

2006

Laurie P. Wall v. Cory R. Wall : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LAURIE P. WALL,

Petitioner/Appellee
and Cross-Appellant,

vs.

CORY R. WALL,

Respondent/Appellant
and Cross-Appellee.

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Case No. 20060312-CA

Trial Court Case: 994908054 DA

BRIEF OF APPELLANT/CROSS APPELLEE

Appeal from an Order of the
Third Judicial District Court
Salt Lake County, State of Utah
The Honorable Sandra N. Peuler, Presiding

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UTAH APPELLATE COURTS
AUG 11 2006

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LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceedings in the Third Judicial District Court in and for Salt Lake County, State of Utah:

1. Laurie P. Wall, Appellee/Appellee and Cross-Appellant, is represented by Robert H. Wilde of Midvale, Utah.

2. Cory R. Wall, Appellant/Appellant and Cross-Appellee, is represented by Gregory B. Wall of WALL & WALL, apc, Salt Lake City, Utah.

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IN THE UTAH COURT OF APPEALS

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Case No. 20060312-CA

Trial Court Case: 994908054 DA

PRELIMINARY STATEMENT

In this brief there are two volumes that are transcripts of proceedings in the lower court. “R. 1204/Tr1” refers to the first volume from proceedings held on November 1, 2006. “R. 1205/Tr2” refers to the second volume from proceedings held March 17, 2006. “R” refers to the record of the court and “Ex” refers to exhibit, followed by the exhibit number.

Pursuant to the provisions of Rule 24(d), Utah Rules of Appellate Procedure, the Appellant shall be designated as the “Respondent” and the Appellee shall be designated at the “Petitioner,” consistent with the parties’ designations in the lower court.

STATEMENT OF JURISDICTION

This court has jurisdiction to hear this matter pursuant to the provisions of Section 5, Article VIII of the Utah Constitution, Rule 3 of the Utah Rules of Appellate Procedure, and §78-2a-3, Utah Code Annotated.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS FOR REVIEW

A. WHETHER THE TRIAL COURT ERRED IN FAILING TO REDUCE OR TERMINATE THE RESPONDENT'S ALIMONY OBLIGATION TO THE PETITIONER.

STANDARDS OF REVIEW:

- a) The trial court's interpretation of binding case law is a question of law reviewed for correctness, with no deference given to the lower court's interpretation. State v. Richardson, 843 P.2d 517, 518 (Utah app. 1992).
- b) The correctness of error standard means that no particular deference is given to the trial court's ruling on questions of law. State v. Pena, 869 P.2d 932 (Utah 1994).
- c) Findings of fact are reviewed by an appellate court under the clearly erroneous standard. Pena at 936;

B. WHETHER THE TRIAL COURT ERRED IN FAILING TO RETROACTIVELY APPLY THE CHILD SUPPORT MODIFICATION PROVIDED FOR IN UTAH CODE ANNOTATED §78-45-9.3(4).

STANDARDS OF REVIEW:

- a) The trial court's interpretation of case law presents a question of law and the appellate court reviews the trial court's interpretation of that law for correctness. State v. Richardson, 843 P.2d 517 (Utah App. 1992);
- b) The trial court's interpretation of statutes, rules and ordinances is a question of law which is reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993).
- c) Whether a statute operates retroactively is a question of law which is reviewed for correctness without any deference to the trial court. Evans & Sutherland Computer Corporation v. Utah State Tax Commission, 953 P.2d 435 (Utah 1997).
- d) The Court of Appeals accords the lower court's statutory interpretations no particular deference, but assesses them for correctness as it would any other conclusion of law.

C. WHETHER THE TRIAL COURT ERRED IN DENYING THE RESPONDENT'S MOTION FOR A NEW TRIAL.

STANDARDS OF REVIEW:

- a) The trial court's interpretations of rules of procedure is a question of law that is reviewed for correctness. State v. Larsen, 865 P.2d 1355 (Utah 1993);

b) While review of denial of a motion for new trial is made under an abuse of discretion standard, if the trial court made a determination of law that provides the premise for denial of a new trial, such legal decision is reviewed under the correctness standard. Crookston v. Fire Ins. Exch., 860 P.2d 937, 939-40 (Utah 1993).

D. WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE PETITIONER.

STANDARDS OF REVIEW:

a) The trial court's interpretation of case law presents a question of law and the appellate court reviews the trial court's interpretation of that law for correctness. State v. Richardson, 843 P.2d 517 (Utah App. 1992);

DETERMINATIVE STATUTES AND RULES

The following authorities are set forth in detail in the appendix due to their length:

1. §30-3-5(8)(g)(I) Utah Code Annotated.
2. §78-45-7.2(8)(b) Utah Code Annotated.
3. §78-45-9.3(4) Utah Code Annotated.
4. Rule 59, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

A. NATURE OF THE CASE: This appeal is from the Order Modifying Decree of Divorce and Judgment and Order Denying Respondent's Motion for New Trial of the trial court, which granted Respondent's petition to modify his child support obligation to

the Petitioner but denied his petition to reduce or terminate his alimony obligation to the Petitioner; denied his request that the child support modification be made retroactive to the month following date of service of the Petition to Modify on the Petitioner pursuant to the provisions of §78-45-9.3(4); denied his request for an award of attorney's fees; and awarding Petitioner a judgment for attorney's fees in the amount of \$3,972.50.

B. COURSE OF PROCEEDINGS: On November 1, 2005, the Respondent's Verified Motion for Modification of Decree of Divorce came on for trial before the Third Judicial District Court, the Honorable Sandra N. Peuler, District Court Judge, presiding. Following a one day trial, the court granted that portion of the Respondent's petition wherein he was seeking a reduction in his child support obligation to the Petitioner. The trial denied, however, the Respondent's request that his alimony obligation to the Petitioner be either reduced or terminated; and that the reduction in his child support be made retroactive to the month following service of the petition to modify on the Petitioner.

The trial court took under advisement the parties' respective requests for an award of attorney's fees. After the parties submitted their affidavits of attorney's fees incurred, the trial court ordered that Petitioner be awarded a judgment for attorney's fees in the amount of \$3,972.50.

The Order Modifying Decree of Divorce and Judgment was entered by the trial court on January 16, 2006. (R. 1106-1109)

Following the entry of the Order Modifying the Decree of Divorce, the Respondent filed with the trial court his Motion for New Trial which came on for hearing

before the court on March 17, 2006. The Respondent's motion was denied. (R. 1187-1189)

C. DISPOSITION IN LOWER COURT: Following the trial on November 1, 2005 and the court having received the parties' respective affidavits of attorney's fees, it entered its Order Modifying Decree of Divorce and Judgment which provides in pertinent part the following:

1. The Respondent's Verified Petition to Modify the Decree of Divorce to modify his child support obligation to the Petitioner was **granted** and the decree was modified to provide that the Respondent's child support obligation to the Petitioner be reduced to \$977.00 per month, effective December 1, 2005.
2. All other provisions of the decree not specifically **modified** by the order are to remain in full force and effect.
3. The Petitioner was awarded judgment for her attorney's fees in the amount of \$3,972.50 against the Respondent.

STATEMENT OF FACTS

The parties to this action were originally married on June 10, 1981 in Salt Lake City, Utah. (R. 545, 1098; R. 1204/R. 1204/Tr1. 9). The parties separated in February, 1999 (R. 1204/R. 1204/Tr1. 30) with the Petitioner later initiating the divorce action in December, 1999 (R. 1) They were subsequently divorced pursuant to a Decree of Divorce entered by the court on or about November 2, 2000. (R. 555-563, 1098). Said Decree of Divorce reflected the terms and conditions of a settlement agreement entered into and

signed by the parties at a mediation held on September 1, 2000. (R. 523-534, 1098) The agreement which was reached by the parties occurred after and was the result of extended negotiations between them, with each of them being represented by competent counsel. (R. 546; R. 1204/R. 1204/Tr1. 36)

At the time of the entry of the Decree of Divorce, the parties had been married for 19 years. There are three children born as issue of the marriage, to-wit: Jennifer Laurie Wall, born November 14, 1987 (now age 18); Natalie Ann Wall, born April 21, 1993 (now age 13); and, Emily Corinne Wall, born September 19, 1995 (now age 10). (R. 545, 1098)

As agreed by the parties and as set forth in the Decree of Divorce, the parties were awarded the joint legal custody of their children with the Petitioner being awarded the primary physical custody subject to the Respondent's parent-time rights. (R. 527-528, 556, 1098)

At the time of the mediation and execution of the settlement agreement and entry of the Decree of Divorce, the parties had been separated for over one and half years during which time the Petitioner was unemployed and had no income. (R. 503, 504, 545; R. 1204/Tr1. 10, 12) However, at the time of the marriage, she was employed full-time (R. 1204/Tr1. 9, 10) and during the course of the marriage, she held numerous jobs and was gainfully employed for much of the marriage earning as much as \$20.00 per hour. (R491-498; R. 1204/Tr1. 23)

The Respondent is self employed as an attorney. Due to the nature of his practice as a self employed individual, his income has fluctuated. At the time of the divorce, the

Respondent's most current and accurate income information consisted of his 1999 income tax returns which reflected a gross annual income of \$56,808.00 which equated to a gross monthly income of \$4,734.00 (R. 1099).

