

1994

Marie Penrod v. Dale Penrod : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

STATE OF UTAH

MARIE PENROD,

Plaintiff-Appellee,

vs.

DALE PENROD,

Defendant-Appellant.

Case No. 940383-CA

Priority 15

BRIEF OF APPELLEE

Appeal from the Judgment of the
Fourth Judicial District Court for Utah County
Honorable Guy R. Burningham, Presiding

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STATEMENT OF JURISDICTION

The statutory provision which confers jurisdiction on the Utah Court of Appeals to review this matter is Section 78-2(a)-3(2)(i) U.C.A. (1953 as amended).

STATEMENT OF ISSUES

Appellee does not disagree with Appellant's Statement of the Issues with the exception that Appellee asserts her claim for legal fees and costs incident to this appeal.

STATEMENT OF DETERMINATIVE LAW

The statutes that are believed to be determinative in this case are Section 30-3-5 U.C.A. (1953 as amended) [See Addendum Exhibit "A"] and Section 78-45-7.5 U.C.A. (1953 as amended) [See Addendum Exhibit "B"].

STATEMENT OF THE CASE

A. NATURE OF THE CASE

In this case, Plaintiff-Appellee, hereinafter referred to as "wife", filed a Complaint for divorce against Defendant-Appellant, hereinafter referred to as "husband".

B. COURSE OF THE PROCEEDINGS

Wife's Complaint for divorce was filed August 13, 1992. [R. 4].

Husband's Answer to the Complaint was filed September 25, 1992. [R. 37].

Trial was held on July 28, 1993, before the Honorable Guy R. Burningham. [R. 66].

Objections to the proposed Findings of Fact and Conclusions of Law were filed by husband on November 17, 1993. [R. 71].

Oral argument was held by the trial court on February 15, 1994, to consider husband's objections. [R. 74].

Findings of Fact, Conclusions of Law, and a Decree of Divorce were signed and entered by the trial court on June 14, 1994. [R. 86, 91].

Husband filed a Notice of Appeal on June 20, 1994. [R. 95].

C. DISPOSITION IN THE TRIAL COURT

The trial court considered the evidence submitted by the parties, the argument of counsel, and the documentary evidence admitted at trial, and found, in pertinent part, that:

1. Wife was entitled to permanent alimony in the sum of \$672.00 per month for ten (10) months after which alimony would be reduced to \$322.00 per month.
2. Husband was required to maintain a life insurance policy in the sum of \$100,000.00 naming the wife as beneficiary thereunder.
3. The one acre lot on which the marital home was built in 1972 was a joint gift from husband's father to both the wife and the husband.

D. STATEMENT OF THE FACTS

1. The parties were married on December 10, 1965, in Mapleton, Utah. [R. 85 P. 2].

2. The parties had three (3) children as issue of the marriage, none of whom were minors at the time of trial. [R. 85 P. 4].

3. The wife's income was \$1,779.00 per month and her expenses were \$2,499.00 per month. [R. 85 P. 5, R. 62, R. 82 P. 15, R. 103 P. 39 L. 11 - P. 42 L. 18].

4. The husband's income was \$2,383.00 per month and his expenses were less than \$1,000.00 per month. [R. 85 P. 5, R. 103 P. 91 L. 11-20, R. 103 P. 92 L. 11-17, R. 103 P. 94 L. 4-14, R. 103 P. 100 L. 8-R. 103 P. 107 L. 9, R. 82 P. 15, R. 103 P. 9 L. 9-24].

5. The wife's expenses were expected to decrease in ten (10) months. [R. 82 P. 15, R. 103 P. 68 L. 23-25].

6. The husband was ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the wife as beneficiary thereunder. [R. 82 P. 16, R. 103 P. 42 L. 19 - P. 43 L. 8].

7. In 1972, the husband's father made a joint gift to husband and wife of one acre real property, upon which the parties built their marital home. [R. 84 P. 7, R. 103 P. 13 L. 8 - P. 14 L. 11, R. 103 P. 62 L. 4 - P. 63 L. 11].

8. The ordinary expenses during the marriage were shared by both parties and therefore both should be given for mortgage payments made on the home and real property of the parties. [R. 83 P. 6].

SUMMARY OF THE ARGUMENT

The trial court considered the factors enumerated in Schindler v. Schindler 776 P.2d 84 (Utah Ct. App. 1989) and properly awarded alimony to the wife.

