6007

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

| | | |
|------------------------------|---|--------------------------|
| | | UTAH |
| | | DOCUMENT |
| IN THE UTAH COURT OF APPEALS | | 50 |
| JANET BOWCUTT, | : | .A10 |
| Plaintiff and Appellee | : | DOCKET NO. <u>940361</u> |
| | : | |
| v. | : | CASE NO. 940361 |
| | : | |
| DON LESLIE BOWCUTT, | : | PRIORITY 15 |
| Defendant and Appellant | : | |
| | : | |

BRIEF OF APPELLEE

APPEAL FROM AN ORDER ON RULING: CHILD SUPPORT,
IN THE FOURTH DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE STEVEN L.
HANSEN

ROSEMOND BLAKELOCK #6183
Blakelock and Stringer
37 East Center, 2nd Floor
Provo, Utah 84606

Attorney for Appellee

DON LESLIE BOWCUTT
1130 West State Road
Pleasant Grove Utah 84602
Appellant, Acting pro se

RON WILKINSON
11309 South Orem Blvd.
Orem, Utah 84057
Guardian Ad Litem for minor
child David Bowcutt

SEP 17 1994

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JANET BOWCUTT,
Plaintiff and Appellee

v.

DON LESLIE BOWCUTT,
Defendant and Appellant

CASE NO. 940361

PRIORITY 15

BRIEF OF APPELLEE

APPEAL FROM AN ORDER ON RULING: CHILD SUPPORT,
IN THE FOURTH DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE STEVEN L.
HANSEN

ROSEMOND BLAKELOCK #6183
Blakelock and Stringer
37 East Center, 2nd Floor
Provo, Utah 84606

Attorney for Appellee

DON LESLIE BOWCUTT
1130 West State Road
Pleasant Grove Utah 84602
Appellant, Acting pro se

RON WILKINSON
11309 South Orem Blvd.
Orem, Utah 84057
Guardian Ad Litem for minor
child David Bowcutt

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES..... | iii |
| JURISDICTION AND NATURE OF PROCEEDINGS..... | 1 |
| STATEMENT OF ISSUES PRESENTED ON APPEAL..... | 1 |
| STATUTES AND CONSTITUTIONAL PROVISIONS..... | 6 |
| STATEMENT OF THE CASE..... | 8 |
| STATEMENT OF THE FACTS..... | 8 |
| SUMMARY OF ARGUMENT..... | 12 |
| ARGUMENT | |
| POINT I APPELLANT WAIVED SEVERAL OF THE ISSUES RAISED IN HIS BRIEF BY FAILING TO RAISE THEM BELOW OR BY FAILING TO SUPPORT THEM WITH LEGAL ANALYSIS ON APPEAL..... | 14 |
| POINT II THE APPELLANTS' ARGUMENTS REGARDING THE LOWER COURT'S CONSIDERATION OF THE SOCIAL SECURITY FUNDS IS WITHOUT LEGAL ANALYSIS OR EVIDENCE OF ABUSE OF DISCRETION..... | 18 |
| POINT III APPELLANT CITED NO EVIDENCE TO SUPPORT HIS CONTENTION THAT HIS TOTAL INCOME SHOULD NOT BE CONSIDERED..... | 21 |
| POINT IV UTAH CODE DOES NOT REQUIRE THE COURT TO SUBTRACT TAX AND MEDICAL LOAN PAYMENTS FROM GROSS INCOME NOR ALLOW UNDER THESE CIRCUMSTANCES, TO BE DEDUCTED.... | 24 |
| POINT V WHILE APPELLANT AND HIS CURRENT WIFE MAY HAVE THREE CHILDREN, THE TESTIMONY PROVIDED TO THE LOWER COURT WAS THAT THERE WERE ONLY TWO CHILDREN AS A PRODUCT OF THE APPELLANT'S CURRENT MARRIAGE..... | 26 |
| POINT VI IT WAS THE APPELLANT WHO ELIMINATED ALL ISSUES EXCEPTING THE APPROPRIATE AMOUNT OF CHILD SUPPORT AND THE DETERMINATION OF THE APPELLANT'S INCOME..... | 27 |

| | | |
|-----------------|--|----|
| POINT VII | THE APPELLANT WAS UNDER A CONTINUING OBLIGATION TO SUPPORT THE MINOR CHILD - EVEN IF HE DID NOT DO SO AFTER THE TIME THE CUSTODIAL PARENT DIED..... | 28 |
| POINT VIII | THE AWARD OF ATTORNEY'S FEES WAS APPROPRIATE AND THE APPEALS COURT SHOULD AWARD ADDITIONAL FEES TO HELEN JENSEN..... | 31 |
| CONCLUSION..... | | 35 |
| ADDENDUM..... | | 36 |

TABLE OF AUTHORITIES

CASES CITED

| | Page |
|---|--------------------|
| <u>Allred v. Allred</u> , 797 P.2d 1108, 1111 (Utah App. 1990)..... | 23 |
| <u>Baggs v. Anderson</u> , 528 P.2d 141, 143 (Utah 1974)..... | 29 |
| <u>Durfee v. Durfee</u> , 796 P.2d 713, 717 (Utah App. 1990)..... | 23, 25 |
| <u>Eames v Eames</u> , 735 P.2d 395, 397 (Utah App. 1987)..... | 33 |
| <u>Faver v. Hansen</u> , 803 P.2d 1275 (Utah App. 1990)..... | 28 |
| <u>Hansen v. Hansen</u> , 736 P.2d 1055 (Utah App. 1987). | 3, 4, 5, 23, 32 |
| <u>Hansen v. Gossett</u> , 590 P.2d 1258, 1260 (Utah 1979)..... | 29, |
| <u>Hill v. Hill</u> , 841 P.2d 722, 724 (Utah App. 1992)..... | 20, 22, 27 |
| <u>Hills v. Hills</u> , 638 P.2d 516, 517 (Utah 1981)..... | 29 |
| <u>Lyngle v. Lyngle</u> 831 PP.2d 1027 (Utah App. 1992)..... | 31, 32 |
| <u>Mason v. Mason</u> , 148 or. 34, 34 P.2d 328 (1934)..... | 29, |
| <u>Morgan v. Morgan</u> , 795 P.2d 684, 676-88 (Utah App. 1990)... | 6, 31 |
| <u>Nielson v Nielson</u> , 826 P.2d 1065, 1067 (Utah App. 1991)... | 30 |
| <u>Ostler v. Ostler</u> , 789 P.2d 713, 715 (Utah App. 1990)..... | 23 |
| <u>State Division of Family Services v. Clark</u> , 554 P.2d 1310 (Utah 1976)..... | 29 |
| <u>State in re Schreuder</u> , 649 P. 2d 19, 22 (Utah 1982)..... | 2, 3, 17, 31 |
| <u>State v. Amicone</u> , 689 P.2d 1341, 1344 (1984)..... | 22, 24 |
| <u>Stubner v. Stubner</u> , 121 Utah 632, 244 P.2d 650 (1952)..... | 31, 32 |

| | Page |
|--|---------|
| Tribe v. Tribe, 59 Utah 112, 202 P.2d 213 (1921)..... | 31, 32 |
| <u>Turner v. Turner</u> , 649 P.2d 6, 8 (Utah 1982)..... | 3, 4, |
| | 5 |
| <u>Wasescha v. Wasescha</u> , Utah, 548 P.2d 895 (1976)..... | 29 |
| <u>Whitehead v. Whitehead</u> , No. 910205-CA, slip op. at 3 | |
| (Utah App. Aug. 7, 1992)..... | 3, 4, |
| | 5 |
| <u>Woodward v. Woodward</u> , 709 P.2d 393, 394 (Utah 1985)..... | 20, 22, |
| | 27, 29 |

CONSTITUTIONS, STATUTES AND RULES

| | |
|---|-----------|
| Utah Code Ann. § 75-5-202.5 (1985)..... | 6, 15 |
| Utah Coder Ann. § 75-5-203 (1985)..... | 6, 15 |
| Utah Code Ann. § 75-5-204 (1985)..... | 6, 12 |
| | 13, 14-15 |
| Utah Code Ann. § 78-45a-2 (Supp. 1994)..... | 6, 30 |
| Utah Code Ann. § 78-45-3 (1987)..... | 6-7, 29 |
| Utah Code Ann. § 78-45-4.2 (1979) | 7, 30 |
| Utah Code Ann. § 78-45-7.5(1)(b) (1994)..... | 7, 24 |
| Utah Code Ann., § 78-45-7.5(8)(b) (1994)..... | 3, 7 |
| | 18-19, 20 |
| Utah Code Ann § 78-45-7.5 (4)(a) (1994)..... | 7, 24 |
| Utah Code § 78-45-7.5(7)(d) (1994)..... | 7, 19 |

| | |
|---|-------|
| Utah Code Ann. § 78-45-7.6 (1) (1989)..... | 7, 24 |
| Rule 4-501 (1)(d) of the Utah Code of Judicial Administration..... | 2 |
| Rule 33, of the Utah Rules of Appellate Procedure..... | 32 |

IN THE UTAH COURT OF APPEALS

JANET BOWCUTT,
Plaintiff and Appellee

v.

DON LESLIE BOWCUTT,
Defendant and Appellant

CASE NO. 940361

PRIORITY 15

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an Order of the Fourth District Court setting the amount of child support for minor child David Charles Bowcutt. This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3 (2)(i) (1994).

STATEMENT OF ISSUES PRESENTED ON APPEAL
AND STANDARDS OF REVIEW

1. Did the Appellant fail to preserve the issue of Guardianship, by never requested a ruling on the issue, and, additionally, informing the Court that the issue of Guardianship was "moot" at the Evidentiary Hearing held on March 18, 1994, (T. 14), and by only now attempting to resurrect and challenge the

issue (essentially) for the first time on appeal?