Among the many issues involved in the case and those which pertain to the Respondent's petition to modify and this appeal is the fact that it was agreed between the parties that the Respondent would pay alimony to the Petitioner in the amount of \$800.00 per month which the Petitioner agreed was an acceptable alimony award. (R. 531, 550, 560, 1098; R. 1204/Tr1. 94)

It was further agreed and ordered that Respondent would pay child support to the Petitioner in the amount of \$1,200.00 per month. (R. 528, 556, 1098) Said child support amount was based upon the Respondent's average gross monthly income at the time with no income being imputed to the Petitioner as she was unemployed. (R. 536-537) It exceeded the Child Support Guidelines by approximately \$30.00 per month. (R. 1099)

Following the execution of the settlement agreement and the entry of the Decree of Divorce, the Petitioner, rather than seeking any employment, entered the University of Utah in the fall of 2000. (R. 1204/Tr1. 12) She completed her studies in August, 2003, receiving a bachelors degree in speech communications at that time. (R. 1204/Tr1. 13, 17, 80)

The Respondent filed the subject Verified Petition to Modify Decree of Divorce on March 3, 2003 seeking a termination or reduction in his alimony obligation pursuant to §30-3-5(8)(g)(I) Utah Code Annotated and a reduction in his child support obligation to the Petitioner pursuant to §78-45-7.2(8)(b) Utah Code Annotated. (R. 564-574) The

Petitioner was served with the Summons and Verified Petition to Modify Decree of Divorce on March 4, 2004 (R. 575-577) Said petition was based upon the Respondent's claim of Petitioner's substantial and material change in her circumstances due to her having obtained a college degree and becoming available and more qualified to obtain employment and earn an income with which she could support herself and assist in the support of the parties' minor children. (R. 566, 567)

After the Respondent's initiation of the petition to modify, the Petitioner finally did make efforts to become employed and had, in fact, been intermittently employed during the pendency of the modification action earning as much as \$3,167.00 per month as recently as July, 2005. (R. 1099; R. 1204/Tr1. 13, 15) As of the date of trial in the modification action, Petitioner was employed full time, earning a gross annual salary of \$32,000 which equates to a gross monthly income of \$2666.00 (R. 1204/Tr1. 17; R. 942, 1100)

At the time of the trial on Respondent's Petition to Modify, he had a gross annual income, after deducting reasonable business expenses, of \$56,472.00 which equates to a gross monthly income of \$4,706.00. This amount is reflective of the Respondent's current ability to earn. (R. 1100)

This matter came on for trial on November 1, 2005, on Respondent's Verified Petition to Modify Decree of Divorce wherein the Respondent sought a termination or reduction in his alimony obligation to the Petitioner as well as a reduction in his child support obligation as a result of the Petitioner's graduation from college and subsequent employment.

Petitioner asserted and claimed throughout the modification proceeding that neither the alimony nor the child support obligations of the Respondent were subject to change and should remain in place as set forth in the Decree of Divorce and contended that the decree should not be modified. (R. 788)

At the conclusion of the trial on November 1, 2005, the trial court ruled and ordered that the Respondent's child support obligation to the Petitioner be modified based upon the parties' respective gross monthly incomes and applying the statutory child support guidelines. Respondent's child support obligation was reduced to \$977.00 per month effective December 1, 2005. (R. 1204/Tr1. 139, 141)

However, the court declined to apply the child support modification retroactively as allowed under the provisions of Utah Code Annotated §78-45-9.3(4). (R. 1204/Tr1. 141; R. 1101) The trial court made a finding that the implementation of the retroactivity provisions of §78-45-9.3(4) would adversely affect the children and that the Petitioner did not have the ability to pay back to the Respondent the retroactive amount of approximately \$4,000.00. (R. 1204/Tr1. 141, 142; R. 1101)

With respect to the alimony issue, the court declined to modify the Respondent's alimony obligation to the Petitioner and determined that said alimony award should remain, consistent with the provisions of the Decree of Divorce. (R. 1204/Tr1. 139). In rendering its decision at the time of the trial, the court commented that the stipulations, the findings and the decree stand on their own and are clear and that it would not consider things which went into the parties' settlement negotiations at the time of the original mediation. (R. 1204/Tr1. 140, lines 6 – 9).

However, it then went on to address the needs of the Petitioner which existed at the time of the decree and made a finding that there is nothing in the Stipulation, Findings or Decree that led the court to believe the Petitioner agreed to the original alimony award of \$800.00 per month because it was enough to meet her needs. (R. 1204/Tr1. 142, line 25; 143, lines 1 – 3; R. 1102) The court then went on to accept the Petitioner's claimed living expenses contained in her Financial Declaration filed at the time of the divorce and make a finding that the \$800.00 per month alimony award did not meet her needs at the time of the divorce. (R. 1204/Tr1. 143, lines 3 – 23; R. 1101, 1102).

The court then took the parties' respective requests for attorney's fees under advisement after allowing the parties to submit their respective fee affidavits and requiring them to submit proof of what each of the parties had actually paid in attorney's fees. (R. 1204/Tr1. 101, 139, 146) After each of the parties had submitted their affidavits and exchanged objections and responses thereto, the court awarded the Petitioner attorney's fees in the amount of \$3,972.50. (R. 1106)

On January 20, 2006, the Respondent filed his Motion for New Trial pursuant to the provisions of Rule 59, Utah Rules of Civil Procedure, requesting that a new trial be held on the issues of the Respondent's requested reduction/termination of alimony, retroactive application of the child support award, and the award of attorney's fees. (R. 1113).

The hearing on Respondent's motion came on for hearing before the trial court on March 17, 2006. (R. 1186; R. 1205/Tr2. 3). At that time, the trial court denied the Respondent's motion. (R. 1205/Tr2. 20, line 6). It then went on to hold that it could look

at the Petitioner's current living expenses which Respondent had argued should not be considered. (R. 1205/Tr2. page 20, line 9). Further, the court held that if there are findings in a decree that don't detail what the alimony is for, what it's to cover, what the expenses are and what the incomes are of the parties, then it has the right to do that at the time of modification and "go back and recreate that." (R. 1205/Tr2., page 20, lines 18-22). The court acknowledged that what it had done was to go back and look at the Petitioner's expenses at the time of the divorce and her present income now, plus the alimony, and found that it still wasn't sufficient to meet the Petitioner's needs. In so doing, it determined that the alimony should not be terminated. (R. 1205/Tr2., page 21, lines 10-15). The Order denying the Respondent's motion was entered on March 28, 2006. (R. 1187).

SUMMARY OF ARGUMENTS

1. The Respondent contends that the trial court erred in disregarding the terms of the settlement agreement which was reached at the time of the divorce by re-writing factual findings into that agreement after considering the Petitioner's Financial Declaration submitted at the time of the divorce. The trial court found that, after considering the Petitioner's claimed living expenses as set forth in that Financial Declaration, the original alimony award was not sufficient to meet her needs, despite the fact the Petitioner had agreed to accept the ordered amount. Respondent submits and claims that the Petitioner's needs were negotiated and established at the time of the divorce as set forth in the settlement agreement by accepting the sum of \$800.00 per month in alimony.

2. Respondent also contends the trial court erred by finding that the Petitioner had not experienced a substantial material change in circumstances not contemplated in the decree of divorce. Respondent contends that the decree did not contemplate the Petitioner's changed circumstances which included her graduation from college and obtaining employment.

3. In rendering its decision denying the Respondent's petition to terminate or reduce alimony, the trial court considered the Petitioner's current needs which did not exist at the time of the divorce. Respondent contends that by so doing, the trial accepted and considered evidence contrary to the provisions of §30-3-5(8)(g)(ii).

4. In granting the Respondent's petition to reduce his child support obligation, the trial court declined to make said reduction retroactive pursuant to the provisions of §78-45-9.3(4) Utah Code Annotated. Respondent contends that the provisions of this statute are mandatory in nature and require the trial court to make any adjustments in child support and alimony awards which are part of a child support order retroactive to the month following the date of service of the summons and petition to modify.

5. Respondent contends that the trial court erred in denying his motion for new trial which was made on the grounds of insufficiency of evidence and surprise. Respondent submits that the trial court erred by considering the Petitioner's claimed living expenses both at the time of the divorce and at the time of the trial on the petition to modify and that the same constituted surprise which was not contemplated by the Respondent. Further, by considering said evidence, the Respondent submits that it was

insufficient to support the trial court's denial of his petition to reduce or terminate alimony.

6. The trial court awarded attorney's fees to the Petitioner after the conclusion of the trial on the petition to modify. At that time, the court failed to make any detailed factual findings as to the ability of the Respondent to pay those fees and the need of the Petitioner be awarded the same.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO REDUCE OR TERMINATE THE RESPONDENT'S ALIMONY OBLIGATION TO THE PETITIONER BASED UPON THE PETITIONER'S SUBSTANTIAL MATERIAL CHANGE IN CIRCUMSTANCES

It is well settled and established law in this state that an award of alimony is subject to modification upon a showing of a substantial material change in circumstances since the entry of the decree of divorce and not contemplated in the decree itself. Bolliger v. Bolliger, 997 P.2d 903, 906 (Ut.App. 2000). Utah Code Annotated §30-3-5(8)(g)(I) provides in pertinent part: "The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce."