The trial court considered the evidence submitted at trial and properly ordered the husband to maintain a life insurance policy naming the wife as beneficiary thereunder.

The trial court properly found that the gift of one acre real property upon which the marital home was constructed, was a joint gift to both husband and wife.

ARGUMENT

I. The trial court considered the factors enumerated in Schindler v. Schindler 776 P.2d 84 (Utah Ct. App. 1989) and properly awarded alimony to the wife.

In a recent case, this Court stated:

Trial courts have broad discretion in awarding alimony. We will not disturb the trial court's alimony award so long as the trial court exercises its discretion within the standards set by the court. (Osguthorpe v. Osguthorpe 804 P.2d 530 [Utah App. 1990]).

Furthermore, the Court stated:

In determining alimony, the trial court must consider three (3) factors: (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support. (Osguthorpe, supra).

And, finally, the Court in Osguthorpe stated:

If the trial court considers these factors, this court will not disturb the alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion.

Regarding the issue of credibility, the Court stated:

We find no error in the trial court's failure to make a specific finding regarding defendant's income in this circumstance. The trial court found that defendant was not candid as to actual incurred income or was purposely underemployed. We defer to the trial court's assessment of the credibility of the witnesses. (Utah R. Civ. P. 52(a); Riche v. Riche 784 P.2d 465 [Ct. App. 1989]). Given the evidence in the record, it was well within the court's discretion to determine that defendant was either earning more than the evidence indicated or had the ability to earn more money.

In another recent case the Court stated:

The purpose of such support is to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge. In an action for divorce, the trial court has considerable discretion to provide for spousal support, and this court will not interfere with the trial court's award of such support in a divorce proceeding absent a showing of a clear and prejudicial abuse of discretion. (Paffel v. Paffel 732 P.2d 96 [Utah 1986]).

The Utah Supreme Court when considering this same issue stated in part as follows:

The alimony award in that situation should, "to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage". (Gardner v. Gardner 748 P.2d 1076 [Utah 1988]).

In the instant case, the trial court considered the evidence, some of which was in conflict, and found the income and expense figures of the wife both from her financial declaration and by direct testimony to be:

1. Income - \$1,779.00 per month; and
2. Expenses - \$2,494.00 per month.

Furthermore, the Court found that the wife would experience a foreseeable reduction in expenses within ten (10) months because her son would return home from missionary service.

The trial court imputed income to the husband based upon extensive testimony in the record, both from the wife, and

admissions by the husband. This evidence supported the trial court's finding that the husband's imputed income was \$2,383.00 per month.

Because the husband failed to provide a financial declaration showing monthly expenses, and only testified to expenses of approximately \$350.00 per month, the Court found that husband had "minimal" monthly expenses.

The trial court considered the evidence of historical income and the abilities of the parties to provide support and found that the wife needed permanent alimony in the sum of \$672.00 per month for ten (10) months and \$322.00 per month thereafter.

The record shows that the trial court considered the three (3) prong test enumerated in Osguthorpe and the alimony award is fair and equitable.

Furthermore, the husband failed to marshal the evidence in support of the trial court's findings and his appeal should be denied on that basis alone.

However, the record does show careful consideration of the financial condition of the parties, the needs of the wife, the ability of the wife to provide income for herself, and the ability of the husband to provide support for the wife.

The transcript of the trial provides the following evidence at page 39 line 11 thru page 42 line 18 regarding the needs of the

wife and her ability to provide for herself:

Q Now, I'd like to talk to you for a moment about alimony. You earlier stated that this is a 27 year marriage. And you've set forth your financial declaration to the Court which sets forth a monthly income of \$1,739. I'm going to hand you a duplicate copy of that. And if you can turn to the second page, what is the net take home that you have from your job at Smith's?

A \$1,739.

Q And that would your gross income, would it not?

A That would be the gross.

Q If you'd look down on line 3, what's the net take-home?

A \$1,230.

Q You have \$1,230 a month disposal to take care of your expenses, do you not?

A Yes. That's based on 40 hours, if I work 40 hours or not.

Q Sometimes you work less, don't you?

A Yes. I don't work a flat 40 every time.

Q But the point is if you did work 40 hours, you'd have \$1,230 plus each month?

A Yes.

