

1995

## Gayle Ball v. David Peterson : Reply Brief

Utah Court of Appeals

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**BRIEF**

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950150CA

**FILED**

IN THE COURT OF APPEALS

AUG 02 1995

STATE OF UTAH

COURT OF APPEALS

GAYLE BALL, fka Gayle Peterson,

Plaintiff / Appellee,

vs.

DAVID PETERSON,

Defendant / Appellant.

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Appeals Court No. 950150-CA

Trial Court No. CV 86 363

(Priority No. 15)

**REPLY BRIEF OF APPELLANT**

**Appeal from the Fourth Judicial District Court for Utah County  
The Honorable Ray M. Harding**

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vs.

DAVID PETERSON,

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## INTRODUCTION

Although replete with vituperative rhetoric, the Brief of Appellee Gayle Ball ("Ball") is devoid of analysis or legal authority to refute the numerous instances of error identified by Appellant David Peterson ("Peterson"). In response to every issue raised by Peterson, Ball relies on the "broad discretion" of the trial court in dealing with matters of child support. While Peterson clearly recognizes that trial courts are vested with substantial discretion in dealing with domestic litigation, many of the issues in this appeal involve the trial court's interpretation and application of statutory provisions. These issues are questions of law, which are reviewed for correctness. Even as to those issues committed to the discretion of the trial court, by findings sufficient to permit this court to determine whether the trial court's action was rationally based. As to both the legal and factual issues identified in Peterson's opening brief, Ball has completely failed to provide support for the trial court's actions challenged through this appeal. Accordingly, the decision of the trial court must be reversed and remanded for further proceedings.

## ARGUMENT

- I. The trial court erred in retroactively modifying Peterson's child support obligations for periods prior to the filing of Ball's petition for modification, in violation of *Utah Code Ann.* § 30-3-10.6(2).**

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Ball has conceded, as she must, that Utah law flatly proscribes retroactive modification of child support obligations. *See* Appellee's Brief at 11. Indeed, section 30-3-10.6(2) of the *Utah Code Ann.* and numerous decisions of this court have established that "[i]n no event may

the award be retroactively increased beyond the period during which the modification petition was pending." Brooks v. Brooks, 881 P.2d 955, 960 (Utah App. 1994); *accord* Cummings v. Cummings, 821 P.2d 472, 480-81 (Utah App. 1991). It is readily apparent from the face of the trial court's Findings of Fact and Conclusions of Law, however, that a substantial part of Peterson's alleged child support arrearages are based on a retroactive application of the modification sought through Ball's Counterpetition to Modify, which was not filed until December 1993.

It is undisputed that Ball's Counter-Petition was not filed until the end of December 1993. It is also undisputed that the then existing child support order was entered in February 1992. Under the February 1992 support order, Peterson was obligated to pay \$1547.00 per month. This amount represents Peterson's child support obligation, at least until the filing of Ball's Counterpetition in December 1993. As reflected in the trial courts's Findings and Conclusions, however, Peterson has been assessed "arrearages" for the months from June 1992 through July 1993 because he was not paying Ball \$1745.00 per month. Peterson's child support obligation was **not** \$1745.00 during 1992 or 1993. No petition to modify was filed No order modifying his child support obligation had been entered.

Ball implicitly concedes this point in her brief when she explains that these purported arrearages were derived from "amounts [that] were **changed** . . . pursuant to *Utah Code Ann.* § 78-45-7.10 which provides for an automatic change without the need for an Order to Show Cause or Petition to Modify . . . ." Appellee's Brief at 11. In other words there was no petition to modify or other request for judicial modification of Peterson's support obligation.