In Bolliger this court stated:

This court has articulated what is meant by "contemplated by the divorce decree":
The fact that the parties may have anticipated [a substantial material change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change. In order for a material change in circumstances to be

contemplated in a divorce decree **there must be evidence, preferably in the form of a provision within the decree itself**, that the trial court anticipated the specific change. Durfee v. Durfee, 796 P.2d 713, 716 (Utah App. 1990). (Emphasis added)

Accordingly, if both the divorce decree and the record are bereft of any reference to the changed circumstances at issue in the petition to modify, then the subsequent changed circumstance was not contemplated in the original divorce decree. Id. at 906.

More recently, this court reiterated the same rule in Smith v. Smith, WL 1405478, Utah App. 1005 (June 16, 2005) when it stated: “In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change.” *quoting* Durfee, 796 P.2d at 716.

In this action, the Respondent maintained that the Petitioner experienced a substantial material change in her circumstances not contemplated in the decree of divorce. Specifically, the Petitioner, at the time of the divorce was unemployed and had no income. Since the entry of the decree, she has returned to school, obtained a degree, and is now employed.

Respondent maintains that while Petitioner has always been capable of working and supporting herself, she was not so employed at the time of the settlement agreement or at the time of the entry of the decree. Petitioner has taken the position that her going to college and later returning to work were somehow contemplated at the time of the decree. However, such a claim is baseless and is not supported by a review of the record. Neither the settlement agreement which was prepared by Petitioner’s counsel and signed by the parties, nor the decree of divorce itself makes any reference whatsoever regarding any

plans or contemplation that the Petitioner would go to college to obtain a degree and/or return to work. As the record in this case is, in fact, “bereft of any reference to the changed circumstances at issue in the petition to modify,” then they were not contemplated in the decree.

There is nothing in the decree that contemplates this situation. The child support was set according to the Respondent’s income only. In this regard, it was contemplated that the Petitioner would have no income at all. If the possibility of future income by the Petitioner had been contemplated there would likely have been pertinent language in the settlement agreement and the decree addressing this issue. There was not. There was no credible evidence presented that Petitioner’s increase in income was ever even contemplated by the parties let alone in the decree itself. In addition, nothing in the decree precludes the consideration of additional income as a basis for a substantial change in circumstances warranting a modification petition.

In the few cases that have ever held a significant increase in income was contemplated by the decree, there is, on the record, strong evidence that the increase in income was not only contemplated but expected. Dana v. Dana, 789 P.2d 726, 729 (Ut. App. 1990). In Dana the court explicitly stated an expectation of significant growth in the alimony receiver’s income. Such express contemplations were used to determine the obligations of the decree, including the amount of child support. *Id.*

The courts have reinforced this idea of requiring explicit statements regarding future income. “We do not believe it makes for good law or sound policy to have parties arguing years after the fact over what a trial court may or may not have considered when

making an alimony award . . . the trial court must make findings indicating that the future income has [or has not] been considered in making the present award. Such finding will then allow the paying spouse to bring a modification proceeding at the appropriate time.” Johnson v. Johnson, 855 P.2d 250, 253-54 (Ut. App. 1993). Also, “since the divorce decree at issue did not have a provision expressly anticipating an increase in Respondent’s income, and since Respondent did not offer any evidence at trial that the trial court had previously anticipated the increase in income when the original divorce decree was entered, we find that the increase was not a material change in circumstances contemplated in the original divorce decree.” *Durfee*, 796 P.2d at 716.

A vague reference in the original Findings of Fact that the Petitioner was an unemployed student is not, by any stretch of the imagination, an explicit or express reference to any contemplation that the Petitioner would one day complete her college degree and get a job. Neither the settlement agreement nor the divorce decree contain any express language regarding a future expectation or contemplation that the Petitioner’s income would increase. Had Petitioner truly contemplated a substantial increase in income it would have been very easily included in the settlement agreement and the decree and equity would certainly require as much. However, the facts support the opposite. She agreed \$800 was the amount required to support her standard of living with no additional language that any increased income was contemplated or expected. There are no provisions in the stipulation, findings or decree that it was expected that the Petitioner would graduate from college, obtain employment, or have any income other than the alimony and child support she agreed to accept from the Respondent.

Looking at the Petitioner's actions over the last several years and the Respondent's testimony, it is clear that the parties never contemplated a substantial increase in Petitioner's income; let alone the fact that the decree itself is completely devoid of any language supporting this assertion.

At the time of the divorce there was no assurance that the Petitioner would ever finish her schooling or ever get a job. The record reflects that during the period of over one and half years the parties were separated prior to the entry of the decree, the Petitioner remained unemployed. During that time, she could have obtained employment but chose not to. In the fall of 1999 and spring of 2000 she enrolled in and later dropped classes at the University of Utah. As of September 1, 2000 when the parties attended mediation and signed the settlement agreement, the Petitioner was not attending school nor was she working. There was no indication at that time that she was intent on becoming enrolled as a full time student or that she would ever follow through and complete her education or that she intended to get a job.

As such, the Petitioner's obtaining of a college degree and subsequent employment were and are substantial material changes in circumstances giving rise to Respondent's claim for either a termination or reduction in his alimony obligation to the Petitioner.

Respondent submits that the Petitioner's employment constitutes a substantial material change in circumstances. In Haslam v. Haslam, 657 P.2d 757, 758 (Utah 1982) the Utah Supreme Court held that the change in circumstances required to justify a modification of a divorce decree varies with the type of modification sought. And, in the

instance of modification of alimony, it held that where the former wife had become employed, experienced a substantial increase in her income and had accumulated some savings, such circumstances qualified as being substantial and material. It should further be noted that the husband's income was about the same as it was at the time of the divorce.

The Petitioner in this case has, as mentioned previously, become employed, is making substantially more than her previous income which is the alimony payments made by the Respondent, and she has accumulated some savings. Respondent's income has remained virtually unchanged.

In Bridenbaugh v. Bridenbaugh, 786 P.2d 241 (Utah App. 1990) this court upheld a termination of an alimony award under circumstances virtually identical to those present in this case. In that case, the wife was not employed at the time of the divorce and had no income from outside sources. During the four years after the divorce, she did not work but instead went to college and obtained a Master's degree in social work. Thereafter, she became employed and worked for Granite School District. At the time of trial in that action, the wife was receiving approximately \$22,000.00 per year from her employment and other sources. The husband, on the other hand, had also experienced a significant increase in his income, earning approximately eight times what he was earning at the time of the divorce and his net worth had increased forty times.

The court held that it was appropriate to terminate alimony as it was satisfied that the recipient spouse was now able to support herself at a level approximating the level she enjoyed during the marriage despite the dramatic increase in the husband's post

decree income. The court noted that the purpose of alimony is to allow the recipient spouse a standard of living as close as possible to that experienced during the marriage, not to provide subsequent improvements to keep pace with those of the payor spouse. Id. at 243.

In addition, the Petitioner has maintained throughout these proceedings that the alimony award in this case is “permanent” and not subject to modification. Such a claim is likewise without any legal basis. In Smith, *cited supra*, the court noted that an award of “permanent alimony” may be modified upon appropriate petition. Id. quoting Munns v. Munns, 790 P.2d 116, 122 (Utah Ct. App. 1990).

POINT II

COURT CANNOT ISSUE OR MODIFY ALIMONY BASED ON NEEDS OF RECIPIENT SPOUSE WHICH DID NOT EXIST AT TIME OF DIVORCE

At the trial, the Petitioner submitted and the court accepted her current Financial Declaration which shows significantly higher living expenses than those that existed at the time of the divorce and some which did not even exist at that time. Obviously, this was done in an attempt to show a justification for continued alimony when, in fact, based on her own income and the addition of child support, Petitioner should easily be able to maintain a standard of living equal to that at the time of the divorce.

At the time of the divorce Petitioner agreed that \$800 per month in alimony together with the child support would be sufficient to meet her needs. Since that time and up to the point when she became employed, she had established that such was the case. The only significant debt she incurred during that period were student loans she obtained

in order to attend schooling which she chose to do instead of obtaining employment which she was more than qualified to do. This fact alone is telling as to her needs. Petitioner is now earning more than three times the alimony amount and yet she claims she still needs the additional income in the form of ongoing alimony. This leads one to question, if she has so much more income, how can she still require a supplemental source? The answer is straightforward; she is claiming expenses that were not a part of her standard of living at the time of the divorce.

The consideration of these current expenses by the trial court in determining whether to maintain the current alimony award is erroneous. Utah Code Annotated §30-3-5(8)(g)(ii) provides:

The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

In Van Dyke v. Van Dyke, 86 P.3d 767 (Utah App. 2004), the recipient had become permanently disabled and unable to work to support herself. It indicated that this type of situation was an example of what constituted “extenuating circumstances” in order to consider post divorce needs. The Petitioner has suffered no such circumstances which would warrant a consideration of her current needs/expenses. In fact, quite the opposite is true in her situation. She was unemployed and had no income at the time of the divorce and now has a college degree, is employed full time and earning a significant income.