Q Now, if you would turn to the next page, what's the total of your monthly expenses?

A \$2,494.

Q So you run a shortfall each month of about 1,200 to \$1,300 a month?

A Yes.

Q Is it your request that the Court order him to pay \$1,000.00 per month of alimony to you?

A Yes.

Q Do you feel that would be fair and equitable?

A Yes.

Q Do you think he has the ability to pay that?

A Yes.

Q Do you have a need for that?

A Yes.

Q If he were to pay that to you, would that allow you to maintain the standard of living you've had during the marriage?

A Yes.

Q Do you also have a potential medical condition which may make it difficult for you to continue your employment?

A Yes.

Q Would you tell the Court what that is?

A Well, by rights I should have back surgery. That's what two doctors has recommended.

Mr. Petro: Your Honor, I'd object on the basis that it's hearsay. It's what a doctor told her. I think it's entirely inappropriate and requires expert testimony.

Mr. Harrison: I think she can testify as to what her condition is.

The Court: She can, but she can't tell me what the doctors have told her, so I'm going to sustain the objection.

Q By Mr. Harrison: Mrs. Penrod, if you would tell me, what is your physical ailment?

A I have a bulging disk and my spine is narrowing like an

hour glass. And it causes the pressure put on the nerves causing pain to go down through my back and down through my legs.

Q Have you been treated for this condition?

A Yes.

Q By who?

A Dr. John.

Q How long have you been treated for this condition?

A I think it was a couple years ago when it really started acting up.

Q Does it affect you when you have to stand for a long period of time?

A Yes. And a lot of bending, yes.

Q And does your job by its nature require that you stand for a long period of time?

A Yes.

Q And what do you do?

A I check in a grocery store.

Q So you check groceries?

A Yes.

The transcript also shows the husbands needs and his ability to provide for the wife. On page 91 line 11 thru line 20, the husband testifies as follows:

Q Mr. Penrod, you have not filed with the Court a financial declaration, have you?

A No, not to my knowledge.

Q And you have not prepared any statement that shows what your monthly living expenses are, have you?

A Not to my knowledge.

Q Nor have you stated under oath or executed a document under oath showing what your monthly income is.

A Nobody asked me.

He further testifies on page 94 line 4 thru 14:

Q And what did you charge them as an hourly rate?

A Sixty-five an hour.

Q And how many hours did you work for them?

A I worked five hours yesterday.

Q Would you say that your normal customary billing rate for that kind of work is \$65 an hour?

A Yes.

Q How many years have you used that as your billing rate?

A Approximately 10, 11 years.

Husband's argument regarding one of the wife's expenses (\$350.00 per month for a child doing missionary work) is without merit.

Whether husband acknowledges it or not, the wife had been incurring said expense prior to the divorce hearing and would

continue to incur the expense on a monthly basis thereafter for ten (10) additional months. The expense total of \$2,494.00 per month was a fair representation of the wife's needs and expenses during the marriage.

As a practical matter, the trial court provided for an automatic reduction in alimony after ten (10) months without requiring the husband to file a Petition to Modify based upon a change of material circumstances.

In addition to the above, the trial court took the husband at this word, which was that he worked only approximately 20 hours per week, and billed between \$40.00 - \$65.00 per hour. The trial court did not require him to work 40 hours per week, but accepted the evidence submitted and imputed income of only \$2,383.00 per month.

The trial court's award of alimony to the wife should be sustained.

II. The trial court considered the evidence submitted at trial and properly ordered the husband to maintain a life insurance policy naming the wife as beneficiary thereunder.

The trial court's order that husband maintain life insurance for the benefit of the wife is entirely consistent with its award of alimony and the need for financial security by the wife, and the

general powers granted to the court under Section 30-3-5 U.C.A. (1953 as amended).

Section 30-3-5 states in part as follows:

When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts, or obligations, and parties.

This Section authorizes the trial court to provide for the financial security of the party seeking alimony.

The record contains evidence that the \$100,000.00 life insurance policy was maintained during the marriage and the court found that it should continue.

The transcript shows that the wife testified on page 42 line 19 thru page 43 line 8 as follows:

Q Is there a life insurance policy that Mr. Penrod has maintained on his life?

A Yes.

Q And is that in the sum of \$100,000?

A Yes.

Q Is it your request that he be ordered to maintain that policy?

A Yes.