Apparently Ball contends Peterson was simply supposed to know that his support obligation had been "automatically" increased by an event that occurred almost immediately after the determination of his support obligation in February 1992.<sup>1</sup>

At the time the February 1992 Order was entered, there were four minor children living with Ball and the oldest minor child, Cameron, was living with Peterson. The court ordered child support of \$1547 based on this custody arrangement. Less than a month later, Cameron attained age 18. He continued to live with Peterson and the four remaining minor children continued to live with Ball. Because the number of minor children living with Ball had not changed, Peterson continued to pay the ordered support of \$1547.00 per month throughout this period from June 1992 (when Cameron Peterson had attained majority and graduated from high school) through August of 1993 (when Cynthia Peterson moved into Peterson's home). The "arrearages" assessed by the trial court are clearly predicated on the assumption that Peterson should have been paying \$1745 per month during this time. Such a determination represents an improper retroactive modification of support obligation for periods **prior** to the filing of Ball's Counterpetition, which did not occur until December 1993.

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<sup>1</sup>As set forth more fully below, Ball contends that the \$1547 per month award established by the February 1992 order should have "automatically" **increased** pursuant to *Utah Code Ann.* §78-45-7.10, in March 1992 when the parties' oldest child, Cameron, who was living with Peterson, attained majority and converted a 4-1 split custody scenario into situation in which there were only 4 minor children -- all living with Ball. Peterson contends this is an erroneous application of that statute. *See* discussion at 7-13 below. For purposes of the "retroactivity" issue, however, it must be noted that Ball did not even raise the argument that Peterson should have paid \$1745 per month until January 31, 1994, when she filed an Affidavit in Support of her Counterpetition to Modify [R. at 760].

Ball asserts, without citation of either legal or factual support, that the trial court's assessment of "arrearages" with respect to amounts Peterson had never been ordered to pay was within its "broad discretion." *See* Appellee's Brief at 12. A trial court's discretion, however, does not entitle it to ignore controlling statutes and established case law. Indeed, Ball's own brief concedes that the appropriate standard of review with respect to the trial court's apparent retroactive increase of Peterson's support obligations is a "correctness" standard. *See* Appellee's Brief at 1. The unequivocal language of *Utah Code Ann.* § 30-3-10.6(2) and established case law interpreting it, unquestionably preclude retroactive modifications of support obligations and that portion of the district court's award must be reversed.

**II. The trial court erred in retroactively applying the 1994 amendments to *Utah Code Ann.* § 78-45-7 *et seq.*, which require child support payments to continue until children graduate from high school, to modify Peterson's child support obligations and to assess arrearages based on Peterson's non-compliance with statutes that were not yet in effect, with respect to Peterson's children Cameron<sup>2</sup> and Patrice and, both of whom had attained majority prior to the enactment of the 1994 amendments.**

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The parties' original Decree of Divorce stated that Peterson's child support obligation would continue "until each child reaches the age of 18 years, or becomes emancipated, whichever shall first occur." [R. at 272]. The February 25, 1992 Order modifying

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<sup>2</sup>Peterson's Opening Brief incorrectly refers to Cynthia Peterson in the statement of this issue as one of the parties' children who attained age 18 prior to July 1, 1994. The text of the brief correctly identifies Cameron and Patrice as the two children to whom this issue relates. Moreover, Peterson concedes now, as he did in his opening brief, *see* Appellant's Brief at 18 & n. 5, that the district court's error as to the time Cameron attained majority worked in his favor. Ball's allegations that Peterson has "unclean hands" because he raises "retroactivity" issues only when they are in his favor, *see* Appellee's Brief at 14, are unfounded.

the Decree did not alter or extend the time for which Peterson was responsible for making child support payments. [R. at 726-29]. A portion of the arrearages assessed against Peterson, however, are based on the assumption that Peterson's support obligation continued until each child reached 18 and graduated from high school. This represents a retroactive application of amendments to § 78-45-7.10 which were effective as of July 1, 1994. That amendment has the effect of extending the period of time for which child support is owed when a child reaches the age of 18 before he or she graduates from high school. Both Cameron Peterson and Patrice Peterson reached 18 before July 1, 1994. It is therefore improper to assess arrearages with respect to these children on the basis of a retroactive application of this substantive change in child support law.