This Court will not review issues that are raised for the first time on appeal. State in re Schreuder, 649 P. 2d 19, 22 (Utah 1982).

2. Did the Appellant fail to preserve the issue of jurisdiction, by failing to file any sport of appeal of challenge to the Ruling On The Order To Show Cause, held November 4, 1993, which addressed the issue of jurisdiction, by later accepting the Ruling issued November 24, 1993, regarding jurisdiction, and then, on or about January 18, 1994, by making a Request for Full Evidentiary Hearing, and attending the Hearing with his counsel, and never, at any time since the November 4, 1993 Order To Show Cause, raising the issue of jurisdiction, and only now raising the issue for the first time on appeal?

This Court will not review issues that are raised for the first time on appeal. State in re Schreuder, 649 P. 2d 19, 22 (Utah 1982).

3. Did the Appellant fail to preserve the issue of Setting Aside Order Appointing Guardian, by failing to bring his Motion For Order To Show Cause To Set Aside Order Appointing Guardian and Conservator (filed on December 13, 1993), by either scheduling a hearing on the matter or filing a Notice To Submit For Decision, pursuant to Rule 4-501 (1)(d) of the Utah Code of Judicial Administration, while at the same time failing to voice an objection to jurisdiction at any subsequent hearings held Before Judge Hansen, and only now attempting to raise the issue for the

first time on appeal? (In addition, counsel for Appellant declared the issue of Guardianship "moot" at the Evidentiary Hearing held on March 18, 1994, (T. page 14))

This Court will not review issues that are raised for the first time on appeal. State in re Schreuder, 649 P. 2d 19, 22 (Utah 1982).

4. Does Utah Code Ann., § 78-45-7.5(8)(b) even apply to the facts of this matter concerning the social security survivorship benefits, and if so, does it require (mandate) the trial court to "offset" the Social Security benefits received by the minor child against the obligor Appellant's obligation, and, even if it is permissible to do so, does Judge Hansen's Ruling amount to a manifest injustice or inequity so much so that there exists evidence of clear abuse of Judge Hansen's discretion?

The Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Hansen v. Hansen, 736 P.2d at 1056, 1055 (Utah App. 1987) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

5. Does the Appellants' own failure to convince the judge through marshalling the evidence in support his position (with testimony or evidence regarding his contention that he has more than "one full-time" job), or that the monthly income figure should be other than that ultimately considered by the Court, when he had the opportunity to do so once having raised the issue, amount to

error by the Court such that the issue should be retried or the holding invalidated; and even if the circumstances might be characterized to constitute nominal error, did Judge Hansen's Ruling amount to a manifest injustice or inequity, that amounts to a clear abuse of Judge Hansen's discretion.

The Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Hansen v. Hansen, 736 P.2d at 1056, 1055 (Utah App. 1987) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

6. Does Utah Code Ann § 78-45-7.5 (4)(a) enable the Appellant to avoid the admission (under penalty of perjury) in his tax returns that he has a taxable income of \$7000 per month, and then subtract tax and student loan payments from his declared taxable income, and even if he might be allowed this double standard, does the denial of such deductions by the trial court, amount to a manifest injustice or inequity so much so that there was a clear abuse of Judge Hansen's discretion?

The Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Hansen v. Hansen, 736 P.2d at 1056, 1055 (Utah App. 1987) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

7. Does the fact that the Appellant provided no information

other than that by the testimony of the Appellant's spouse regarding the fact that there were two children born as issue of the Appellant's current marriage (T. 49), when he had opportunity to present additional information as to any additional children, constitute (in the face of res judicata) grounds for this Court to invalidate the ruling or reopen the issue, and even if so, does Judge Hansen's Ruling amount to a manifest injustice or inequity that amounts to a clear abuse of Judge Hansen's discretion.

The Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Hansen v. Hansen, 736 P.2d at 1056, 1055 (Utah App. 1987) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

8. Was the Appellant under a continuing obligation to pay child support when the custodial parent died and the minor child did not reside with the Appellant, and if so, was the award of child support, retroactive to the death of the custodial parent, a manifest injustice or clear abuse of discretion?

The Court will presume the correctness of the trial court's decision absent "manifest injustice or inequity that indicates a clear abuse of . . . discretion." Hansen v. Hansen, 736 P.2d at 1056, 1055 (Utah App; 1987) (citing Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)); see also Whitehead v. Whitehead, No. 910205-CA, slip op. at 3 (Utah App. Aug. 7, 1992).

9. Did Judge Hansen have the jurisdiction and discretionary

authority to award attorney's fees and costs, and if so, was the award of attorney's fees an abuse of this discretion?

The Court will presume the correctness of the trial court's decision and review the issue of the award of attorney's fees on an abuse of discretion standard. Morgan v. Morgan, 795 P.2d 684, 676-88 (Utah App. 1990).

STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 75-5-202.5 (1985)

(1) The parent of an unemancipated minor may appoint a guardian by written instrument designating the guardian.

.....

Utah Code Ann. § 75-5-203 (1985)

Any person interested in the welfare of a minor, or a minor of 14 years or older, may file with the court in which the will is probated or the written instrument is filed a written objection to the appointment before it is accepted or within 30 days after notice of its acceptance.

.....

Utah Code Ann. § 75-5-204 (1985)

The court may appoint a guardian for an unemancipated minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order. A guardian appointed by will under § 75-5-202, or by written instrument under §75-5-202.5, whose appointment has not been prevented or nullified under §75-5-203.....

Utah Code Ann. § 78-45a-2 (Supp. 1994)

(2) If paternity has been determined or has been acknowledged according to the laws of this state or any other state, the liabilities of the father may be enforced in the same or other proceedings...

Utah Code Ann. § 78-45-3 (1987)

The father's liability for past education and necessary support are limited to a period of four years next preceding the commencement of an action.

Utah Code Ann. § 78-45-4.2 (1979)

Nothing contained herein shall act to relieve the natural parent or adoptive parent of the primary obligation of support; furthermore, a stepparent has the same right to recover support for a stepchild from the natural or adoptive parent as any other obligee.

Utah Code Ann. § 78-45-7.5(1)(b) (1994)

(gross income includes) (b) income from salaries, wages, commissions royalties, bonuses, rents.....

Utah Code Ann., § 78-45-7.5(8)(b) (1994)

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.

Utah Code § 78-45-7.5(7)(d) (1994)

Income may not be imputed if any of the following conditions exist" ..(ii) a parent is physically or mentally disabled to the extent that he cannot earn minimum wage.

Utah Code Ann § 78-45-7.5 (4)(a) (1994)

Gross income from self-employment or operation of a small business shall be calculated by subtracting necessary expense required for self-employment or business operation from gross receipts. The income and expenses from self-employment..... Only those e expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

Utah Code Ann. § 78-45-7.6 (1) (1989)

As used in the guidelines, "adjusted gross income" is the amount calculated by subtracting from gross income alimony previously ordered and paid and child support previously ordered.

STATEMENT OF THE CASE

Appellant is the natural father of the minor child David Bowcutt. The Appellant appeals from an Order On Ruling: Child Support.

A hearing was held before Judge Steven Hansen on March 18, 1994 in the Fourth District Court, for the purpose of determining the amount of child support that Appellant should pay for the support of the minor child, David Charles Bowcutt. On April 5, 1994, Judge Hansen issued Findings of Fact and Conclusions of Law. The Order regarding the Findings of Fact and Conclusions of Law was signed the 13th day of May, 1994, and is the subject of this appeal. The Order denied the Defendant's request for an offset of the Social Security Benefits received by the minor child, David Bowcutt, set the amount of child support the Appellant is to pay, entered a judgment for past due child support, ordered an accounting and that Appellant should pay attorneys' fees in the amount of \$1,000.00 and costs in the amount of \$105.00.

Appellant filed a notice of Appeal on June 10, 1994.

STATEMENT OF FACTS

1. David Charles Bowcutt is a minor child, whose mother, Janet Sue Bowcutt, is deceased and whose father is the Appellant, Don Leslie Bowcutt.

2. The minor child's parents were divorced prior to the death of Janet Sue Bowcutt.

3. On or about October 27, 1993, an Order to Show Cause was filed in Fourth District Court by Helen Jensen, Guardian and Conservator of the minor child, David Charles Bowcutt, regarding the issue of child support.

4. On or about October 29, 1993 Appellant, through his counsel, Robert Moody, filed a Motion to Dismiss along with a Memorandum in Support of Motion To Dismiss.

5. On or about November 3, 1993, Helen Jensen filed a Response to Motion To Dismiss Order To Show Cause.

4. On November 4, 1993 an Order To Show Cause hearing was held before Judge Steven Hansen, regarding the issues of jurisdiction, child support arrearages and the issue of on-going support.

5. The Appellant was represented by attorney Robert Moody.

6. Following the arguments from counsel at the Order To Show Cause Hearing, the Court took the matter under advisement and on November 24, 1993, the honorable Judge Steven L. Hansen, issued a Ruling regarding the issues of on-going child support, and jurisdiction, and arrearages.

7. On November 24, 1993, the Court found that the Appellant had an on-going support obligation to the minor child.

8. On November 24, 1993, the Court found that minor child, David Charles Bowcutt, did have standing to maintain an action against his natural father for support, via a Guardian Ad Litem, and Ron Wilkinson, was appointed as Guardian Ad Litem.

9. On November 24, 1993, with regard to jurisdiction, the court found that the court has continuing jurisdiction to make an

award of child support, pursuant to U.C.A. § 30-3-5(3).

10. The court ordered a special review hearing to "determine the status and needs of the minor child, David Charles Bowcutt, as well as Defendant's [Appellant's] current income level." (See Exhibit 1, point # 7).