In this case, the Petitioner has, since the entry of the decree of divorce, increased her mortgage indebtedness on her home, incurred student loans, personal medical bills

and other claimed expenses that did not exist at the time of the decree of divorce. The court cannot, under the above referenced authority, consider these items when considering an alimony award to the Petitioner. In essence, the court should only consider the need expressed by the Petitioner herself in the settlement agreement of \$800.00 per month for alimony. Inasmuch as she is now earning approximately three and one-half times the amount of the existing alimony award, the Respondent should be entitled to a termination of his alimony obligation to the Petitioner.

Further, the court cannot award alimony to the Petitioner in an amount more than her established needs. In Bingham v. Bingham, 872 P.2d 1065, 1068 (Utah App. 1994), the court held that the trial court in that case should not have awarded to the recipient spouse more than her established needs required, regardless of the payor spouse's ability to pay any excess amount. (Emphasis added).

The practical effect of considering the Petitioner's increased current living expenses and claiming that her increased income was contemplated in the decree of divorce as a justification for continuing the Respondent's alimony obligation is to basically disregard the original Stipulation and Settlement Agreement and re-do it. The decree did not expressly contemplate the Petitioner's increase in income. Petitioner agreed that \$800 in alimony together with the original \$1,200 in child support would meet her needs. This was a court sanctioned agreement and one entered into by the parties who were both represented by legal counsel. Petitioner has now been able to actually increase her standard of living by obtaining a college degree and obtaining employment.

Petitioner now wants the court to go back and, in essence, controvert the facts existing at the time of the divorce, and claim that the agreed upon alimony was insufficient and that it must have been contemplated that she would be working to support herself; none of which is referred to in any way in the language of the decree.

In Land v. Land, 605 P.2d 1248 (Utah 1980) the Utah Supreme Court discussed a similar situation as it pertains to a stipulated decree of divorce. There, the court held that “when a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.” *Id.* at 1250-51

It is inherently unfair and unjust to now claim that for some reason, not articulated in the decree, Petitioner truly needed more support than agreed to and that her subsequent earnings of more than three times that amount could not constitute a substantial change in circumstances. The terms of the agreement and the decree were premised on the fact that the Petitioner was not employed and had no income. Both parties agreed to this and the court sanctioned the agreement.

Furthermore, Respondent contends that had the court made an accurate and appropriate evaluation of the parties' respective financial positions, it should have, at the very least performed an income equalization analysis. The Petitioner's net monthly income, including her receipt of child support is \$3,287.42. The Respondent's net monthly income, after paying the modified child support to the Petitioner is now \$3,206.58, resulting in Petitioner receiving \$80.84 more per month than does the

Respondent. When the Respondent is then obligated to continue paying alimony of \$800.00, the disparity becomes that much greater and is that much less equitable.

POINT III

PETITIONER'S NEEDS AT TIME OF DIVORCE WERE AGREED TO BY STIPULATION AND CANNOT BE RE-DETERMINED IN MODIFICATION PROCEEDING

Respondent asserts that the trial court erred in considering the Petitioner's August 2000 Financial Declaration. In this case, the parties entered into a binding Stipulation and Settlement Agreement at the time of the divorce, settling all issues including the payment of an alimony award to the Petitioner in the amount of \$800.00 per month. The terms of that agreement are reflected and contained in the Findings of Fact, Conclusions of Law and Decree of Divorce. Respondent contends and maintains that this amount was agreed to by the parties, particularly the Petitioner, as sufficient to meet the needs of the Petitioner.

The trial court was correct in stating that at the time of the divorce there were no findings as to the specific needs of the Petitioner (R. 1204/Tr1., page 142, lines 21-22). The trial court was also correct in an earlier statement that the "stipulations, the findings and the decree, I believe, stand on their own and are clear" in stating that it did not consider what things went into the parties' settlement negotiations. (R. 1204/Tr1., page 140, lines 6-8).

However, where the trial court erred is when it then examined, in detail, the Petitioner's Financial Declaration filed in 2000 in making a determination that the \$800

alimony amount which the parties had agreed to in mediation did not meet the needs of the Petitioner. In fact, at the hearing on Respondent's motion for new trial held on March 17, 2006 the judge stated: "And if I have findings in a decree that don't detail what – what the alimony is for, what it's to cover, what the expenses are and what the incomes are of the parties, **then I think what we have to do at the modification trial is go back and recreate that.**" (R. 1205/Tr2., page 20, lines 18-22)(Emphasis added)

Such a determination by the trial court is clearly erroneous and contrary to the established case law on this issue. The trial court, in essence, went behind the original agreement of the parties which had been entered into five years earlier, and re-wrote it in making a finding that the agreed upon amount did not meet the Petitioner's needs.

In doing so, the court completely circumvented the entire mediation process and all that went into it.

In Davis v. Davis, 29 P.3d 676, (Utah App. 2001) this court quite clearly stated the rule as it pertains to this very issue. It held:

[A stipulation] has all the binding effect of findings of fact and conclusions of law made by the court upon the evidence. The rationale is that **the stipulation constitutes an agreement of the parties that all the facts necessary to support it . . . pre-existed and would be sustained by available evidence, had not the agreement of the parties dispensed with the taking of evidence.** (Citing *United Factors v. T.C. Assocs., Inc.*, 21 Utah 2d 351, 354, 445 P.2d 766, 768 (1968) (Emphasis added).

In this case and applying the holding in *Davis*, the Stipulation and Settlement Agreement which was signed by the parties constituted an agreement that all of the facts necessary to support it, including what the Petitioner's needs were with respect to alimony, would be sustained and were sustainable by available evidence at that time. It is

clearly an erroneous ruling by the trial court to, after the fact and five years later, make some determination that the facts used to support the stipulation were something other than what they actually were and in essence, re-write the agreement between the parties.

The purpose of mediation is to take the court out of the loop and allow the parties to engage in arms length discussions and negotiations. It is the process of exchanging information, give and take, and in many respect replaces or constitutes the aspect of cross-examination which would otherwise occur at trial. Based upon the facts known to the parties at the time of mediation, and with the advice of legal counsel, they entered into an agreement whereby the Petitioner agreed to accept the sum of \$800.00 per month in alimony together with a child support award of \$1,200.00.

By disregarding the stipulation, findings and decree which, in the words of the trial court itself, “stand on their own and are clear” it re-inserted itself into the loop, making a finding which was contrary to what the parties had previously agreed upon based the information they had at the time of the mediation and execution of the settlement agreement.

In Bennett v. Bennett, 2005 WL 3315331 (Utah App.) 2005 UT App 528, Dec. 8, 2005, this court, which cited Davis, supra, held that by entering into a stipulation, the parties implicitly agree with the underlying facts and that a trial court and the parties are bound by the parties' stipulation. *Citing* Yeargin, Inc., v. Tax Commission, 2001 UT 11, ¶19, 20 P.3d 281. The court held that given the stipulation which the parties had entered into, the trial court would not be able to receive other evidence contrary to the stipulation.

Id.

Accordingly, the trial court was not and should not have considered other evidence which is contrary to the stipulation. This would include any evidence regarding the Petitioner's claimed living expenses at the time of the divorce which were in dispute, never litigated, and never found to be valid or accurate in any way. Not that he should have been required to do so, given the opportunity, Respondent submits that he would have been able to clearly establish the inaccuracy of the Petitioner's claimed expenses at the time of the divorce. He was never allowed that opportunity as it was assumed the trial court would follow the law on this issue and not consider those expenses. That issue was settled, set and decided by the parties as contained in the stipulation and the court cannot go back and re-write the agreement.

The Petitioner agreed at the time of the mediation that \$800.00 per month in alimony, together with what she would be receiving in the form of child support, was sufficient to meet her needs. Even at the trial on the modification action, the Petitioner herself testified that she would had requested \$1,000.00 per month in alimony but in order to settle, agreed to accept the \$800.00 amount which was ultimately included in the settlement agreement and the decree of divorce. (R. 1204/Tr1., page 86, lines 15-17).

It is a well settled and established principle that with respect to stipulations entered into between parties, they are conclusive and binding on the parties unless, upon timely notice and for good cause shown, relief is granted therefrom. Higley v. McDonald, 685 P.2d 496 (Utah 1984), (Citing First of Denver Mortgage Investors v. C.N. Zundel & Associates, 600 P.2d 521 (Utah 1979, and State v. Bailey, 282 P.2d 339 (Utah 1955)).

In Birsa v. Birsa, 2000 WL 33244127 (Utah App.2000) this court, in addressing a decree of divorce which was the product of a stipulation between the parties, held: “[T]here is an institutional hesitancy to relieve a party from a stipulation negotiated and entered into with the advice of counsel.” (Citing Birch v. Birch, 771 P.2d 1114, 1116 (Utah Ct.App.1989) *see also* In re Marriage of Gonzalez, 1 P.3d 1074 (Utah 2000).