Ball does not dispute that the district court assessed arrearages based on the assumption that Peterson's support obligation should have continued until the Cameron and Patrice graduated from high school. *See* Appellee's Brief at 12-13. Instead, Ball argues that this Court's decision in Thornblad v. Thornblad, 849 P.2d 1197 (Utah App. 1993), grants district courts discretion to extend support obligations until graduation. Ball misses the point entirely. Without question Thornblad holds that a court may exercise its discretion to extend child support obligations. In order to do this, however, Thornblad requires that the court make specific "findings of necessity and special circumstances to justify extending [the child's ] support obligation until graduation." 849 P.2d at 1199. The district court in Thornblad made such findings of changed circumstances, which were upheld on appeal as warranting the extension of the support obligation.

Equally without question is the discussion in Thornblad as to the impropriety of "retroactively" modifying support obligations until the child graduates. Addressing this issue, the Court of Appeals stated:

However, the trial court incorrectly applied the modification retroactively to October 1, 1990, the date Mr. Thornblad ceased support payments for Christopher. Utah Code Ann. § 30-3-10.6(2) (1992) establishes that

[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.

Notice of Mrs. Thornblad's petition for modification was served on Mr. Thornblad on February 11, 1991. The order of modification can only be applied retroactively to that date. Accordingly, we reverse that portion of the support obligation applicable from October 4, 1990, to February 11, 1991.

*Id.* at 1200 (emphasis added).

Peterson does not dispute that the district court has the discretionary power to extend child support obligations until the time the parties' children graduated. In the present case, however, no such discretion was exercised. No findings of changed circumstances or special necessity were made. Instead the court simply repeated the language from the post-July 1, 1994 version of § 78-45-7.10. *See* Findings at ¶3 [R. at 1122-23]. The district court's calculation of arrearages mistakenly assumes that, **as a matter of law**, Peterson's support obligation for each child continues until the child reaches 18 and graduates from high school. With respect to Cameron and Patrice, both of whom had reached 18 prior to the effective date (or enactment)

of the 1994 amendments to section 7.10, the retroactive application of the substantive change in the guidelines is improper and must be reversed.

**III. The trial court erred in interpreting § 78-45-7.10 of the *Utah Code Ann.* to require an "automatic" increase in Peterson's child support obligation when Cameron, the child living with Peterson and establishing "split" custody, attained majority, given that the number of minor residing with Ball remained unchanged.**

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The legal effect of Cameron Peterson's attaining majority raises a further issue of statutory interpretation and application. As with the issues discussed above, Ball again attempts to hide the district court's legal error under the cloak of "discretion." *See* Appellee's Brief at 14-15. The February 1992 Order, which established Peterson's child support obligation through the modification at issue in this appeal, states:

1. Child support in the amount of \$1547.00 per month is awarded pursuant to the statutory child support guidelines for split custody, there being four children with plaintiff, and one child with defendant, said award commencing with November 1, 1991.

[R. at 729]. Neither the February 1992 Order nor the supporting Findings of Fact and Conclusions of Law made by the district court at that time contain any statement as to the effect upon Peterson's child support obligation of Cameron's reaching the age of 18. Less than a month later, on March 13, 1992, Cameron Peterson turned 18.

Utah's statutory scheme for child support includes a specific provision dealing with the effect of children reaching majority. Section 78-45-7.10 of the *Utah Code Ann.*, which is entitled "**Reduction when child becomes 18.**" (emphasis added) states<sup>3</sup>:

(1) When a child becomes 18 years of age, **the base combined child support award is automatically reduced** to reflect the lower base combined child support obligation shown in the table for **the remaining number of children due child support, unless otherwise provided in the child support order.**

(emphasis added). Although this statute is entitled "Reduction when child becomes 18" and the express language of the statute refers to awards being "automatically reduced," the district court awarded arrearages against Peterson based upon an "automatic" recalculation and **increase** in Peterson's support obligation when Cameron Peterson reached majority and the 4-1 "split" custody was replaced by 4-0 "sole" custody calculation. It is upon this basis that Ball claims Peterson should have paid as much as \$1745.00 per month even though no support order ever required him to pay more than \$1547.00 per month.