11. No appeal was filed regarding the November 24, 1993, Ruling of the Trial Court on the Order To Show Cause held on November 4, 1993, which included Findings of Fact, and Conclusions of Law on the issues of jurisdiction and child support obligations.

12. On December 23, 1993, the hearing was held before Judge Hansen, regarding the status of the case and the Appellant's financial status for purposes of establishing the amount of child support. Appearing at the hearing held December 23, 1993, the Appellant's counsel made a request for an Evidentiary Hearing, regarding only the amount of the child support, not whether there should be child support.

13. No appeal was filed regarding the court's decision to conduct an Evidentiary Hearing to establish the amount of child support obligation of the Appellant.

14. On March 21, 1994, an Evidentiary Hearing was held, regarding the sole issue of the amount of Appellants child support obligation for the minor child, David Charles Bowcutt.

15. The minor child was not present in court, but was represented by his Guardian Ad Litem, Ron Wilkinson.

16. The minor child's maternal grandmother, and Guardian and Conservator, Helen Jensen, was also present, with her counsel,

Rosemond Blakelock.

17. The Trial Court, at the Evidentiary Hearing, heard argument and testimony regarding the Appellant's ability to provide support for the minor child, David Bowcutt, and the said minor child's need for on-going support.

18. The Appellant's counsel, Robert Moody informed the trial court, on March 18, 1994, that (the two cases were agreeably consolidated) and the issue of Guardianship was "moot" and did not proceed to address the issue any further.

19. The Trial Court then took the matter of the amount of child support under advisement, and on or about April 5, 1994, made a Ruling, issuing Findings of Fact and Conclusions of Law, concerning the amount of child support to be assessed.

20. The issue of the *custodial status* of the minor child, was never brought before the trial court, either at the Order To Show Cause, held on November 4, 1994, the subsequent hearing held December 23, 1993, or the Evidentiary Hearing held March 18, 1994.

21. Appellant, either personally or through counsel, made a general appearance at all hearings, provided testimony to the court regarding his opinion as to the monthly expenses and needs of his minor child, David Bowcutt, and in all other matters submitted himself to the jurisdiction of the trial court, without objection.

22. On the 24th day of December, 1993, the 30-day appeal period on the November 24, 1993 Ruling (Findings and Conclusions) concerning jurisdiction and the obligation (not amount), ran out.

23. On the 27th day of January, 1994 (allowing for a few

holidays) the 30-day appeal period on the December 23, 1993 Ruling, ran out.

24. On the 13th day of May, 1994, Judge Hansen issued the Ruling establishing the amount of the child support, from which Ruling the Appellant appeals.

25. Appellant filed the notice of appeal on or about the 10th of June, 1994.

26. It is the *child's right to support* that is at the heart of this matter, and neither the Notice of Appeal, nor the Docketing Statement, nor the Request for Summary Disposition were mailed to, or served upon, the Guardian Ad Litem (legal counsel) for the minor child. See the mailing Certificates to the Notice of Appeal, Docketing Statement and the Request for Summary Disposition, on file with this Court.

SUMMARY OF ARGUMENT

Several of Appellants' claims were waived either by failure to assert them at or before the Evidentiary Hearing or by failure to adequately address them on appeal. These include:

1. Appellant's claims regarding Guardianship and application of Utah Code Ann. § 75-5-204;
2. Appellant's claim that jurisdiction is an issue;
3. Appellant's claim that it is appropriate to now rule on the Motion To Set Aside Order Appointing Guardian.

The section of the Utah Probate Code that Appellant claims

should have been followed by the lower court, §75-5-204, was never raised as an issue at the Evidentiary Hearing. In addition, counsel for the Appellant stated to the Honorable Judge Hansen that the matter of guardianship was "moot", thus waiving any additional claims. (T. 14).

Even if § 75-5-204 should have been followed, the Appellant has misread and misapplied the applicable sections.

Appellant failed to marshal any evidence supporting his contention that this court should ignore long-established procedural law against making a ruling on appeal, on any issue that has never been contested or raised in the lower court. Further, Appellant asks this court to overrule a decision that has never been made -- a procedural impossibility.

The remaining issues raised by Appellant are unsupported by any argument or case law supporting his position, or reaching the procedural standard of demonstrating that there was an abuse of judicial discretion. The standard of review was not even addressed by Appellant.

Once the Appellant agreed and stipulated to the Appointment of the Guardian Ad Litem, (T. 14), stipulated to the consolidation of all matters, (T. 3), and stipulated that the only remaining issue was the determination of the amount of the amount of child support (based upon the status and needs of the minor child, and the Defendant's income (T. 3), the only legitimate issues which may even be considered on appeal would be those contested and addressed at the Evidentiary Hearing.

ARGUMENT

POINT I.

APPELLANT WAIVED SEVERAL OF THE ISSUES
RAISED IN HIS BRIEF, BY FAILING TO RAISE
THEM BELOW OR BY FAILING TO SUPPORT THEM
WITH SUFFICIENT LEGAL ANALYSIS ON APPEAL

Appellant asserts claims in his Statement of Issues and Statement of Facts that were not raised in the Evidentiary Hearing held on March 18, 1994. Further, some of these issues are not clearly briefed in the Argument portion of Appellants' brief. However, to the extent that the issues are nominally raised, this Court should not consider them. Other claims are simply unsupported by sufficient citations to relevant authority or legal analysis.

A. Claims Regarding Application of Utah Code Ann. § 75-5-204

First, Appellant appears to assert that Utah Code Ann § 75-5-204 (1985), applies because the Appellant's parental rights have not been terminated. The Appellant either failed to read the entire statute, or failed to understand the statute. Clearly, this statute does provide that the court may appoint a guardian for an unemancipated minor "if" all parental rights of custody have been terminated. However, the parental rights of the Appellant were not ever an issue before the court, and so this particular section of the guardianship statute does not apply at all. In addition, Appellant failed to cite to the entire statute, omitting the (more

applicable) second half of the sentence in Utah Code Ann. § 75-5-204 (1985), the statute reads as follows:

The court may appoint a guardian for an unemancipated minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order. A guardian appointed by will under § 75-5-202, or by written instrument under §75-5-202.5, whose appointment has not been prevented or nullified under §75-5-203.....

The testimony at the Evidentiary Hearing from the Appellant was that the minor child refused to live with the Appellant. (T 55, "He won't stay with me"). Had the issue been challenged and heard as a contested issue at the Evidentiary Hearing, the Appellant's own testimony was that the physical custody of the minor child was, at a minimum, "suspended."

However, the purpose of the Evidentiary Hearing (which is the subject of this instant appeal) was solely for the purpose of setting the amount of child support, and the issue of guardianship was not addressed.

Second, The Guardian was appointed under Utah Code Ann. § 75-5-202.5, which permits appointment of a Guardian in instances where the parental rights have not been terminated. Appellant received notification of the Guardianship Hearing, was in fact present in the Probate courtroom, and voiced no timely objection to the appointment.

Third, pursuant to Utah Code Ann. § 75-5-203 the Appellant, following the hearing, filed an objection in the form of his Motion, although it was not timely. This Motion was itself rendered moot when the Appellant by, and through, his counsel of

record, Robert Moody, accepted the Appointment of the Guardianship, in open court, at the Evidentiary Hearing (T 14).

B. Claims regarding November 24, 1993 Ruling.

Issue two (2) of the Appellants' Statement of Issues (App. Br. at 2) asserts that the Trial Court erred in proceeding under the parties' original divorce action and asserts that there was no jurisdiction. (The issue is discussed in Issue Two of the Appellant's Brief on the issue of whether or not the November 24, 1993 Ruling was in error. App. Br. at 15-17).

To begin with, it is well established law that jurisdiction must be addressed at the initial stages of a proceeding, and must be considered waived when the parties appear, and especially, as here, when they appear at a succession of hearings, and file a succession of pleadings -- none of which raised the jurisdictional challenge.

Appellant did not file an objection to the Ruling of the Trial Court on November 24, 1993, nor did he file an appeal of the Ruling with the Appeals Court. Neither did the Appellant object to the November 24, 1993 Ruling at the Evidentiary Hearing. In fact, the Appellant himself evidenced his acceptance of the Court's subject matter jurisdiction and personal jurisdiction. For example, Appellant personally appeared at the evidentiary Hearing on March 18, 1994, with his counsel (thus waiving any right to object to personal jurisdiction), and asked the court to consolidate all matters under one case number, (T. 3, the court accepted the

Stipulation of all parties to consolidate the pending matters, resolving or waiving any challenge to subject matter jurisdiction). The court stated that the "fundamental issue", and purpose of the hearing was solely to determine the "status and needs of David Charles Bowcutt" (T 3).

Thus, while the trial court may or may not have lost it's jurisdiction, that jurisdictional issue became moot when the Appellant appeared, accepted jurisdiction of the court, and thus waived his right to raise jurisdictional issues.

For example Appellant's counsel elicited testimony from the Appellant regarding whether or not Appellant felt that he should support the minor child, David Charles Bowcutt, to which the Appellant answered "Yes, I think someone needs to support him" (T 54). Thus, the Appellant, through his own testimony and appearance on the witness stand, accepted jurisdiction, the consolidation of the case, and the process of proceeding under the original decree.

This court cannot decide an issue which was not challenged before the trial court, but is being challenged for the first time, on appeal. State in re Schreuder, 649 P. 2d 19, 22 (Utah 1982).

C. Claims Regarding the Motion To Set Aside Order Appointing guardian and Conservator

Issue three (3) of the Appellants Statement of Issues, is a restatement of Issue one. However, because it is two separate issues in the Appellant's brief, it will, again be addressed.