Q And that you be named as the sole beneficiary on that policy?

A Yes.

Q Why do you think the Court should award it that way?

A So I'll have some money to take care of me later on if anything happens to Dale.

The husband approved the specific language of the Findings of Fact, Conclusions of Law, and Decree of Divorce and cannot now argue that the form of the language should be changed.

The provision for life insurance is an aspect of the alimony award and the trial court should be awarded broad discretion in its findings. The order providing for life insurance coverage should be sustained.

III. The trial court properly found that the gift of one acre real property upon which the marital home was constructed, was a joint gift to both husband and wife.

In the recent case of Osguthorpe v. Osguthorpe, supra, the Court stated:

Absent a showing of a clear and prejudicial abuse of discretion, we will not interfere with a property award.

Furthermore, the Court stated:

However, in making equitable orders pursuant to Section 30-3-5 the court has consistently concluded that the trial court is given broad discretion in dividing property, regardless of its source or time of acquisition.

The Court further concluded:

However, the trial court found the gifts were intended for both parties and we will not overturn the court's factual findings unless they are clearly erroneous.

In the instant case, the husband again fails to marshal evidence in support of the trial court's findings and therefore should fail on that basis alone.

However, the record contains clear evidence on which the findings of the trial court are based.

The wife testified that the one acre was a gift to both parties in 1972, that they built their marital home on the property and jointly made payments on the property throughout their marriage.

The transcript shows that the wife testified on page 13 line 8 thru page 14 line 8 as follows:

Q In addition to that, did you obtain a one-acre parcel and build a house on it?

A Yes, we did.

Q When did you do that?

A I believe it was in '72.

Q Now, I'm going to hand you Exhibit 2. If you'll hold onto Exhibit 1 for just a moment. Can you tell the Court what Exhibit 2 is?

A That's a deed from Grandpa Penrod to Dale and I when we were going to build our home.

Q Now, Leroy Penrod would be your father-in-law, would he not?

A Yes.

Q And in 1972 did he deed this one acre piece of property to you and Dale?

A Yes.

Q And do you know why he did that?

A Yes. So we could build a home on it.

Q Did he give that piece of property only to Mr. Penrod?

A No.

Q Did he give it to the both of you?

A Yes.

Q After you received that one acre, did you build a home on it?

A Yes.

Q Have you live there with your family ever since that time?

A Yes.

The trial court specifically found that the one acre was a gift to both parties. The record supports this finding and should be sustained.

Husband refuses to recognize that the trial court found the wife's testimony more clear, more convincing, and more truthful and in its discretion adopted findings consistent with the evidence

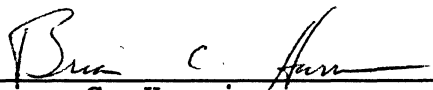
submitted.

Accordingly, the findings that the one acre was marital property should be sustained.

CONCLUSION

It is respectfully urged that the trial court's Findings of Fact, Conclusions of Law, and Decree of Divorce are based upon the evidence in the record and were decided under the appropriate statutes and cases governing these issues and should therefore be sustained.

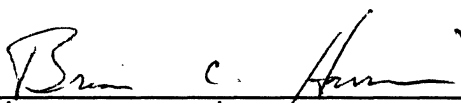
DATED this 10th day of December, 1994.



Brian C. Harrison
Attorney for Plaintiff-Appellee

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed two (2) copies of the foregoing Brief of the Appellee to Michael J. Petro, Young & Kester, 101 East 200 South, Springville, UT 84663, by first-class U.S. mail, postage prepaid, this 14th day of December, 1994.



Brian C. Harrison

ADDENDUM

- A. Section 30-3-5 U.C.A. (1953 as amended)
- B. Section 78-45-7.5 U.C.A. (1953 as amended)

1991, substituted "Section 78-3-31" for "Section 78-3-3.1" in the third sentence of Subsection (1).

The 1992 amendment by ch. 98, effective April 27, 1992, in Subsection (1) added Subsection (c) and the subsection designations (a), (b), and (d).

The 1992 amendment by ch. 290, effective July 1, 1992, in Subsection (2), substituted "order of the court upon the motion of either

party" for "the court upon the written request of either party and payment of a \$5 fee" in the first sentence, inserted "sealed portion of the" and made a stylistic change in the second sentence, and made stylistic changes in the third and last sentences.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

COLLATERAL REFERENCES

A.L.R. — Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically

requested in pleadings of prevailing party, 5 A.L.R.5th 863.