Without any case authority, legislative history or other apparent basis, Ball purports to know the legislature's intent. According to Ball, § 78-45-7.10 is intended "to provide for the automatic support adjustment without the expense and hassle of a court proceeding." Appellee's Brief at 14. The plain language of the statute, however, does not support Ball's interpretation. The statute states that child support awards should be "**reduced**" to reflect the lower base

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<sup>3</sup> As noted above, this statute was amended effective July 1, 1994 to extend the event triggering reduction under this statute until the child graduates from high school. The statutory text quoted here is the language of the statute as it read in March 1992, when Cameron Peterson attained the age of 18.

combined child support obligation shown in the table for **the remaining number of children due child support . . .**" (emphasis added).

At the time of the February 1992 Order, Peterson was supporting four of his minor children in Ball's household and paying \$1547.00 per month. Because the remaining number of children due child support (*i.e.* the children living with Ball) remained unchanged after Cameron Peterson reached majority, Peterson properly believed that his child support obligation remained unchanged.

The \$1547.00 per month support figure was established by an Order dated February 25, 1992. Within three weeks of that Order, Cameron reached his eighteenth birthday. It is apparent that neither the parties nor the district court believed that the support award contained in the February Order would be superseded within such a short period of time. The fact that Ball failed to seek the increased support of nearly \$200 per month until two years later is compelling evidence that she did not interpret the February 1992 Order to require such increased payments. It is inequitable and unjust for Ball to advance an argument for the first time after thousands of dollars in supposed "arrearages" had accrued.

Ball accuses Peterson's counsel "of playing semantics . . . in bad faith" on this issue. Appellee's Brief at 15. This attack not only on Peterson but on the counsel representing him is unwarranted and offensive. It is incomprehensible how Ball can claim that Peterson's argument regarding § 78-45-7.10 is not made in good faith. Peterson's argument is based on the plain language of the statute! A fundamental rule of statutory interpretation in Utah is that courts must look first to the plain language of the statute. K & T, Inc. v. Koroulis, 888 P.2d

623, 627 (Utah 1994); State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993); Schurtz v. BMW of N. America, 814 P.2d 1108, 1112 (Utah 1991); Harmon v. Ogden City, 258 Ut. Adv. Rptr. 5, (Ut. App. Feb. 9, 1995). Moreover, courts are required "to assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." Savage Indus. v. Utah State Tax Comm'n, 811 P.2d 664, 670 (Utah 1991).

Ball asserts that "[s]urely Peterson's counsel can see that the legislature would never have intended" § 78-45-7.10 to be read literally and limited to the plain meaning of their terms. Appellee's Brief at 15. This assertion falls flat in the face of the recent pronouncement from the Utah Supreme Court that:

A cardinal rule of statutory construction is that courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.

Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994) (emphasis added). Ball makes no effort to analyze the language of the statute. Instead, she simply asserts, without citation to any authority, that her interpretation is "clearly the intent of the legislature." Appellee's Brief at 14. The Utah Supreme Court has held, however, that "if the statutory language is plain and unambiguous, the Court will not look beyond the same to divine legislative intent." Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989); accord World Peace Movement of Am. v. Newspaper Agency Corp., 879 P.2d 253, 359 (Utah 1994) ("Only when we find ambiguity in



the statute's plain language need we seek guidance from the legislative history and relevant policy considerations.")

Notwithstanding Ball's *ad hominem* attacks on Peterson (and Peterson's counsel), nothing in § 78-45-7.10 supports the conclusion that a child support obligation can be "automatically" increased, without notice to the paying party or any court action, when a child of the payor attains majority. The argument that a change in circumstances of the parties should give rise to a later claim for child support arrearages was firmly rejected by the Utah Supreme Court in Stettler v. Stettler, 713 P.2d 699 (Utah 1985). In that case, the parties agreed that one of the parties' children would move from the custodial parent's home to the home of the non-custodial parent. The parties stipulated to a modification of custody but did not modify the child support order until approximately a year later. The Supreme Court affirmed the district court's rejection of a claim that the change in custody gave rise to an automatic change in the child support award. The Supreme Court explained: "Thus, while custody had changed, the order regarding support payments had not and was a valid existing order until March 1983." *Id.* at 702 (emphasis added).