Not only did the Appellant fail to follow the appropriate

procedures regarding his Motion To Set Aside Order Appointing Guardian and Conservator, counsel for the Appellant withdrew any chance of having the matter heard by the trial court, when he (Mr. Moody) stated to the court, at the Evidentiary Hearing held March 18, 1994: "Now, We've consolidated the guardianship matter, your Honor. We had some problem with that appointment because of certain thing, but I think that now becomes moot because the Court has appointed a Guardian Ad Litem" (T 14). The court did not address the issue of Guardianship, or the Motion To Set Aside Order Appointing Guardianship any further, because counsel for Appellant stated that they believed the matter to be moot. Appellant cannot now on appeal challenge a matter conceded at the trial court.

POINT II

THE APPELLANTS' ARGUMENTS REGARDING THE LOWER COURT'S CONSIDERATION OF THE SOCIAL SECURITY FUNDS IS WITHOUT LEGAL ANALYSIS OR EVIDENCE OF ABUSE OF DISCRETION

The discussion of Issue Four (4) of the Appellant's Brief, is based upon the assumption that the Appellants obligation should be reduced by the survivorship benefits received by the child as a result of his mother's death, or that the minor child's deceased mother should contribute somehow to the support of the minor child. (App. Br. at 20).

Pursuant to the Utah Code Ann. § 78-45-7.5(8)(b):

Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of

that parent.

To begin with, the Appellant mis-interprets or misapplies this statute. This statute might allow the obligor a credit for social security benefits received by the child or other spouse, if the benefits were generated by the obligor's work history or actions. But in this case, the benefits are survivorship benefits, created by and related to the mother's death, not the obligor's actions.

Further, Appellant cites no authority for his bald assertion that the deceased mother should have imputed to her as income the child's Social Security survivorship benefits, or that she should have imputed income at all.

Even if the benefits might be used as imputed income, the obvious question is how much income should be imputed to the minor child's deceased mother?

Appellant suggests an outlandish formula wherein he would require the court to impute to the deceased party a certain income. Appellant failed to address the fact that pursuant to Utah Code § 78-45-7.5(7)(d) "Income may not be imputed if any of the following conditions exist" ..(ii) a parent is physically or mentally disabled to the extent that he cannot earn minimum wage."

It seems equally outlandish to have to state that death certainly constitutes a physical disability which is going to keep the minor child's mother from having a wage imputed to her, much less the \$1,750.00 per month salary that Appellant requests. (App. Br at 20). Such absurd rhetoric is yet another ruse for the Appellant to avoid paying child support, by having his child support reduced.

The Appellant failed to present any authority for his personal application of Utah Code Ann. § 78-45-7.5 (8)(b). Appellant's failure to support his bare assertions with authority and analysis should also result in this Court refusing to consider the issue. State v. Amicone, 689 P.2d 1341, 1344 (1984).

In addition to the Appellant's failure to state the legal basis for his contentions, he fails to state the basis for overruling the decision of the lower court. Due to the equitable nature of child support proceedings, the Court of Appeals accords substantial deference to the trial court's findings and gives the trial court considerable latitude in fashioning child support orders. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985); Hill v. Hill, 841 P.2d 722, 724 (Utah App. 1992). Absent an abuse of discretion, the Appeals Court "will not disturb the trial court's actions." Hill, 841 P.2d at 724.

Appellant cites to "common sense" as the basis of his arguments, without citing one case, or statute to support his contentions, (App. Br. at 20) and offers his preferred solution. However, the standard of review is whether the Court abused its discretion. The Appellant not only failed to marshal any evidence of abuse of discretion, he also failed to acknowledge that it was the Appellant himself who requested the court not consider the guidelines at all in coming to a decision. (T 25) It takes little more than common sense to come to the conclusion that even if the Court strayed from the guidelines in reaching a conclusion, it did so at the insistence of the Appellant, and the Appellant, of all

people, cannot now cry "foul" of the result.

POINT III

APPELLANT CITED NO EVIDENCE TO SUPPORT HIS CONTENTION
THAT HIS TOTAL INCOME SHOULD NOT BE CONSIDERED

Available evidence indicates that the Appellant, through his counsel, Robert Moody, supplied the court with the information upon which the lower court made it's findings and conclusions. For example, Mr. Moody informed the court that the [child support] Guidelines are "only advisory" (T. 72), and further informed the court that the Appellant earns "\$83,000 a year" (T. 75). Further, it was Appellant's counsel that proposed to the court that, for purposes of calculating child support, the Appellant should be considered to earn \$7,000 per month. The court listened to proffered evidence from all counsel present, including counsel for Appellant. Counsel for Appellant did not deny that the Appellant worked the equivalent of one full time job, and in fact, provided the figures and information to the court, to which he now objects! (T. 71-72).

The income information provided to the lower by Appellant's attorney, Robert Moody, was clear regarding the probable earning potential (\$84,000 per year) his education and training (physician). Given Appellant's failure to provide any other information to the lower court, and in light of the fact that the Ruling of the lower court used the figures provided by Appellant, there does not appear to be an error in the court's determination

of Appellant's income.

The Appellant makes arguments and provides "testimony" in his brief, that were never, considered or made available to, the lower court. Appellant's contentions that he works "extensive weekend and after hour on-call obligations" was not introduced at the lower court, and is now prohibited from making new arguments. (App. Br. at 21).

The Appellant states that he "insists that it is not up to the Court's discretion to decide whether a second job will be included in the determination of gross income". (App. Br. at 21) However, the Appellant fails to marshal the evidence or cite to statute or case law to support such a contention. In addition - it was Appellant's counsel who informed the lower court that the guidelines were advisory.

Appellant's failure to support his bare assertions with authority and analysis should also result in this Court refusing to consider the issue. State v. Amicone, 689 P.2d 1341, 1344 (1984).

In addition, the standard of review for such matters is one of abuse of discretion. In cases where the Court of Appeals accords substantial deference to the trial court's findings and gives the trial court considerable latitude in fashioning child support orders, the court will look at the evidence available to the lower court. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985); Hill v. Hill, 841 P.2d 722, 724 (Utah App. 1992). Absent an abuse of discretion, the Appeals Court "will not disturb the trial court's actions." Hill, 841 P.2d at 724.

In this case, it was the Appellant, through his counsel, Mr. Robert Moody, who supplied to the court the information and made the suggestion that the lower court consider the Appellant to earn "\$7.000.00 per month for the purposes of child support".

Appellant puts forth the argument in his Brief that the worksheet (used to figure child support) "is only a guideline to be followed by the court at its own discretion" (App. Br. at page 22), and that the guidelines should not be used at all (T 25). These two statements fly in the face of his arguments regarding the appropriate application of the guidelines. Try as he might to argue otherwise, no court should allow him to have it both ways.

Traditionally, the court accords the trial court considerable discretion to the lower court and thus, the lower court's "actions are entitled to a presumption of validity." Allred v. Allred, 797 P.2d 1108, 1111 (Utah App. 1990)(quoting Hansen v. Hansen, 736 P.2d 1055, 1056 (Utah App. 1987)). In addition, the lower court's determination "will not be upset on appeal unless the evidence clearly preponderates to the contrary or [this court] determine[s] that the court has abused its discretion." Durfee v. Durfee, 796 P.2d 713, 717 (Utah App. 1990)(quoting Ostler v. Ostler, 789 P.2d 713, 715 (Utah App. 1990)).

/

/

/

/

/

POINT IV

UTAH CODE DOES NOT REQUIRE THE COURT TO
SUBTRACT TAX AND MEDICAL LOAN PAYMENTS
FROM GROSS INCOME, NOR ALLOW THEM,
UNDER THESE CIRCUMSTANCES, TO BE DEDUCTED

The Appellant's claim, in Issue six(6) that the lower court should have subtracted tax and student loan payments from his gross income is made without any reference to code or case authority, and without (virtually) any analysis. Such a failure should result in this Court refusing to consider the issue. State v. Amicone, 689 P.2d 1341, 1344 (1984).

Utah Code Ann. § 78-45-7.5(1)(b) (1994), defines "gross income" as "income from salaries, wages, commissions". Even if the Appellant's claim that Utah Code Ann. § 78-45-7.5(4)(a) is applicable, it would not enable the Appellant to deduct tax and loan payments from his income. Utah Code Ann. § 78-45-7.5(4)(a), states clearly that "Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts". Appellant is attempting to deduct items specifically disallowed under the code and by the work sheets approved by the courts of this state.

Utah Code Ann. § 78-45-7.6 (1), Adjusted Gross Income, states that adjusted gross income "...is the amount calculated by subtracting from gross income, alimony previously ordered and paid and child support previously ordered". No other deductions are allowed.

Therefore, the claim made by the Appellant that credit for

tax and student loan payments should be given, has been made in bad faith, and without any basis in law.

It is inappropriate, upon appeal, for the Appellant to insist upon the application of the guidelines, when it was counsel for the Appellant who requested that the court not use the Guidelines at all. (T at 24). Appellants' counsel, Robert Moody, referred the court to Durfee v. Durfee, 796 P.2d 713 (Utah App. 1990) and stated as follows:

Mr. Moody: We cant, your Honor (just use the guidelines and come up with a figure), because the guidelines are only advisory. They're not mandatory. I think the law the Court is searching for is Durfey versus Durfey, Pacific 2d. 796.....

It's a case very similar where the mother died. In that situation the Court stated that the overview section of the guidelines indicate that final orders of the case shall be made at the discretion of the court based on the facts of the individual case.

It went on and talked about the duty of the father to furnish the necessaries. The trial court should take into consideration what the needs of the child are. Based upon the needs and based upon the father's abilities, that what we should determine here.