The Settlement Agreement in this case was the product of a long and involved mediation session at which time the Petitioner was represented by counsel who was present. Petitioner's counsel himself, drafted the agreement as well as the following Findings of Fact, Conclusions of Law and Decree of Divorce. Petitioner should be bound by the terms of that agreement including the agreement that the sum of \$800.00 per month in alimony was sufficient to meet her needs.

The Petitioner is now employed earning almost three and one-half times the amount of alimony and her agreed upon needs as of the date of the divorce. She is now able to more than meet those needs on her own without any further support from the Respondent. Accordingly, alimony should be terminated.

POINT IV

ADJUSTMENTS IN CHILD SUPPORT AND ALIMONY REQUIRED TO BE RETROACTIVE TO COMMENCEMENT OF MODIFICATION ACTION

Under the present law, when the court orders a modification of child support and spousal support under a child support order, it is required to be made retroactive to the month following service of the summons and petition for modification. Utah Code Annotated §78-45-9.3(4) provides:

A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the Petitioner, or on the obligor, if the obligee is the Petitioner. If the tribunal orders that the support should be modified, the effective date of the modification **shall be the month following service on the parent whose support is affected**. Once the tribunal determines that a modification is appropriate, the tribunal **shall** order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered. (Emphasis added)

The use of the word “shall” as contained in this statute is commonly understood to create a mandatory condition and it should be applied in this case. Paar v. Stubbs, 117 P.3d 1079 (Utah App. 2005). Where a provision contains both the words “shall” and “may,” it is presumed that the lawmaker intended to distinguish between them, “shall” being construed as mandatory and “may” as permissive. Scannell v. City of Seattle, 97 Wash.2d 701, 705, 648 P.2d 435, 438 (Wash., 1982). *Citing* State ex rel. Public Disclosure Comm'n v. Rains, 87 Wash.2d 626, 633-34, 555 P.2d 1368 (1976). When an individual's rights depend upon giving the word “shall” an imperative construction, “shall” is presumed to have been used in reference to that right or benefit and it receives a mandatory interpretation. Jordan v. O'Brien, 79 Wash.2d 406, 410, 486 P.2d 290 (1971).

The language of the present statute clarifies previous versions which admittedly gave the trial court discretion regarding the retroactivity of child support and alimony modifications. However, the language of the current statute clearly directs the court to make any modifications retroactive.

“Our primary goal when construing statutes is to evince ‘the true intent and purpose the Legislature [as expressed through] the plain language of the Act.’ In doing

so, we seek 'to render all parts thereof relevant and meaningful,' and we accordingly avoid interpretations that will render portions of the statute superfluous or inoperative."

Hall v. Utah State Dept. Of Corrections, 2001 UT 34, 24 P.3d 958.

The facts and analysis of a similar issue was raised and addressed in Wilde v. Wilde, 35 P.3d 341 (Utah App. 2001). It involved a second appeal brought by the wife concerning an alimony modification petition filed in 1994 and a request by her that an alimony modification be made retroactive to the date the petition was served. That case differed from this one in that during the course of those proceedings the legislature had modified the provisions of U.C.A. §30-3-10.6(2), which is the predecessor statute to 78-45-9.3(4) at issue here.

This case differs factually in that §78-45-9.3(4) was in place when Respondent filed his petition for modification.

In Wilde, when the Respondent served the Petitioner with the modification petition, §30-3-10.6(2) provided:

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 obligor is the Petitioner, or to the obligor, if the obligee is the Petitioner.

The court stated that it had interpreted that section to give courts discretion to determine both if and when a modified child support award should be made retroactive.

Id. at 345. (Citing, Ball v. Peterson, 912 P.2d 1006, 1012 (Utah Ct. App. 1996), and

Crockett v. Crockett, 836 P.2d 818, 820 (Utah Ct. App. 1992)

~~P.2d 818, 820.~~

The provisions of section 30-3-10.6(2) were then amended and renumbered which provided:

A child or spousal support payment under a child support order may be modified with respect to any period during which a **modification** is pending, but only from the date of service of the pleading on the obligee, if the obligor is the Petitioner, or on the obligor, if the obligee is the Petitioner. **The tribunal shall order a judgment for the period from the service of the pleading until the final order of modification is entered for any difference in the original order and the modified amount.** Utah Code Ann. §78-45-9.3(4) (Emphasis added)

The amendment added the sentence requiring the trial court to order a judgment for the period from the service of the pleading until the final order, for any difference between the original award and the modified amount. *Id.* at 346.

Since the holding in Wilde section 78-45-9.3(4) has been amended yet again by the insertion of a new second sentence which states:

If the tribunal orders that the support should be modified, the effective date of the modification shall be the month following service on the parent whose support is affected....(Emphasis added)

The clear and unambiguous meaning of this amendment is a mandatory requirement placed on the courts to retroactively apply modified support to the month following service of the petition on the affected party. In the present case, this court ordered that the Respondent's child support obligation to the Petitioner should be modified in conformity with the child support guidelines using the parties' respective current gross monthly incomes. In doing so, the provisions of section 78-45-9.3(4)

require that modification to be implemented retroactively to the month following service of the petition to modify on the Petitioner which, in this case, would be April, 2004.

It was inherently unfair and inequitable for the trial court to deny the Respondent's request that this statutory provision be followed. During most of the time this matter was pending before the trial court, the Petitioner was employed, either on her own or as an employee with different companies. During that time, the Respondent shouldered all of the child support obligation without receiving any relief as a result of the Petitioner having become employed and sharing in that responsibility.

By not applying a modification retroactively, it removes any incentive on the part of the affected party to bring the matter to conclusion. In fact, it promotes delay and fosters increased litigation costs and attorney's fees. Respondent respectfully submits that the current provisions of section 78-45-9.3(4) required the trial court to apply the modified child support retroactively and, in addition, that the Respondent be awarded a judgment against the Petitioner for the amount in question.

At trial, the court voiced its concern that to apply the modified support amount retroactively would impose a hardship on the Petitioner and the children. However, such is not the case, as the court could have fashioned any remedy it deemed necessary in order to allow the satisfaction of the judgment over a period of time or to even stay execution of the judgment to a later date.

POINT V

NEW TRIAL IS NECESSARY WHERE COURT'S RULING IS BASED ON INSUFFICIENT EVIDENCE

Under the provisions of Rule 59, Utah Rules of Civil Procedure, a party may petition the court seeking a new trial if the findings or rulings of the court in the initial proceeding are not supported by sufficient evidence. Rule 59 provides, in pertinent part:

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

...

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

...

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that is against law.

Respondent submits that in denying his petition to either reduce or terminate his alimony obligation, the court based its decision, to a large extent on the purported needs of the Petitioner as set forth in her Financial Declaration dated August 4, 2000 rather than what the Petitioner agreed to receive in the form of alimony when the case was settled through mediation. The Respondent's petition to modify the alimony award was based on the fact that Petitioner had obtained a college degree and, during the course of the proceedings, become employed earning a significant income well in excess of the alimony award. Neither party, particularly the Respondent, approached this matter in terms of what the Petitioner's expenses were at the time of the divorce but rather what the

Petitioner's ability was to support herself in light of her income from employment which she did not have at the time of the divorce and the fact that her current income is more than three times the current alimony award.

The Respondent should have had and should still have the opportunity to present evidence concerning the Petitioner's claimed living expenses at the time of the divorce if the court deems that to be relevant. The court's adoption of the Petitioner's August 4, 2000 Financial Declaration and finding that the Petitioner's claimed living expenses as set forth in the document were reasonable without taking any evidence as to the reasonableness of those expenses came as a total and complete surprise and is not supported by sufficient evidence or existing law as previously set forth herein.

Respondent was unaware that the issue of the Petitioner's claimed living expenses at the time of the divorce was going to be re-litigated in light of the fact that said issue had already been negotiated and settled pursuant to the Stipulation and Settlement Agreement.

At no time during the initial divorce proceedings did the Respondent ever stipulate or otherwise agree that the living expense figures claimed by the Petitioner were accurate or reasonable. In fact, quite the opposite is true as evidenced by Respondent's pleadings filed at the time. The Petitioner's claimed living expenses were always a hotly contested issue during the initial proceedings and should not have been adopted by the court as reasonable without a sufficient showing of evidence to support the same.

POINT VI
PETITIONER NOT ENTITLED TO ATTORNEY'S FEES

In this action, both parties requested an award of attorney's fees each incurred in the prosecution and defense of the matter. It is this Respondent's position that Petitioner should not have been awarded attorney's fees in any amount whatsoever. This is based on the fact that this Respondent filed and prosecuted his petition for modification of the decree of divorce in good faith and his claims have merit based upon the Petitioner's substantial material change in circumstances which includes her employment and earning an income which resulted in a decrease in the Respondents' child support obligation.