There are innumerable potential changes of circumstance that can bring about a modification of a child support award. Section 78-45-7.10, by its own terms, deals with only one. Where a child for whom a support payor is making support payment attains majority (and, after July 1, 1994 graduates from high school), this statute indicates that the obligor's payments are automatically reduced to the level appropriate for the "remaining number of children due support." For other changes in circumstance, such as moving from one parent's home to the

other (as seen in Stettler) or where the child attaining majority is not a child for whom the support obligor is making support payments (as in the present case) and for the myriad of other potential changes in circumstance that will need to be evaluated on a case-by-case basis, § 78-45-7.10 simply does not effect an "automatic" modification of child support obligations. Accordingly, there was no basis in the present case for the trial court to retroactively modify Peterson's existing support obligations based on Cameron Peterson's attaining majority in March 1992 and to assess nearly two years of arrearages on the basis of a supposedly "automatic" modification of Peterson's support obligations of which neither he nor Ball were aware at the time.<sup>4</sup>

Because the statutory language is clear, there is no need for this court to delve into issues of policy. For purposes of analytical completeness, however, Peterson offers the following response to Ball's vigorous assertion that the legislature has expressed an "intent to provide for the automatic support adjustment without the expense and hassle of a court proceeding." Appellee's Brief at 14. As desirable as it may be to have support awards that adjust without the need for court action, the law has and must place a greater value on parties being able to ascertain their legal obligations. A statute that effects "automatic" changes in support obligations

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<sup>4</sup>As stated in Upland Industries Corp. V. Pacific Gamble Robinson Co., 684 P.2d 638, 642 (Utah 1984), the parties' pre-litigation conduct is a very persuasive indicator of their contemporaneous understanding of their rights and obligations. If Ball actually believed that she was due an additional \$200 per month in child support when Cameron Peterson reached age 18, it was incumbent upon her to give Peterson some notice of this fact rather than seeking thousands of dollars in arrearages and attorneys' fees two years later. The fact that no such claim for support was advanced until January 1994 is indicative of the fact that Ball did not believe, in March 1992, that Peterson owed additional support.

is of no utility if neither of the parties understand the change to have taken place until years later. It is difficult to perceive how such a result would reduce the parties' expenses or the "hassle" involved in determining -- at every point in time -- the amount of the support obligation owed.

**IV. The trial court erred in calculating Peterson's child support obligations under *Utah Code Ann.* § 78-45-7.15 by giving Ball credit for medical insurance payments which she does not, in fact, pay and which are purchased by her current spouse to cover his children from a previous marriage.**

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In Peterson's Opening Brief, the evidence on this issue was carefully marshaled to support the decision and the conclusion was nonetheless inescapable: Ball is receiving credit in the calculation of the child support obligation for medical insurance premiums that are being made by her current spouse. [R. at 1213-14]. The insurance is a "family policy" obtained through the employer of Ball's present spouse which is paid for by deductions from her spouse's paycheck. [R. at 1219]. The coverage provided by that policy extends to Ball's present spouse, Ball herself, the children from Ball's spouse's previous marriage **and** some the parties' children. Under the district court's ruling, Ball is credited with \$100 per month of medial insurance payments. *See* [R. at 1004] (attached to Peterson's Opening Brief as Attachment 4). This determination is clearly erroneous.

Without citing any supporting evidence from the record, Ball disingenuously claims that "Ball has paid for the insurance she has purchased . . . ." Appellee's Brief at 15. This insupportable claim that Ball "pays" for this insurance is rationalized on the next page of Ball's brief where she concedes that

It makes no difference how insurance is paid, and/or who signs a check when funds come from the family budget. If one parent makes a purchase for clothing, food, or even medical insurance, the child support payments from another spouse reimbursed the pooled resources of the family. . . . [T]his is how family budgets operate, and that all child support orders and guidelines are made taking this into consideration.