(T. 24-25)

At that point, counsel for Appellant went even further when Robert Moody requested that the court not use the guidelines at all, when he proffered as follows:

Mr. Moody: Well, my point is that we just don't go to the guidelines and say, "this is what it is."

(T. 25)

Following Mr. Moody's request that the Guidelines not be used, Helen Jensen, Guardian of the minor child, testified as to the needs of the minor child, and the fact that Helen Jensen was the sole source of support for the minor child, submitting to the Court

receipts and providing testimony as to the minor child's needs and generally providing testimony that Appellant had refused to voluntarily support the minor child. (T. 26-33)

POINT V

WHILE APPELLANT AND HIS CURRENT WIFE HAVE MAY A TOTAL OF THREE CHILDREN, THE TESTIMONY PROVIDED TO THE LOWER COURT WAS THAT THERE WERE ONLY TWO CHILDREN AS A PRODUCT OF THE APPELLANT'S CURRENT MARRIAGE

While it was discussed in the Evidentiary Hearing that the Appellant and his current wife have three children in the home, the lower court gave the Appellant credit for two children from his current marriage, based upon the testimony of the Appellant's wife, Nora Bowcutt.

Nora Bowcutt, was duly sworn and testified as follows:

Mr. Moody:

Q. Mrs. Bowcutt, tell us your name and your relationship to Dr. Don Bowcutt.

A. My name is Nora Bowcutt and I'm Don Bowcutt's wife.

Q. And how long have you been married to Dr. Bowcutt?

A. Thirteen years.

Q. How many children have been born as issue to that marriage?

A. Two

(T. 48-49)

There was no other direct testimony regarding the number of children in the Appellant's home. While there was some discussion stating the fact that there were other children in the home, (presumably Nora Bowcutt's by a previous marriage), the exact circumstances and situation was not made available to the lower

court. If there was an error and/or mistake of fact, it was not brought to the attention of the lower court. The lower court, based upon the testimony of Nora Bowcutt, gave the Appellant credit for two children in his home.

There is no available evidence, or even a claim by Appellant, that the court abused it's discretion in allowing the Appellant credit for two children in the home. Indeed, the statute itself, is not mandatory, and the credit could have been denied completely. Given this legal fact, the exclusion of one child is irrelevant.

In questions regarding the award of child support, the Court of Appeals accords substantial deference to the trial court's findings and gives the trial court considerable latitude in fashioning child support orders, the court will look at the evidence available to the lower court. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985); Hill v. Hill, 841 P.2d 722, 724 (Utah App. 1992). Absent an abuse of discretion, the Appeals Court "will not disturb the trial court's actions." Hill, 841 P.2d at 724.

POINT VI

IT WAS THE APPELLANT WHO ELIMINATED ALL ISSUES
EXCEPTING THE APPROPRIATE AMOUNT OF CHILD SUPPORT
AND THE DETERMINATION OF THE APPELLANT'S INCOME

The Appellant, through his counsel, Robert Moody, stipulated to the appointment of the Guardian Ad Litem, stating at the Evidentiary Hearing that the appointment was "appropriate and we think that it's helpful" (T at 14). The Appellant also stipulated to the consolidation of all pending matters (T. 3) thus waiving any

further jurisdictional objections.

Appellant agreed to proceed in the Evidentiary Hearing on the matters set forth as the "fundamental" issue or reason for the hearing (being status and needs of minor David Bowcutt and the determination of the Appellant's current income level).

Although the Appellant had opportunity to raise other issues during the Evidentiary Hearing, he did not.

Once the minor child's Guardian Ad Litem was appointed, the court proceeded under the consolidated cases, using the parties original divorce action as reference number, but stated clearly that the action could be maintained by the minor child, through his Guardian Ad Litem, and cited to Faver v. Hansen, 803 P.2d 1275 (Utah App. 1990). (See Addendum 1, Ruling April 5, 1993, page 2)

At the Evidentiary Hearing, there was no objection to that decision, (to consolidate and proceed), because it was the Appellant's counsel who requested an Evidentiary Hearing and it was Appellant's counsel who filed the Motion To Consolidate.

POINT VII

THE APPELLANT WAS UNDER A CONTINUING OBLIGATION
TO SUPPORT THE MINOR CHILD - EVEN IF HE DID NOT
DO SO AFTER THE TIME THE CUSTODIAL PARENT DIED

The question of retroactivity is applicable in a case where the minor child does not reside with the parent who is obligated to provide that minor child's support.

It is clear that the minor child, has independent standing to request child support. Utah courts have long held that the right to

receive child support is an unalienable right, belonging to the child, and cannot be bartered away by the child's parent or parents. Hills v. Hills, 638 P.2d 516, 517 (Utah 1981); Hansen v. Gossett, 590 P.2d 1258, 1260 (Utah 1979) (right to support belongs to the child); State Division of Family Services v. Clark, 554 P.2d 1310, 1311-12 (Utah 1976) (child support duty is continuing and right to receive it is unalienable); Baggs v. Anderson, 528 P.2d 141, 143 (Utah 1974) (a father cannot divest himself of the obligation to support, nor defeat the child's right to support). The right to child support is a right of the children themselves. Hansen v. Gossett, 590 P.2d 1258 (Utah 1979), quoting Wasescha v. Wasescha, Utah, 548 P.2d 895 (1976); see also, Mason v. Mason, 148 Or. 34, 34 P.2d 328 (1934).

The fact that one parent may not be under a current obligation to pay child support does not terminate that parent's responsibility to pay support in the future. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985).

Thus, Appellant was obligated to support the minor child, no matter which case number was used. However, the consolidation of all matters, by stipulation, renders the question moot.

In addition, to the case law cited above, the right of a child to receive support and to maintain an action for support is found in the Utah Code. Utah Code Ann. § 78-45-3 (1987) ("Every man shall support his child"); Utah Code Ann. § 78-45-4.2 (1979) ("Nothing contained [within the Uniform Civil Liability for Support Act] shall act to relieve the natural parent or adoptive parent of

the primary obligation of support").

More specifically, the Uniform Act on Paternity acknowledges the right of a child to maintain an action for paternity and for liabilities thereof, including the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses. Utah Code Ann. § 78-45a-2 (Supp. 1994).

The Appellant's reliance on Nielson v Nielson, 826 P.2d 1065, 1067 (Utah App. 1991), is either naive' or purposefully misrepresented to the court. The case (Nielson) was one where custody was at issue. Each parent was contending that the other was unfit. Custody (in Nielson) was awarded to the Plaintiff, Gregory Nielson. Defendant then filed a petition for modification (as to custody) and Plaintiff filed a counter petition.

The custodial parent (Mr. Neilson) then died.

Mr. Nielson's personal representative attempted to continue to litigate the issue of custody. The court stated clearly that "upon the death of the custodial parent, the right to custody of the children immediately vests in the noncustodial parent" Nielson v Nielson, 826 P.2d 1065, 1067 (Utah App. 1991).

There is no issue of custody before the court and it has never, at any time been represented as an issue. Appellant's own testimony evidenced an acknowledgement that the minor child simply refuses to reside with the Appellant, when he stated "He [minor child David Bowcutt] won't stay with me." (T. 55).

The Appellant cannot acknowledge the fact that the minor child refuses to reside with him, (T. 55), and cannot stipulate to the

fact that he is obligated to support the minor child (T. 54) in the Evidentiary Hearing in the lower court, and then file an appeal claiming that he is somehow being denied custody, or that he has no obligation to support the minor child. Those contentions were resolved by agreement or waiver in the proceedings presented before the trial court, and cannot now be contested for the first time on appeal. This Court will not review issues that are raised for the first time on appeal. State in re Schreuder, 649 P. 2d 19, 22 (Utah 1982).

POINT VIII

THE AWARD OF ATTORNEY'S FEES WAS APPROPRIATE
AND THE APPEALS COURT SHOULD AWARD ADDITIONAL
FEES TO HELEN JENSEN

The lower court awarded attorney's fees in the amount of \$1000.00 and costs in the amount of \$105.00. The Appellant disputes the lower court's ability to award attorney's fees but did not cite any evidence indicating an abuse of discretion by the lower court in granting the award. The Appeals Court will presume the correctness of the trial court's decision and review the issue of the award of attorney's fees on an abuse of discretion standard. Morgan v. Morgan, 795 P.2d 684, 676-88 (Utah App. 1990).

Appellant disputes the lower court's reliance on Lyngle v. Lyngle 831 PP.2d 1027 (Utah App. 1992), and cited instead to Tribe v. Tribe, 59 Utah 112, 202 P.2d 213 (1921), and Stubner v. Stubner, 121 Utah 632, 244 P.2d 650 (1952). While the cases Appellant cites may have been applicable, they predate the current and better law,,

and ironically do not rebut the lower court's award of attorney's fees.

Tribe speaks to one being compelled to bring proceedings against another. The Ruling by Judge Hansen, issued April 5, 1994, at point 9, awarded attorney's fees to Mrs. Jensen, and stated in the Findings of Fact and Conclusions of Law that "Mrs. Jensen was forced to bring this Defendant before the court in order to obtain support for the minor child" (See Addendum, 1 , Ruling, dated April 5, 1994.) Thus, if Tribe applies at all, it supports the award of fees by Judge Hansen.

Stubner, stands for the award of attorneys fees when a party failed to live up the his agreement and forced legal action. Again this only supports the contentions of the Appellee that she is entitled to fees, and does not undermine the Findings of Fact or Conclusions of Law in the Ruling.

The Appellant did not provide any evidence to indicate that the lower Courts reliance on Lyngle was an abuse of discretion. Pursuant to the terms set forth in Hansen v. Hansen, 736 P.2d 1055, 1056 (Utah App. 1987) Appellant had to show, given the particular facts of this case, the trial court's decision creates a "manifest injustice or inequity that indicates a clear abuse of . . . discretion." No particularities were shown.