There are, of course, several factors the court must consider in determining whether to award attorney's fees in divorce modification proceedings. In Wilde vs. Wilde, 35 P.3d 341, 349 (Utah App., 2001), the Utah Court of Appeals stated that:

To recover attorney fees and costs in modification proceedings, 'the requesting party must demonstrate his or her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees.' *Citing, Larsen* 888 P.2d at 726. Utah appellate courts have reversed attorney fee awards where the requesting party has failed to show any one of these factors. *Citing Hoagland v. Hoagland*, 852 P.2d 1025, 1028 (Utah Ct. App. 1993)

In addressing these factors as they apply to the Petitioner, she is currently employed and has the ability to pay her own attorney's fees. Respondent, quite frankly, does not have the ability to pay the Petitioner's attorney's fees in light of the fact that he has incurred his own fees in the prosecution of this action and has his own obligation

which he must meet. Finally, the amount of fees requested by the Petitioner were clearly unreasonable. In Wilde the court cited several factors which constitute unreasonableness of fees. It stated that:

The trial court found that Respondent's requests were unreasonable because: (1) "it is impossible to tell from the evidence presented . . . [what] portion of the time expended relate[d]: to the modification and the fraud claim; (2) "it is impossible to tell what portion of the time was expended with respect to those issues upon which [Respondent] . . . prevailed;" (3) "it is very clear that [Respondent] in this case engaged in overkill to an enormous degree with respect to attorney time, costs, expert witnesses and the like;" (4) "the facts and issues in this matter were not unusually difficult," but Respondent worked "many more hours than what would be reasonable;" . . . Wilde at 349.

Most of these factors are applicable in this case as they pertain to the Petitioner. Respondent submits that the Petitioner and her counsel have engaged in "overkill to an enormous degree." The amount of time expended by Petitioner's counsel is greatly in excess of that expended by Respondent's counsel even though both have done comparable amounts of work in this matter. The hourly rate charged by Petitioner's counsel is on the high end of fees charge by attorney's practicing divorce litigation in this locality which results in a greatly inflated claim for fees.

The facts and issues in this matter are not unusually difficult. Petitioner took the firm position throughout the proceedings, that neither the alimony nor the child support awards in this case were subject to modification when the law is quite clear that they are. Respondent had to pursue this matter through to trial as a result of the Petitioner's refusal to accept the applicable law in this area and even discuss a possible resolution of this matter.

POINT VII

AWARD OF ATTORNEY'S FEES IS IMPROPER WITHOUT FINDINGS OF NEED AND ABILITY TO PAY

Respondent acknowledges that in the context of divorce proceedings, "[t]he decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court," however, the court must "base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees." Childs v. Childs, 967 P.2d 942, 947 (Utah Ct. App. 1998), *cert. denied*, 982 P.2d 88 (Utah 1999). "Failure to consider these factors is grounds for reversal on the fee issue." Wilde v. Wilde, 969 P.2d 438, 444 (Utah Ct. App. 1998). "Moreover, [s]uch an award must be based on sufficient findings regarding these factors." Shinkoskey v. Shinkoskey, 2001 UT App 44 ¶18, 19 P.3d 1005. "This enables an appellate court to determine if the trial court has abused its discretion. Without adequate findings of fact, there can be no meaningful appellate review." Willey v. Willey, 951 P.2d 226, 230 (Utah 1997).

In this case, the court awarded attorney's fees to the Petitioner and awarded her a judgment for that amount. However, in its findings of fact, the court did not make any of the required findings necessary to justify an award of attorney's fees. *See* Walters v. Walters, 812 P.2d 64, 68 (Utah Ct. App. 1991), *cert. denied*, 836 P.2d 1383 (Utah 1992). There was no evidence adduced at trial regarding the factors which the court must take into consideration in making an award of attorney's fees.

In this case, the court accepted and adopted as being reasonable the Respondent's gross and net monthly income and his monthly living expenses. The Respondent's net monthly income is \$4,183.58. Taking into account the reduced child support amount, his reasonable monthly expenses are \$5,203.21 which results in a net negative cash flow each month of <\$1,019.63>. Analyzing it another way, after paying alimony of \$800 and child support of \$977 each month to the Petitioner, the Respondent is left with only \$2,406.58 each month to meet his own monthly living expenses which are reasonable and necessary.

The Respondent's net cash intake from her employment, child support and alimony received totals \$4,087.42. In other words, the Respondent brings in \$1,680.84 more per month than does the Petitioner. The Respondent does not have the ability to pay any of the Petitioner's attorney's fees after taking into consideration his current financial obligations and the disparity in the parties' respective net monthly incomes.

Further, at the time of trial, the court ordered that both of the parties present their billing statements reflecting all payments made on the respective accounts. Respondent has complied. Petitioner has not. Respondent questions whether the Petitioner has even incurred any attorney's fees or has been obligated to pay any to her attorney. Respondent requests that the court order Petitioner's counsel to comply and provide a complete and accurate payment record of the claimed attorney's fees.

Finally, in light of the foregoing arguments and existing case law regarding the termination of alimony, it is fair and reasonable that the Respondent's alimony obligation

to the Petitioner be terminated or, at the very least, substantially reduced. As such, the award of attorney's fees with the accompanying judgment should be negated in total.

CONCLUSION

In this case, it is clear that the Petitioner experienced a substantial material change in circumstances which was not contemplated in the decree of divorce. At the time of the settlement agreement between the parties settling the divorce case, the Petitioner was not employed, had no income and was not in school and had not been attending school on a regular and consistent basis. Her subsequent attendance and completion of her college education and ultimate obtaining of a job were issues and facts which were not contemplated in the settlement agreement or the decree. There is no language that it was every expected or contemplated that the Petitioner would ever become employed.

Further, the trial court erred by going around the original settlement agreement and making a retroactive finding that the original alimony award was not sufficient to meet the Petitioner's needs at the time of the divorce. It went back and looked at the Petitioner's Financial Declaration, the contents of which were never agreed to by the parties as being accurate in any way. In doing so, it completely disregarded all of the facts, evidence and discussions which were exchanged at the original mediation which produced the agreement between the parties including the Petitioner's agreement to accept the original alimony amount.

While the trial court's adjustment and reduction of the Respondent's child support obligation to the Petitioner was consistent with the applicable laws, its refusal to make such adjustment retroactive to the month following service of the summons and petition

to modify on the Petitioner was not. Utah Code Annotated §78-45-9.3(4), supported by the cited authorities herein, clearly dictate and mandate that any such adjustment be made retroactive.

As a result of the trial court's erroneous consideration of evidence and rulings which run contrary to both statutory and case law, it should have granted the Respondent's motion for a new trial and its decision to deny the Respondent's motion was in error.

Finally, in light of the fact that the trial court made no specific findings concerning the issue of attorney's fees in this matter, said issue should be remanded for final determination.

Based upon the foregoing authorities and arguments, the Respondent submits and requests that the Respondent's alimony obligation to the Petitioner should be terminated inasmuch as the Petitioner is now earning an income which more than triples her need at the time of the divorce based upon a material substantial change in her circumstances. Further, the child support modification should be made retroactive and the award of attorney's fees granted by the trial court should be reversed.

RESPECTFULLY SUBMITTED this 17th day of August, 2006.



GREGORY B. WALL
Attorney for Respondent/Appellant

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of August, 2006, two (2) true and correct copies of the Respondent's Brief were hand delivered to the following:

Robert H. Wilde, Esq.
Attorney for Appellee
935 E. South Union Avenue, Suite D-102
Midvale, Utah 84047



GREGORY B. WALL

APPENDIX

1. §30-3-5(8)(g)(I) Utah Code Annotated.
2. §78-45-7.2(8)(b) Utah Code Annotated.
3. §78-45-9.3(4) Utah Code Annotated.
4. Rule 59, Utah Rules of Civil Procedure.

NOTES TO DECISIONS

ANALYSIS

Appeal from order

Attorney fees

—Amount

—Criteria for award

—Findings required

—Reasonable

—Timing

Appeal from order.

An award of fees to the defendant was upheld on appeal where the plaintiff did not challenge any of the findings entered by the trial court in support of the award. *Bolliger v Bolliger*, 997 P2d 903 (Utah Ct App 2000)

Attorney fees.

—Amount.

Where the trial court addressed the three required findings necessary in awarding attorney's fees, i.e., the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees, an argument by the receiving spouse that was based on nothing more than her dissatisfaction with the award did not show an abuse of discretion by the trial court in awarding fees. *Childs v Childs*, 967 P2d 942 (Utah Ct App 1998), cert denied, 982 P2d 88 (Utah 1999)

—Criteria for award.

Where the trial court found that one party had a need for attorney fees, that the other party had the ability to pay, and that the fees were necessary and reasonable, the findings were sufficient to affirm an award of fees based

on the parties' earned income ratios. *Rehn v Rehn*, 1999 UT App 41 974 P2d 306

—Findings required.

It was an abuse of discretion for the trial court to order the parties to a divorce proceeding to pay their own attorney's fees and costs without making findings as to the recipient spouse's need, the payor spouse's ability to pay, and the reasonableness of the requested fees. *Wilde v Wilde*, 969 P2d 438 (Utah Ct App 1998)

Where the trial court ordered both parties to pay their own attorney fees, but made no findings about either party's need for or ability to pay attorney fees, remand was required for reconsideration and the entry of findings. *Williamson v Williamson*, 1999 UT App 219, 983 P2d 1103

—Reasonable.