Appellee's Brief at 16 (emphasis added). Without taking time to dispute the patently ridiculous assertion that Ball knows how all family budgets operate, her claim that this is how the child support guidelines function is -- as a matter of law -- simply wrong. Section 78-45-7.4. of the *Utah Code Ann.* expressly provides that "Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines." In other words, the "pooled resources" of Ball and her new husband are irrelevant to the calculation of Peterson's child support obligation.<sup>5</sup> If Ball were remarried to a billionaire and his children were living in palatial luxury with Ball's new spouse, Peterson's child support obligation would remain unchanged. For purposes of calculating child support, it is **only** the incomes and expenses of Peterson and Ball that are relevant.

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<sup>5</sup>In an apparent attempt to construct a *reductio ab absurdum* argument, Ball further asserts that "Plaintiff's Counsel may as well argue that he should see every check written for food clothing and everything else . . . ." Appellee's Brief at 16. This argument too demonstrates lack of understanding of Utah's child support laws. Pursuant to *Utah Code Ann.* § 78-45-7.20 a support payor is entitled to an accounting, including receipts, of amounts expended for the child's benefit. This is not, however, the point. Medical insurance premiums are different that amounts spent for food, clothing and other necessities because those items are presumably covered by the base child support obligation. Medical insurance premiums are added to the base child support award and have separate specific statutory procedures for determining the proper amount to be added to the obligor's support obligation. Moreover, Ball's argument pointlessly focuses on the "non-issue" of which spouse "wrote the checks" for the medical insurance premiums. *See* Appellee's Brief at 16. The clear evidence in this case is that **no** checks were being written for the medical insurance premiums. These premiums were deducted from Ball's spouse's paycheck to provide insurance for many more people than the parties' children

The plain language of Utah's statutes also demonstrates the district court's error. Section 78-45-7.7 of the *Utah Code Ann.* states that "the children's portion of any monthly payments **made directly by each parent for medical and dental insurance premiums**", (emphasis added)<sup>6</sup>, should be used in making the child support calculation. The 1994 amendments to the child support guidelines clarify that "[E]ach parent [is] to share equally the out-of-pocket costs of the **premiums actually paid by a parent** for the children's portion of the insurance." *Utah Code Ann.* §78-45-7.15(3) (emphasis added). The statutory language is unmistakable. Only premiums paid by **parents** are entitled to be considered in calculating child support obligations. Because the medical insurance payments do not come from Ball's income, they cannot be used to modify Peterson's support obligation.

A further respect in which the ruling with respect to medical insurance is clearly erroneous is that it is based on an obvious arithmetic error. Under the district court's decision, Ball is receiving a credit of \$100 per month for medical insurance premiums that she is "paying." The child support worksheet showing the derivation of this \$100 figure, [R. at 1004] (Attachment 4 to Peterson's Opening Brief), indicates that Ball is getting credit for 4/7 of the \$175.50 premium "paid" by Ball. There is no dispute that only two of the parties' children are covered by Ball's insurance. Thus, 2/7, which would yield a credit of \$50.14--if the amount were actually paid by Ball. This error, which was identified in Peterson's Opening Brief, is not controverted or defended by Ball in her brief.

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<sup>6</sup>The quoted text is the version of the statute in effect prior to the 1994 amendments. It contains the procedure in effect at the time of the trial in this matter.

In response to this overwhelming authority, Ball again responds that it is within the district court's discretion to make its child support calculations on the basis of "a family budget of pooled resources." Appellee's Brief at 16. This is not correct. The district court does not have discretion to ignore the clear mandate of a statute which specifically indicates that **only** medical premiums actually paid by a **parent** may be considered. Notwithstanding the broad discretion given to trial courts in such matters, where the legislature has spoken a district court cannot ignore its mandate.<sup>7</sup>

**V. There is no basis for awarding attorneys fees to Ball in this matter.**

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Amazingly, a mere three pages after Ball claimed that her family "like all families" functions on "pooled assets," *see* Appellee's Brief at 16, Ball claims that she is entitled to an award of attorneys' fees on the basis of "her meager income below the minimum wage level." *Id.* at 19. The evidence before the district court was clearly to the contrary. Defendant's Exhibit 14, the 1993 Federal Tax Return for Ball and her current spouse indicated gross income of \$73,987. In addition to this amount, Ball received tax-free child support payments from