Unless such a showing is made, the Appeals Court should not disturb the trial court's ruling that Mrs. Jensen was entitled to costs and attorney fees.

Further, Appellee, pursuant to Rule 33, of the Utah Rules of

Appellate Procedure, asserts that the Appeals Court should assess damages and attorney's fees against the Appellant. The court may make such a determination under Rule 33 "where there is no basis for the argument presented and when the evidence or law is mischaracterized and misstated". Eames v Eames, 735 P.2d 395, 397 (Utah App. 1987).

In each and every one of the issues presented by the Appellant, the Appellant had no basis for the arguments presented, and/or the evidence or statute cited does not support the Appellant's contentions. Appellant's entire Brief, failed to pass the test as follows: (Appellants' issues in order)

Issue One: (Guardianship) - Not capable of appeal, the issue was resolved by agreement prior to the entry of the Court's Order being appealed.

Issue Two: Not capable of appeal. Appellant has argued that custody is or was at issue. He has it. Further, the issue was not challenged at the Evidentiary Hearing. Appellant stipulated to the consolidation of all issues at the Evidentiary Hearing.

Issue Three: Not capable of appeal, the issue was resolved by agreement prior to the entry of the Court's Order being appealed.

Issues Four, Five, Six, and Seven: not capable of appeal, they are all arguments regarding the enforcement of the guidelines. The Appellant's counsel, Robert Moody informed the lower court that Durfey applied and requested that the court not apply the guidelines, arguing that they are advisory in nature. He cannot cry "foul" for the trial Court's deviation from the guidelines.

Appellants' own Brief asserts that the trial court may operate "at its own discretion" as to child support. (App. Br. at 22).

Issue Eight: Appellant cites to an inapplicable case Nielson, which is addressing the issue of custody (not an issue before the lower court), and does not cite to any statute or acknowledge any case law regarding a parent's legal obligation to support a minor child.

Issue Nine: Attorney's Fees: Appellant's argument rambles and is almost incomprehensible. Ironically, the cases cited support the Appellee, not the Appellant.

The Appellant had competent counsel at trial. This pro se appeal is a sham, calculated to create hardship on the Appellee, and used as a means of retribution as a quid pro quo for having to pay child support -- it is a transparent attempt to force the Appellee to incur costs which equal or exceed the child support awarded. Appellant's appeal creates great financial hardship on Helen Jensen, and only serves to delay the receipt of (or eliminate the economic benefit of) child support for the minor child. Such tactics are unconscionable and should be discouraged. Should the Appeals Court not take steps to indicate to Appellant the inappropriateness of his behavior, he will likely litigate the matter until the minor child reaches his majority without having had the benefits of child support to which he is legally and morally entitled.

Appellee has incurred more than \$5,000.00 in fees and costs associated with fighting this frivolous appeal, and should be

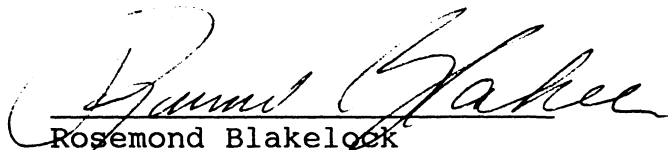
awarded her fees and costs.

CONCLUSION

Based upon the foregoing arguments, Helen Jensen respectfully requests that this Court

- i. Dismiss the Appeal summarily, or
- ii. Affirm the order of the District Court, Order On Ruling: Child Support, and in either case,
- iii. Award her fees and costs as incurred, in the minimum amount of \$5,000.00.

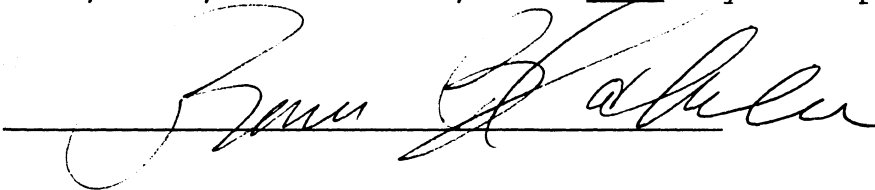
DATED this 17th day of September, 1994.



Rosemond Blakelock
attorney for Helen Jensen, Appellee

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Respondent were mailed to Don Leslie bowcutt, 1130 West State Road, Pleasant Grove utah 84602, and to Ron Wilkinson, 1139 South Orem blvd, Orem, Utah 84057, this 17th day of September, 1994.



ADDENDUM

FILED
CLERK OF DISTRICT COURT
UTAH COUNTY, UTAH
1994 APR -5 PM 1:42

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

JANET SUE BOWCUTT,

Plaintiff,

RULING

CASE NUMBER: 784448131

vs.

APRIL 5, 1994

DON LESLIE BOWCUTT,

STEVEN L. HANSEN, JUDGE

Defendant.

The above-entitled matter came before the Court on March 18, 1994 for an evidentiary hearing regarding the defendant's child support obligation for the parties' minor child, David Charles Bowcutt. Helen Jensen, maternal grandmother, Guardian and Conservator for the minor child, David Charles Bowcutt, was present and represented by Rose Blakelock. Defendant was present and represented by Robert Moody. Ron Wilkinson, Guardian Ad Litem for David Charles Bowcutt, was also present. At that time, the Court heard discussion and testimony regarding defendant's ability to provide support for the minor child and the minor child's status and needs for support and took the matter under advisement.

On December 23, 1993 attorneys Rose Blakelock, Robert Moody, John Musselman, and Ron Wilkerson appeared before Judge Steve L.

Hansen for an Order To Show Cause hearing. At that time, the Court ordered that a child support order was to be in the file within thirty days and the order would be retroactive to the Petition To Modify. On or about January 18, 1994 defendant filed a Request For Full Evidentiary Hearing. On or about January 21, 1994 defendant filed a Motion To Consolidate along with a Memorandum Of Points And Authorities. On January 27, 1994 an Order On Hearing was signed and entered by the Court. On or about February 3, 1994 Helen Jensen, Guardian and Conservator of David Charles Bowcutt, filed a Motion In Support Defendant's Motion To Consolidate and a Motion In Support Defendant's Request For Full Evidentiary Hearing, Request For Information On Defendant's Income, And Motion For Compliance With Court's Order Of December 3, 1993. On or about March 8, 1994 Helen Jensen, Guardian and Conservator of David Charles Bowcutt, filed a Notice To Submit and on March 18, 1994, Mrs. Jensen's counsel filed an Affidavit In Support Of Attorney's Fees.

The Court, having reviewed the above documentation and the Court's tape record of the March 18, 1994 hearing, and upon being advised in the premises, now rules as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. A Decree Of Divorce in the above-entitled matter was signed and entered on March 2, 1978, whereas plaintiff, Janet Bowcutt, was awarded custody of the parties' two minor children and defendant was ordered to pay child support in the amount of

\$75.00 per month per child. On August 3, 1982 the Court entered an Order, whereas defendant's child support obligation was increased to \$125.00 per month per child.

On or about June 11, 1992 the State of Utah, Department of Human Services filed a Petition To Modify on behalf of plaintiff, Janet Bowcutt. At that time the State of Utah sought to increase defendant's child support obligation from \$125.00 per month to \$763.00 pursuant to U.C.A. §78-45-7.2(6).

On February 5, 1993, Janet Bowcutt, plaintiff and custodial parent of David Charles Bowcutt, died due to suicide. On or about August 13, 1993, Helen Jensen, maternal grandmother of David Charles Bowcutt, filed a Verified Petition For Appointment Of Guardian And Conservator of David Charles Bowcutt and on September 3, 1993 Helen Jensen was appointed as David Charles Bowcutt's Guardian and Conservator by Judge Guy R. Burningham.

This matter came before the Court on November 4, 1993 for an Order To Show Cause hearing brought by Helen Jensen, Guardian and Conservator of David Charles Bowcutt, who was seeking child support from the defendant on behalf of the minor child. The Court issued a Ruling on November 24, 1993, whereas the Court found that defendant did have an on-going support obligation to David Charles Bowcutt and ordered that defendant place \$125.00 per month in an interest bearing trust account pending final resolution of this matter, that the \$6,653.00 child support arrearage previously reduced to judgement be collected by Janet Bowcutt Wing's personal representative pursuant to the Utah Uniform Probate Code, and that a special review hearing be set

for the limited purpose of determining David Charles Bowcutt's status and needs as well determining the defendant's present income. Additionally, the Court appointed Mr. Ron Wilkerson as David Charles Bowcutt's Guardian Ad Litem.

2. With regard to defendant's Motion To Consolidate filed on or about January 21, 1994, the Court agrees that all three cases, Civil Number 934402209, Civil Number 93400310, and Civil Number 784448131, in which child support for David Charles Bowcutt are at issue should be consolidated. The Court notes that it previously directed Mr. Ron Wilkerson in the Ruling issued November 24, 1993 to proceed on this matter under the parties' original divorce action, Civil Number 784448131, based upon the Court's determination that modification of defendant's monthly child support obligation to David Charles Bowcutt would be retroactive to the date the State of Utah filed its Petition To Modify As Intervenor on June 11, 1992. For clarification purposes, the Court consolidates the other two cases into Civil Number 784448131. Counsel is directed to file all documents pertaining to this matter in Civil Number 784448131 pursuant to the Court's previous finding that based upon Utah Court of Appeals' decision in Faver v. Hansen, 803 P.2d 1275 (Utah App. 1990), David Charles Bowcutt, via his Guardian Ad Litem, does have standing to maintain an action against his natural father for support.