Trial court did not abuse its discretion in awarding the wife \$ 2,500 in attorney fees, as the trial court was permitted to do so under this section and the trial court made sufficient findings regarding the parties' income to support such an award. *Davis v Davis*, 2003 UT App 282, 479 Utah Adv Rep 6, 76 P3d 716

—Timing.

In a child support modification case, the court could order an award of attorney fees before receiving wife's attorney fees affidavit because the issue of fees was still before the court and late submission of the affidavit was not prejudicial to the father. *Reinhart v Reinhart*, 963 P2d 757 (Utah Ct App 1998)

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and parent-time — Determination 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; and
- (d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.
- (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 child 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 custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.
- (4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.
- (5) (a) In determining parent-time rights of parents and visitation rights of 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 parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.
- (6) If a petition for modification of child custody or parent-time 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.
- (7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time 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 or parent-time.
- (8) (a) The court shall consider at least the following factors in determining alimony:
 - (i) the financial condition and needs of the recipient spouse;
 - (ii) the recipient's earning capacity or ability to produce income;
 - (iii) the ability of the payor spouse to provide support;
 - (iv) the length of the marriage;
 - (v) whether the recipient spouse has custody of minor children requiring support;
 - (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
 - (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by

the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) 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 or death 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.

(10) 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 cohabitating with another person.

the prospective support shall be the amount as stated in the order, without a showing of a material change of circumstances, if the stipulated provision:

- (i) is clear and unambiguous;
- (ii) is self-executing;
- (iii) provides for support which equals or exceeds the base child support award required by the guidelines; and
- (iv) does not allow a decrease in support as a result of the obligor's voluntary reduction of income.

(2) If no prior court order exists, a substantial change in circumstances has occurred, or a petition to modify an order under Subsection 78-45-7.2(6) has been filed, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering 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 ability of an incapacitated adult child to earn, or other benefits received by the adult child or on the adult child's behalf including Supplemental Security Income;
- (f) the needs of the obligee, the obligor, and the child;
- (g) the ages of the parties; and
- (h) the responsibilities of the obligor and the obligee for the support of others.

(4) *When no prior court order exists, the court shall determine and assess all arrearages based upon the Uniform Child Support Guidelines described in this chapter.* 1998

78-45-7.1. Medical expenses of dependent children — Assigning responsibility for payment — Insurance coverage — Income withholding.

The court shall include the following in its order:

- (1) a provision assigning responsibility for the payment of reasonable and necessary medical expenses for the dependent children;
- (2) a provision requiring the purchase and maintenance of appropriate insurance for the medical expenses of dependent children, if coverage is or becomes available at a reasonable cost; and
- (3) provisions for income withholding, in accordance with Title 62A, Chapter 11, Parts 4 and 5. 1998

78-45-7.2. Application of guidelines — Rebuttal.

(1) The guidelines apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989.

(2) (a) The child support guidelines shall be applied as a rebuttable presumption in establishing or modifying the amount of temporary or permanent child support.

(b) The rebuttable presumption means the provisions and considerations required by the guidelines, the award amounts resulting from the application of the guidelines, and the use of worksheets consistent with these guidelines are presumed to be correct, unless rebutted under the provisions of this section.

(3) A written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case. If an order rebuts the presumption through findings, it is considered a deviated order.

(4) The following shall be considered deviations from the guidelines, if:

- (a) the order includes a written finding that it is a nonguidelines order;
- (b) the guidelines worksheet has the box checked for a deviation and has an explanation as to the reason; or
- (c) the deviation was made because there were more children than provided for in the guidelines table.

(5) If the amount in the order and the amount on the guidelines worksheet differ, but the difference is less than \$10, the order shall not be considered deviated and the incomes listed on the worksheet may be used in adjusting support for emancipation.

(6) (a) Natural or adoptive children of either parent who live in the home of that parent and are not children in common to both parties may at the option of either party be taken into account under the guidelines in setting or modifying a child support award, as provided in Subsection (7). Credit may not be given if:

- (i) by giving credit to the obligor, children for whom a prior support order exists would have their child support reduced; or
- (ii) by giving credit to the obligee for a present family, the obligation of the obligor would increase.

(b) Additional worksheets shall be prepared that compute the obligations of the respective parents for the additional children. The obligations shall then be subtracted from the appropriate parent's income before determining the award in the instant case.

(7) In a proceeding to modify an existing award, consideration of natural or adoptive children born after entry of the order and who are not in common to both parties may be applied to mitigate an increase in the award but may not be applied:

(a) for the benefit of the obligee if the credit would increase the support obligation of the obligor from the most recent order; or

(b) for the benefit of the obligor if the amount of support received by the obligee would be decreased from the most recent order.

(8) (a) If a child support order has not been issued or modified within the previous three years, a parent, legal guardian, or the office may petition the court to adjust the amount of a child support order.

(b) Upon receiving a petition under Subsection (8)(a), the court shall, taking into account the best interests of the child, determine whether there is a difference between the amount ordered and the amount that would be required under the guidelines. If there is a difference of 10% or more and the difference is not of a temporary nature, the court shall adjust the amount to that which is provided for in the guidelines.

(c) A showing of a substantial change in circumstances is not necessary for an adjustment under Subsection (8)(b).

(9) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.

(b) For purposes of Subsection (9)(a), a substantial change in circumstances may include:

- (i) material changes in custody;
- (ii) material changes in the relative wealth or assets of the parties;
- (iii) material changes of 30% or more in the income of a parent;
- (iv) material changes in the ability of a parent to earn;

(v) material changes in the medical needs of the child; and

(vi) material changes in the legal responsibilities of either parent for the support of others.

(c) Upon receiving a petition under Subsection (9)(a), the court shall, taking into account the best interests of the child, determine whether a substantial change has occurred. If it has, the court shall then determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines. If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines.

(10) Notice of the opportunity to adjust a support order under Subsections (8) and (9) shall be included in each child support order issued or modified after July 1, 1997. 2003

78-45-7.3. Procedure — Documentation — Stipulation.

(1) In any matter in which child support is ordered, the moving party shall submit:

(a) a completed child support worksheet;

(b) the financial verification required by Subsection 78-45-7.5(5);

(c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines; and

(d) the information required under Subsection (3).

(2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the other 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 other party in accordance with Utah Rules of Civil Procedure or Title 63, Chapter 46b, Administrative Procedures Act, in an administrative proceeding.

(3) Upon the entry of an order in a proceeding to establish paternity or to establish, modify, or enforce a support order, each party shall file identifying information and shall update that information as changes occur with the court that conducted the proceeding.

(a) The required identifying information shall include the person's social security number, driver's license number, residential and mailing addresses, telephone numbers, the name, address and telephone number of employers, and any other data required by the United States Secretary of Health and Human Services.

(b) Attorneys representing the office in child support services cases are not required to file the identifying information required by Subsection (3)(a).

(4) 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. 2000

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. 1994

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, income replacement 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 40-hour job. However, if and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at his job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Specifically excluded from gross income are:

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, 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 Department of Workforce Services 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, the party defaults, or, in contested cases, 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, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or their occupation is unknown, 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 proceed-

- (a) is required by a prior court or administrative order to:
 - (i) share those expenses with the other parent of the dependent child; or
 - (ii) obtain insurance for medical expenses but fails to do so, or
 - (b) receives direct payment from an insurer under insurance coverage obtained after the prior court or administrative order was issued.
- (2) If the prior court or administrative order does not specify what proportions of the expenses are to be shared, the district court may determine the amount of liability as may be reasonable and necessary.
- (3) This section applies to an order without regard to when it was issued. 1994

78-45-7.20. Accountability of support provided to benefit child — Accounting.

(1) The court or administrative agency which issues the initial or modified order for child support may, upon the petition of the obligor, order prospectively the obligee to furnish an accounting of amounts provided for the child's benefit to the obligor, including an accounting or receipts.

(2) The court or administrative agency may prescribe the frequency and the form of the accounting which shall include receipts and an accounting.

(3) The obligor may petition for the accounting only if current on all child support that has been ordered. 1994

78-45-7.21. Award of tax exemption for dependent children.

(1) No presumption exists as to which parent should be awarded the right to claim a child or children as exemptions for federal and state income tax purposes. Unless the parties otherwise stipulate in writing, the court or administrative agency shall award in any final order the exemption on a case-by-case basis.

(2) In awarding the exemption, the court or administrative agency shall consider:

- (a) as the primary factor, the relative contribution of each parent to the cost of raising the child; and
- (b) among other factors, the relative tax benefit to each parent.

(3) Notwithstanding Subsection (2), the court or administrative agency may not award any exemption to the noncustodial parent if that parent is not current in his child support obligation, in which case the court or administrative agency may award an exemption to the custodial parent.

(4) An exemption may not be awarded to a parent unless the award will result in a tax benefit to that parent. 1994

78-45-7.22. Social security number in court records.

The social security number of any individual who is subject to a support order shall be placed in the records relating to the matter. 1997

78-45-8. Continuing jurisdiction.

The court shall retain jurisdiction to modify or vacate the order of support where justice requires. 1957

78-45-9. Enforcement of right of support.