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<sup>7</sup>On this issue too, Ball again engages in an *ad hominem* attack on both Peterson and Peterson's counsel. Appellee's Brief at 16 ("Peterson and his counsel cannot seriously raise an issue of an abuse of discretion, except in complete bad faith.") As demonstrated above, Peterson's position is directly supported by the unequivocal language of controlling Utah statutes and by uncontroverted citations from the record in this case. It is Ball whose good faith must seriously be questioned. As noted above, it is dishonest to argue that "Peterson cites nothing from the record showing who signed all the checks," *id.*, when the record that unequivocally demonstrates that there were no checks at all--that these medical insurance premiums were directly deducted from the paycheck of Ball's spouse. This assertion, in light of the record on appeal, appears to fall short of the obligations imposed by Rule 3.3 of the Rules of Professional Conduct.

Peterson during 1993 of at least \$14,503 [R. at 1121]. Thus, the "family" income available to Ball was nearly \$90,000 in 1993. Although Ball's personal income was modest, it is clear that she voluntarily changed employment to a lower paying job [R. at 1207] and that she anticipated quitting her employment entirely in order to spend time with her family. [R at 1216]. Peterson does not begrudge Ball's election not to pursue more lucrative employment given her current spouse's substantial income. It is patently absurd, however, for a person with a household income of nearly \$90,000 per year to argue that she is impoverished.

The issue of attorneys fees was argued at length before the trial court. [R. at 1222-32]. At that time Ball's counsel acknowledged that the trial court had never, in any of the proceedings relating to this divorce, awarded her attorneys' fees. [R. at 1222]. Acting on the basis of all the relevant information, the trial court again denied Ball's request for fees. [R. at 1124]. This determination is committed to the sound discretion of the trial court. Lyngle v. Lyngle, 831 P.2d 1027, 1030 (Utah App.1992); Nielson v. Nielson, 826 P.2d 1065, 1068 (Utah App. 1991). Nothing in Appellee's Brief demonstrates an abuse of that discretion.

It must also be noted that the record is devoid of evidence supporting an award of attorneys fees. It is undisputed that Ball's counsel is the brother of her present spouse. There is no evidence in the record indicating that Ball has actually paid **any** fees whatsoever to her attorney. No Affidavit of Fees in compliance with Rule 4-505 of the Utah Code of Judicial

Conduct or any other evidence of fees was offered by Ball in the court below. Accordingly, the district court acted well within its discretion in denying Ball's request for fees.<sup>8</sup>

**VI. The trial court erred by failing to make appropriate findings as to an "appropriate and just" support amount, as required by *Utah Code Ann.* § 78-45-7.12, where the combined incomes of Peterson and Ball exceeded the highest level specified in the Child Support Guidelines.**

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The district court's 1995 Order determined that Peterson's monthly gross income was \$14,583 and that Ball's monthly gross income was \$732.00. These figures produce a total well above the highest level specified in the Utah Uniform Child Support tables. Under these circumstances, the trial court is obligated to determine "an appropriate and just" amount of child support, which "may not be less than the highest level specified in the table for the number of children due support." *Utah Code Ann.* § 78-45-7.12. In exercising this discretion, the trial court must make findings that are specific enough "to ensure that the trial court's discretionary determination was rationally based." *Martinez v. Martinez*, 728 P.2d 994, 994 (Utah 1986). Moreover, "findings are adequate only if they are sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App. 1990). Thus, failure to make adequate findings is an abuse of discretion. *Id.*; *Stevens v. Stevens*, 754 P.2d 952, 958-59 (Utah Ct. App. 1988); *Jefferies v. Jefferies*, 752 P.2d 909, 911-12 (Utah Ct. App. 1988).