3. With regard to a determination of defendant's present

income, the Court finds that defendant is a physician who earned \$62,257.26 from his medical practice in 1993 and also earned an additional \$21,845.00 in 1993 from a contract with Utah County for the provision of medical services to the Utah County Jail for a total earnings of \$84,102.26 in 1993. See 1993 Miscellaneous Income Forms of Dr. Don L. Bowcutt.

Defendant maintains that pursuant to U.C.A. §78-45-7.5(2), his earnings from his medical practice should be viewed as "one full-time job" to be used in calculating his child support obligation for David Bowcutt and that his earnings resulting from his contract with Utah County should be treated as over-time earnings and excluded from calculating gross income for purposes of determining child support.

Helen Jensen, acting in her capacity as David Bowcutt's Guardian and Conservator, maintains that defendant, as a medical doctor is a professional and that all income resulting from his practice of medicine, regardless of where that practice occurs, should be utilized by the Court in calculating defendant's child support obligation to David.

Pursuant to U.C.A §78-45-7(3), the Court in determining the appropriate amount of support, must consider all relevant factors, including but not limited to:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the needs of the obligee, the obligor, and the child;
- (f) the ages of the parties; and
- (g) the responsibilities of the obligor and obligee for the support of others.

The Court, noting that defendant has completed his professional

education and developed a medical practice subsequent to the August 3, 1982 Order which modified his support obligation to \$125.00 per month per child, finds that defendant is engaged in a medical practice that includes providing his services as a physician to the Utah County Jail as well as his practice with Dr. Bell. The Court, in considering defendant's present income level, standard of living, and relative wealth as well as the low level of support that defendant has historically provided for this minor child, will elect to utilize all of defendant's earnings resulting from his practice of medicine in determining defendant's present income level. Therefore, the Court finds that defendant's average monthly gross income is \$7,008.52 based upon his gross 1993 income of \$84,102.26. (\$62,257.26 Earnings From Medical Practice With Carl T. Bell, M.D. + \$21,845.00 Earnings From Utah County = \$84,102.26 1993 Gross Income). (\$84,102.26 1993 Gross Income ÷ 12. = \$7,008.52 Average Gross Monthly Income).

4. With regard to the issue of the needs and status of the minor child, David Bowcutt, the Court heard testimony from Mrs. Jensen at the March 18, 1994 hearing as to actual expenses she has incurred for the care and support of David. It is uncontroverted that David has resided with other third parties, specifically the Tom Prentice family and his sister, Wendy, as well as Mrs. Jensen during the time period following his mother's death in February of 1993. Mrs. Jensen testified that she has paid money to those other third parties that David has

periodically resided with for his support, specifically giving Tom Prentice \$1,500.00 in September of 1993 for food and support provided to David. While Mrs. Jensen was unable to provide the Court with detailed information on the exact amount of funds she has expended in David's behalf, she estimated that she has expended approximately between \$250.00 and \$500.00 per month for David's needs, such as food, clothing, medical expenses, transportation costs, shelter, and other miscellaneous needs.

Additionally, it is uncontroverted that David is currently receiving \$233.00 per month entitlement from Social Security due to his mother's death. Mrs. Jensen testified that the Social Security benefit is deposited directly in David's own bank account and that he has been using those funds for recreation and miscellaneous needs. Mrs. Jensen further testifies that she has had no access to or control over the Social Security entitlement David receives and that those funds have not been used for David's care and support. The Court also heard testimony that David is not employed as defendant has alleged and has no other income separate from his Social Security entitlement.

Additionally, the Court heard testimony from the defendant at the March 18, 1994 hearing as to his belief that monthly expenses attributable for the care and support of a seventeen year old boy such as David would be in the range of \$500.00 per month.

Although defendant is financially secure and capable of providing support for David, he maintains that the Social Security entitlement David receives should be factored in by the

Court in determining defendant support obligation. Pursuant to U.C.A. §78-45-7.5(8)(a), such benefit to a child in the child's own right, may not be included in gross income for purposes of calculating child support. Thus, the Court will not offset defendant's support obligation with the Social Security death benefits David receives as a result of his mother's death.

5. The Court, noting that defendant presently has two minor children with his present spouse for which he provides the sole support for, will allow defendant credit for his support obligation for those children. Thus, the Court will allow defendant a credit a \$1,157.00 for his support obligation to his younger minor children pursuant to U.C.A. §78-45-7.2(4)(a), (b), the Worksheet To Determine Father's Obligation To Children In His Present Home, and the Utah Uniform Child Support Obligation Table set forth in U.C.A. §78-45-7.14. (See Attachment A).

Pursuant to U.C.A. §78-45-7.2(6), a difference of at least 25% between the existing child support order and what the child support obligation would be under the Utah Uniform Child Support Guidelines utilizing the parties' current incomes constitutes a material change of circumstances that would justify the Court modifying an existing child support order. Thus, based upon defendant's gross monthly income of \$7,008.52 and the \$1,157.00 credit for the children in his present home, the Court finds that a difference of more than 25% does exist between defendant's existing support obligation and what his support obligation would be under the present Utah Uniform Child Support Guidelines.

Court will order the modification retroactive to February 5, 1993, the date of Janet Bowcutt Wing's death.

Defendant is entitled to a credit against child support arrearages resulting from the retroactive modification for the \$250.00 that he paid directly to Mrs. Jensen in November of 1993 and for the amounts that have been deposited into Mr. Moody's trust account subsequent to the Court's previous Ruling issued November 24, 1993. The funds currently being held in Mr. Moody's trust account are to be turned over to Mrs. Jensen and an appropriate Judgement for any amounts in arrearage will be entered against the defendant and awarded to Mrs. Helen Jensen, Guardian and Conservator for David Charles Bowcutt.

7. Pursuant to the Utah Court of Appeals decision in Durfee v. Durfee, 796 P.2d 713 (Utah App. 1990), regarding the trial court's discretion to make such arrangements as may be required by the circumstances of a given case to ensure that a child receives the support ordered, the Court will order that defendant make the child support payment directly to Mrs. Helen Jensen, Guardian and Conservator for David Charles Bowcutt.

Mrs. Jensen may disperse these funds to herself and other third parties, such as the Prentice family, with whom David has been residing with periodically and who are engaged in providing David with the care and support necessary for a seventeen year old boy. The Court further orders Mrs. Jensen to submit to the Court on a quarterly basis, a detailed accounting of how the child support award is being expended on David's behalf.

($\$596.00 - \$125.00 = \$471.00 \div \$596.00 = .79\%$). Therefore, the Court will modify defendant's child support obligation for David Charles Bowcutt to \$596.00 per month. (See Attachment B).

6. With regard to the issue of whether the modification of defendant's child support obligation should be retroactive to the date the State of Utah filed a Petition To Modify on June 11, 1992 as Intervenor on behalf of the custodial parent, Janet Bowcutt Wing, who had sought public assistance for the minor child, the Court will refer to U.C.A. §30-3-10.6(2) which states:

"A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligator is the petitioner, or to the obligor, if the obligee is the petitioner."

Although the Court would be inclined to make the modification of defendant's child support obligation retroactive to the date the State of Utah filed its Petition, the Court notes that no Return Of Service for defendant was ever filed in this matter, although plaintiff Janet Bowcutt Wing was served with the State Of Utah's Petition To Modify and an appropriate Return Of Service was filed. However, the Court notes that all parties involved in this matter, Mrs. Jensen, the defendant, and Mr. Wilkerson, the Guardian Ad Litem agreed at the March 18, 1994 hearing that any modification of the child support award should be made retroactive to the date of the custodial parent's death. Therefore, based upon that the parties' agreement as to when the modification of defendant's child support obligation should take effect presented to the Court at the March 18, 1994 hearing, the

court ordered to do so, defendant will be responsible for all costs associated with such therapy for David Bowcutt.

9. With regard to the issue of an award of attorney fees and costs in this matter, the Court notes that Mrs. Jensen filed an Affidavit In Support Of Attorney's Fees on or about March 18, 1994 and defendant filed an Objection To Affidavit In Support Of Attorney Fees on or about March 25, 1994.

The Court will refer to Lynple v. Lynple, 831 P.2d 1027 (Utah App. 1992), in which the Utah Court of Appeals stated that:

"In an action to enforce the provisions of a divorce decree, an award of attorney fees is based solely upon the trial court's discretion, regardless of the financial need of the moving party."

In the above-entitled matter, Mrs. Jensen was forced to bring the defendant before this Court in order to obtain support for defendant's minor child. The Court, noting that defendant had previously taken the position that his support obligation was extinguished by the death of the custodial parent, believes the Mrs. Jensen had little choice in bringing this matter before the Court in order to obtain the support necessary for the minor child, David Bowcutt. Thus, upon review of the Affidavit In Support Of Attorney's Fees filed by Ms. Blakelock on or about March 18, 1994, the Court will elect to award Mrs. Jensen \$1,000.00 in attorney fees and \$105.00 for costs associated in pursuing this matter. Appropriate judgement against the defendant may be entered.

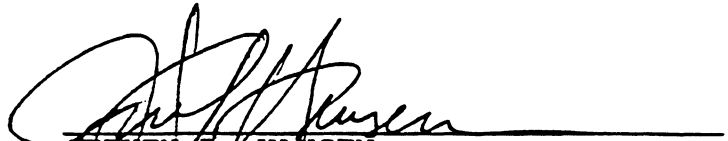
Additionally, the Court would remind Mrs. Jensen that these funds are not to be turned over directly to David for use at his discretion. This child support award is to be used by Mrs. Jensen and the other third party care providers who are assisting Mrs. Jensen in providing a home for David for reimbursement for the reasonable and necessary expenses incurred in providing care, support, and a home for this minor child. Any remaining funds may be turned over to David upon him attaining majority.