30-3-4.1 to 30-3-4.4. Repealed.

Repeals. — Laws 1990, ch. 230, § 4 repeals these sections, as last amended by L. 1989, ch. 104, §§ 2 to 5, providing for the appointment,

authority, duties, and jurisdiction of court commissioners, effective April 23, 1990.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and

(e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional \$7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the

purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(8) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 4; 1993, ch. 152, § 1; 1993, ch. 261, § 1; 1994, ch. 284, § 1.

Amendment Notes. — The 1991 amend-

ment, effective April 29, 1991, inserted "debts or obligations" in the introductory paragraph of Subsection (1), added Subsection (1)(c), and inserted "and obligations for debts" near the end of Subsection (3).

The 1993 amendment by ch. 152, effective May 3, 1993, substituted "members of the immediate family" for "relatives" and "best inter-

- (c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.
- (2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the defaulting party's income by the moving party, based on the best evidence available, may be submitted.
- (b) The evidence shall be in affidavit form and may only be offered after a copy has been provided to the defaulting party in accordance with Utah Rules of Civil Procedure or Title 63, Chapter 46b, Administrative Procedures Act, in an administrative proceeding.
- (3) (a) In a stipulated proceeding, one of the moving parties shall submit:
- (i) a completed child support worksheet;
 - (ii) the financial verification required by Subsection 78-45-7.5(5); and
 - (iii) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.
- (b) A hearing is not required, but the guidelines shall be used to review the adequacy of a child support order negotiated by the parents.
- (c) A stipulated amount for child support or combined child support and alimony is adequate under the guidelines if the stipulated child support amount or combined amount equals or exceeds the base child support award required by the guidelines.

History: C. 1953, 78-45-7.3, enacted by L. 1989, ch. 214, § 5; 1990, ch. 100, § 4; 1994, ch. 118, § 5.

Amendment Notes. — The 1994 amendment, effective July 1, 1994, in Subsection (3)(c), substituted "equals or exceeds the base"

for "exceeds the total" and deleted the former second sentence which read "When the stipulated amount exceeds the guidelines, it may be awarded without a finding under Section 78-45-7.2."

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

Adjusted gross income shall be used in calculating each parent's share of the base combined child support obligation. 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; 1994, ch. 118, § 6.

Amendment Notes. — The 1994 amend-

ment, effective July 1, 1994, substituted "base combined child support obligation" for "child support award."

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 verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Office of Employment Security may be substituted for pay stubs, 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; 1994, ch. 118, § 7.

Amendment Notes. — The 1994 amendment, effective July 1, 1994, rewrote Subsection (5)(b).

NOTES TO DECISIONS

ANALYSIS

Findings by court.
Imputed income.
Cited.

Findings by court.

Although a trial court entered findings required by Subsection 7(b), since the trial court failed to enter any findings required under Subsection (7)(a), the findings on the whole were insufficient. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993).

Imputed income.

Even though the court's findings of fact did

not include a specific finding that ex-husband was underemployed, because he had acquiesced to the imputation of income at the trial level and because his job history and current employment options inarguably supported this imputation, the trial court did not abuse its discretion in imputing income in an amount greater than the ex-husband's current salary. *Hill v. Hill*, 229 Utah Adv. Rep. 46 (Utah Ct. App. 1993).

Cited in *Cummings v. Cummings*, 821 P.2d 472 (Utah Ct. App. 1991).

78-45-7.7. Calculation of obligations.

(1) The parents' child support obligation shall be divided between them in proportion to their adjusted gross incomes, unless the low income table is applicable.

(2) Except in cases of joint physical custody and split custody as defined in Section 78-45-2 and in cases where the obligor's adjusted gross income is \$1,050 or less monthly, the base child support award shall be determined as follows:

(a) Combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base combined child support obligation table.

(b) Calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income.

(3) In cases where the monthly adjusted gross income of the obligor is between \$650 and \$1,050, the base child support award shall be the lesser of the amount calculated in accordance with Subsection (2) and the amount calculated using the low income table.

(4) The base combined child support obligation table provides combined child support obligations for up to six children. For more than six children, additional amounts may be added to the base child support obligation shown.