- (1) (a) The obligee may enforce his right of support against the obligor. The office may proceed pursuant to this chapter or any other applicable statute on behalf of:
 - (i) the Department of Human Services;
 - (ii) any other department or agency of this state that provides public assistance, as defined by Subsection 62A-11-303(3), to enforce the right to recover public assistance; or
 - (iii) the obligee, to enforce the obligee's right of support against the obligor.

(b) Whenever any court action is commenced by the office to enforce payment of the obligor's support obligation, the attorney general or the county attorney of the county of residence of the obligee shall represent the office.

(2) (a) A person may not commence an action, file a pleading, or submit a written stipulation to the court, without complying with Subsection (2)(b), if the purpose or effect of the action, pleading, or stipulation is to:

- (i) establish paternity;
- (ii) establish or modify a support obligation;
- (iii) change the court-ordered manner of payment of support;
- (iv) recover support due or owing; or
- (v) appeal issues regarding child support laws.

(b) (i) When taking an action described in Subsection (2)(a), a person must file an affidavit with the court at the time the action is commenced, the pleading is filed, or the stipulation is submitted stating whether child support services have been or are being provided under Part IV of the Social Security Act, 42 U.S.C., Section 601 et seq., on behalf of a child who is a subject of the action, pleading, or stipulation.

(ii) If child support services have been or are being provided, under Part IV of the Social Security Act, 42 U.S.C., Section 601 et seq., the person shall mail a copy of the affidavit and a copy of the pleading or stipulation to the Office of the Attorney General, Child Support Division.

(iii) If notice is not given in accordance with this Subsection (2), the office is not bound by any decision, judgment, agreement, or compromise rendered in the action. For purposes of appeals, service must be made on the Office of the Director for the Office of Recovery Services.

(c) If IV-D services have been or are being provided, that person shall join the office as a party to the action, or mail or deliver a written request to the Office of the Attorney General, Child Support Division asking the office to join as a party to the action. A copy of that request, along with proof of service, shall be filed with the court. The office shall be represented as provided in Subsection (1)(b).

(3) Neither the attorney general nor the county attorney represents or has an attorney-client relationship with the obligee or the obligor in carrying out the duties under this chapter. 2003

78-45-9.1. Repealed.

1984

78-45-9.2. County attorney to assist obligee.

The county attorney's office shall provide assistance to an obligee desiring to proceed under this act in the following manner:

- (1) provide forms, approved by the Judicial Council of Utah, for an order of wage assignment if the obligee is not represented by legal counsel;
- (2) the county attorney's office may charge a fee not to exceed \$25 for providing assistance to an obligee under Subsection (1).
- (3) inform the obligee of the right to file impecuniously if the obligee is unable to bear the expenses of the action and assist the obligee with such filing;
- (4) advise the obligee of the available methods for service of process; and
- (5) assist the obligee in expeditiously scheduling a hearing before the court. 1983

78-45-9.3. Payment under child support order — Judgment.

(1) All monthly payments of child support shall be due on the 1st day of each month for purposes of child support

services pursuant to Title 62A, Chapter 11, Part 3, income withholding services pursuant to Part 4, and income withholding procedures pursuant to Part 5

(2) For purposes of child support services and income withholding pursuant to Title 62A, Chapter 11, Part 3 and Part 4, child support is not considered past due until the 1st day of the following month. For purposes other than those specified in Subsection (1) support shall be payable $\frac{1}{2}$ by the 5th day of each month and $\frac{1}{2}$ by the 20th day of that month, unless the order or decree provides for a different time for payment.

(3) Each payment or installment of child or spousal support under any child support order, as defined by Section 78-45-2, is, on and after the date it is due

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (4),

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction, and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (4)

(4) A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner. If the tribunal orders that the support should be modified, the effective date of the modification shall be the month following service on the parent whose support is affected. Once the tribunal determines that a modification is appropriate, the tribunal shall order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered.

(5) For purposes of this section, "jurisdiction" means a state or political subdivision, a territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, Native American Tribe, or other comparable domestic or foreign jurisdiction.

(6) The judgment provided for in Subsection (3)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-312.5

2003

78-45-10. Appeals.

Appeals may be taken from orders and judgments under this act as in other civil actions

1957

78-45-11. Husband and wife privileged communication inapplicable — Competency of spouses.

Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable under this act. Spouses are competent witnesses to testify to any relevant matter, including marriage and parentage

1957

78-45-12. Rights are in addition to those presently existing.

The rights herein created are in addition to and not in substitution to any other rights

1957

78-45-13. Interpretation and construction.

This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it

1957

CHAPTER 45a

UNIFORM ACT ON PATERNITY [REPEALED]

78-45a-1 to 78-45a-17. Repealed.

2005

CHAPTER 45b

PUBLIC SUPPORT OF CHILDREN [REPEALED]

78-45b-1 to 78-45b-25. Repealed.

1985, 1987, 1988

CHAPTER 45c

UTAH UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Section

78-45c-1 to 78-45c-26. Repealed

Part 1

General Provisions

78-45c-101	Title
78-45c-102	Definitions
78-45c-103	Proceedings governed by other law
78-45c-104	Application to Indian tribes
78-45c-105	International application of chapter
78-45c-106	Binding force of child custody determination
78-45c-107	Priority
78-45c-108	Notice to persons outside state
78-45c-109	Appearance and limited immunity
78-45c-110	Communication between courts
78-45c-111	Taking testimony in another state
78-45c-112	Cooperation between courts — Preservation of records

Part 2

Jurisdiction

78-45c-201	Initial child custody jurisdiction
78-45c-202	Exclusive, continuing jurisdiction
78-45c-203	Jurisdiction to modify determination
78-45c-204	Temporary emergency jurisdiction
78-45c-205	Notice — Opportunity to be heard — Joinder
78-45c-206	Simultaneous proceedings
78-45c-207	Inconvenient forum
78-45c-208	Jurisdiction declined by reason of conduct
78-45c-209	Information to be submitted to court
78-45c-210	Appearance of parties and child

Part 3

Enforcement

78-45c-301	Definitions
78-45c-302	Scope — Hague Convention Enforcement
78-45c-303	Duty to enforce
78-45c-304	Temporary parent-time
78-45c-305	Registration of child custody determination
78-45c-306	Enforcement of registered determination
78-45c-307	Simultaneous proceedings
78-45c-308	Expedited enforcement of child custody determination
78-45c-309	Service of petition and order
78-45c-310	Hearing and order
78-45c-311	Writ to take physical custody of child
78-45c-312	Costs, fees, and expenses
78-45c-313	Recognition and enforcement
78-45c-314	Appeals
78-45c-315	Role of prosecutor or attorney general
78-45c-316	Role of law enforcement
78-45c-317	Costs and expenses
78-45c-318	Transitional provision

78-45c-1 to 78-45c-26. Repealed.

2000

the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) *Effect of satisfaction.* When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) *Filing transcript of satisfaction in other counties.* When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Compiler's Notes. — There is no federal rule covering this subject matter.

NOTES TO DECISIONS

Acceptance of full payment.

—Effect.

Attachment.

Vacation of satisfaction.

Acceptance of full payment.

—Effect.

When plaintiff voluntarily accepted full payment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated by the judgment. *Sierra Nev. Mill Co. v. Keith O'Brien Co.*, 48 Utah 12, 156 P. 943 (1916).

Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding. *Blake v. Farrell*, 31 Utah 110, 86 P. 805 (1906).

Vacation of satisfaction.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. *Utah C.V. Fed. Credit Union v. Jenkins*, 528 P.2d 1187 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 1004 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 574 to 584.

A.L.R. — Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

Rule 59. New trials; amendments of judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by

chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Harmless error not ground for new trial, U.R.C.P. 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

NOTES TO DECISIONS

Abandonment of motion.
Accident or surprise.
Arbitration awards.
Burden of proof.
Caption on motion for new trial.
Correction of insufficient or informal verdict.
Correction of record.
Costs.
Decision against law.
Discretion of trial court.
Effect of order granting new trial.
Effect of untimely motion.
Evidence.
— Insufficiency.
— Sufficiency.
Excessive or inadequate damages.
— Punitive damages.
— Waiver.
Failure to object to findings of fact.
Failure to order discovery.
Filing of affidavits.
Grounds for new trial.
— Particularization in motion
Improper statement by counsel.
Incompetence or negligence of counsel.
Misconduct of jury.
Motion to alter or amend judgment.
Motion to be presented to trial court.

Newly discovered evidence.
New trial on initiative of court.
Procedure for questioning grant of new trial.
Reconsideration of motion for new trial.
Sanctions.
Settlement bars appeal.
Summary judgment.
Time for motion.
Tolling time for appeal.
Waiver.
Cited.

Abandonment of motion.

Abandonment of motion for new trial must be intentional, and the facts must indicate this intention. *Bailey v. Sound Lab, Inc.*, 694 P.2d 1043 (Utah 1984).

Accident or surprise.

This section requires that the moving party show that ordinary prudence was exercised to guard against the accident or surprise. *Powers v. Gene's Bldg. Materials, Inc.*, 567 P.2d 174 (Utah 1977).

Plaintiff was not entitled to a new trial on the basis of surprise concerning testimony of the defendant's expert witness where the plaintiff failed to object to the testimony either before, or