8. Additionally, the Court is gravely concerned over the emotional needs and well-being of this young man, David Bowcutt. The Court heard testimony from Mrs. Jensen, the defendant, and Mr. Wilkerson, David's Guardian Ad Litem at the March 18, 1994 hearing that David is a young man who appears at times to be out of control, troubled, and in need of therapeutic assistance in helping deal with the trauma he has suffered as a result of the circumstances of his mother's death. The Court, noting that the parties are before him solely for the purpose of determining the child's needs and defendant's present income, does not have jurisdiction over this minor child and can not order David to participate in therapy. In the event that Mrs. Jensen, as David's Guardian, or Mr. Wilkerson, as David's Guardian Ad Litem, should determine that it would indeed be in David's best interest to seek therapeutic assistance, then they may refer the matter to Division of Family Services for an investigation and possible referral to the Juvenile Court. Regardless of whether David decides to participate in therapy voluntarily or is eventually

10. Counsel for Mrs. Jensen is directed to prepare an appropriate order consistent with the aforementioned ruling.

DATED at Provo, Utah this 5th day of April, 1994.

BY THE COURT:


STEVEN I. HANSEN
District Court Judge

cc: Rosemond Blakelock
Robert Moody
Ron Wilkerson

ATTACHMENT "B"

IN THE FOURTH DISTRICT COURTUTAH

COUNTY, STATE OF UTAH

JANET SUE BOWCUTT

vs.

DON LESLIE BOWCUTTCHILD SUPPORT OBLIGATION WORKSHEET
(SOLE CUSTODY AND PATERNITY)Civil No. 784448131

| | Mother | Father | Combined |
|---|--------|-------------|-------------|
| 1. Enter the combined number of natural and adopted children of this mother and father. | | | 1 |
| 2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definition of income. | \$ -0- | \$ 7,008.52 | |
| 2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case). | | | |
| 2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in this case). | | | |
| 2d. Optional: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent. | | 1,157.00 | |
| 3. Subtract Line 2b, 2c, and 2d from 2a. This is the Adjusted Monthly Gross for child support purposes. | \$ | \$ 5,851.52 | \$ 5,851.52 |
| 4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. | | | \$ 596.00 |
| 5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3. | -0- % | 100 % | |
| 6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation. | \$ -0- | \$ 596.00 | |
| 7. Enter the children's portion of monthly medical and dental insurance premiums paid to insurance company. | \$ | \$ | |
| 8. Enter the monthly work or training related child care expense for the children in Line 1. | | | \$ |

| | |
|--|-----------|
| 9. BASE CHILD SUPPORT AWARD Bring down the amount in Line 6 for the Obligor parent. | \$ 596.00 |
| 10. Adjusted Base Child Support Award Subtract the Obligor's Line 7 from Line 9. | \$ |
| 11. Adjusted Base Child Support Award per Child Divide Line 10 by Line 1. | \$ |
| 12. CHILD CARE AWARD Multiply Line 8 by .50 to obtain obligor's share of child care expense. Add to Line 10 only when expense is actually incurred. | \$ |

ATTACHMENT "A"

IN THE FOURTH DISTRICT COURTUTAH

COUNTY, STATE OF UTAH

JANET SUE BOWCUTT

vs.

Don LESLIE BOWCUTTWORKSHEET TO DETERMINE FATHER'S
OBLIGATIONS TO CHILDREN IN HIS
PRESENT HOMECivil No. 784448131

| Current Spouse's Name | Current Spouse | Father | Com |
|---|----------------|-------------|----------|
| 1. Enter the number of natural and adopted children of the father and his current spouse in the home. | | | 2 |
| 2a. Enter the father's and his current spouse's gross monthly income. See instructions for definition of income. | \$ -0- | \$ 7,008.52 | |
| 2b. Enter previously ordered alimony actually paid. (Do not enter alimony ordered for this case). | - | - | |
| 2c. Enter pre-existing ordered child support. (Do not enter obligations ordered for the children in this case). | - | - | |
| 3. Subtract Line 2b and 2c from Line 2a. This is the Adjusted Monthly Gross for child support purposes. | \$ -0- | \$ 7,008.52 | \$ 7,008 |
| 4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. | | | \$ 1,157 |
| 5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3. | -0- % | 100 % | |
| 6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation. | \$ -0- | \$ 1,157.00 | |
| 7. Enter the monthly uninsured medical expenses for the children in Line 1. | | | \$ |
| 8. Enter the monthly work or training related child care expenses for the children in Line 1. | | | \$ |

9. FATHER'S SHARE OF BASE CHILD SUPPORT AWARD FOR THE CHILDREN IN LINE 1. Enter the amount for the father from Line 6.

\$

10. FATHER'S SHARE OF UNINSURED MEDICAL EXPENSES OF THE CHILDREN IN LINE 1. Multiply the amount in Line 7 by a proposed ratio, and enter result here.

\$

11. FATHER'S SHARE OF WORK OR TRAINING RELATED CHILD CARE EXPENSE OF THE CHILDREN IN LINE 1. Multiply Line 8 by .50, and enter result here.

\$

12. FATHER'S SHARE OF TOTAL CHILD SUPPORT OBLIGATION TO THE CHILDREN IN LINE 1. Add Lines 9, 10, and 11. This amount may be used to adjust the father's gross income on the sole, split, or joint custody worksheets.

\$

1,157.00

ROSEMOND BLAKELOCK #6183
BLAKELOCK AND STRINGER, P.A.
Attorneys for Plaintiff/Petitioner
37 East Center, 2nd Floor
Provo, UT 84601
Telephone: (801) 375-7678

SEP 13 PM 4:42

IN THE FOURTH DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

| | | |
|-----------------------------------|---|-----------------------------------|
| JANET SUE BOWCUTT, Plaintiff | : | ORDER ON RULING: CHILD SUPPORT |
| vs. | : | |
| DON LESLIE BOWCUTT, Defendant. | : | Case No. 784448131 |
| | : | Judge Steven L. Hansen |

THIS MATTER came before the Court on an Evidentiary Hearing regarding the Defendant's child support obligation for the parties' minor child, David Charles Bowcutt. Helen Jensen, maternal grandmother, Guardian and Conservator for the minor child, David Charles Bowcutt, was present and represented by Rosemond Blakelock. Defendant was present and represented by Robert Moody. Ron Wilkerson, Guardian Ad Litem for David Charles Bowcutt, was also present. At that time the court heard discussion and testimony regarding the Defendant's ability to provide support for the minor child and the minor child's status and needs for support and took the matter under advisement.

Subsequently, the Court having reviewed the documentation, considered all the evidence, and being fully advised in the

premises, issued Findings Of Fact And Conclusions Of Law.

Based upon the Findings of Fact and the Conclusions of Law, the Court makes the following:

ORDER

1. The Court orders the consolidation of case number 934402209, Case Number 93440310 and Case Number 784448131 consolidated into one number, Case Number 784448131. All documents pertaining to this matter are to be filed under case Number 784448131.

2. The Court shall not offset the Defendant's support obligation with the Social Security death benefits the minor child David receives as a result of his mother's' death.

3. Based upon the Defendant's gross monthly income of \$7.008.52, and allowing a credit for the Defendant's obligations to children in his present home, the Court shall modify the Defendant's child support obligation for David Charles Bowcutt to \$596.00 per month, retroactive to February 5, 1993, the date of Janet Bowcutt Wings's death.

4. Defendant shall be entitled to a credit against child support arrearages resulting from the retroactive modification for the \$250.00 that was paid directly to Mrs. Jensen in November, 1993, and credit for any amounts deposited into Mr. Moody's trust account subsequent to the Court's November 24, 1993 Ruling.

5. The funds held in Mr. Moody's trust account shall be turned over to Mrs. Jensen.

6. A Judgment shall be entered for the amount of \$8,940.00 (\$596 per month from February, 1993 through April, 1994) minus credit for \$250.00 and a credit for the amount held in Mr. Moody's trust account.

7. Future child support payments shall be made directly to Mrs. Helen Jensen, Guardian and Conservator for David Charles Bowcutt.

8. Mrs. Jensen shall disperse these funds to herself and other third parties, such as the Prentice family, with whom David has been residing periodically and who are engaged in providing David with care and support.

9. Mrs. Jensen shall submit to the Court on a quarterly basis, a detailed accounting of how the child support award is being expended on David's behalf. The first report due in August, 1994 for the period of May through July, 1994.

10. The child support funds shall not be turned over directly to David for his use at his discretion. If the funds are not used for ongoing support needs, they may be turned over to David upon his majority.

11. Defendant shall be responsible for all costs associated with any therapy needs for David Bowcutt.

12. Helen Jensen is awarded a judgment against the Defendant in the amount of \$1,000.00 in attorney's fees and \$105 in costs.

/

/

/

/

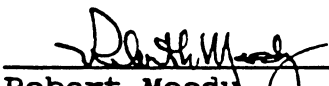
13. Judgment may be entered against Defendant for \$1,105.00,
for attorney's fees and costs.

DATED AND EFFECTIVE this 13th day of May, 1994.

BY THE COURT:


Judge Steven L. Hansen

APPROVED AS TO FORM



Robert Moody

4-504 NOTICE TO DEFENDANT'S ATTORNEY

TO: Robert Moody;

You will please take notice that he undersigned attorney for
Petitioner will submit the above and foregoing Order to the Court,
for signature upon the expiration of five (5) days from the date of
this Notice, plus three (3) days for mailing, unless written
objection is filed prior to that time, pursuant to Rule 4-504 of
the Rules of Judicial Administration of the State of Utah.

DATED this 27th day of April, 1994.


ROSEMOND G. BLAKELOCK
Attorney for Petitioner