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<sup>8</sup>Ball also failed to properly raise this issue on appeal. The trial court ruled against Ball on her request for fees. Ball failed to file a timely notice of appeal on this issue. Instead, she simply raised the question of fees in her Appellee's Brief. Significantly, in Ball's listing of the "Issues on Appeal" she failed to identify how this issue was preserved for appeal. *See* Appellee's Brief at 4.



The district court failed to make **any** findings to support this award. The court's entire statement on this issue is as follows:

The previous monthly gross income of the Defendant was found to be \$10,500.00. the Court finds that the Defendant's monthly gross income is now \$14,583.00, and that the monthly gross income for the Plaintiff shall be imputed to be at the minimum wage level.

9. Based upon the above figures, child support should be awarded to Plaintiff in the amount of \$1,520.00 pursuant to the child support schedules.

[R. at 1120]. In her brief, Ball provides the mathematical equation used by her counsel to determine the extrapolated "Base Combined Child Support Obligation" which Ball asserts should be \$2399 per month. Appellee's Brief at 17. Ball concedes that the figure is merely a linear extrapolation based on the ratio of the highest award in the guidelines to the actual combined income of the parties. *Id.* There are at least two fundamental problems with this analysis.

First, there is no supporting case law in Utah holding that a "straight line" extrapolation above the highest award in the guidelines. By statute, the trial court is required to determine "an appropriate and just" amount of child support, which "may not be less than the highest level specified in the table for the number of children due support." *Utah Code Ann.* § 78-45-7.12. It does not necessarily follow, however, that an appropriate and just award flows mathematically from the guidelines -- regardless of the incomes involved. It is easy to envision circumstances under which child support awards could be ridiculously above any possible need of a child to be supported.

Although there are no Utah appellate decisions on this issue, the en banc decision of the Supreme Court of Missouri in Mehra v. Mehra, 819 S.W.2d 351 (Mo. 1991) (for the

convenience of the Court, a copy of this decision is attached hereto as Attachment "A") is directly on point. This case involved a child support guideline statute much like Utah's that had a maximum monthly income figure of \$10,000. The trial court awarded child support based upon a "straight line" extrapolation above the highest amount in Missouri's table. The Missouri Supreme Court, sitting en banc, reversed this determination. It held:

We interpret the schedule differently. Court-ordered child support, as provided by statute, is to be an amount "reasonable or necessary " for support of the child and not to provide an accumulation of capital. . . . The amounts indicated on the schedule are but a presumption of the proper level of support, given the monthly income of the parties and we find that the trial court's mode of extrapolation beyond the confines of the schedule unjustified in the absence of any specific finding that the \$1550 figure is unjust or inappropriate.

*Id.* at 354 (emphasis added).

Second, the methodology used by Ball to extrapolate is questionable. Her analysis assumes that each incremental block of income is subject to the same percentage of child support obligation. A review of the guidelines, however, quickly demonstrates that this is not correct. The support guidelines for 3 children require support of \$356 per month for income of \$1100, or 32%. For monthly incomes of \$10,1000, however, the support obligation is \$1808, or 18%. Thus it is apparent that the incremental child support **decreases** with higher levels of monthly income. In light of this gradual decrease in incremental support obligation, Ball's extrapolation methodology substantially overstates the appropriately extrapolated award. Attached hereto as Attachment "B" is a handout from the Seminar of the Utah Fellows of the American Academy of Matrimonial Lawyers Seminar on "Dealing with Special Problems in Divorce," held in Salt Lake City in December 1994, in which the methodology used by some domestic practitioners

and commissioners in this state is described. If the parties' base support obligation were calculated using this "extrapolation by incremental percentage ratio" (*i.e.* \$10 of additional support for every \$100 in monthly income above \$10,100 per month) the "Base Combined Support Obligation" in this case would be \$2,128 per month as opposed to \$2399 as calculated by Ball. The discrepancy is substantial. Over the period of time involved in this case, thousands of dollars are at issue.

The district court clearly failed to make findings that are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue [in setting the support award] was reached." *Cf. Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App. 1990). Although, Peterson urged the trial court to consider all the relevant factors set forth in *Utah Code Ann.* § 78-45-7(3) in making an award outside that specified by the guidelines, in the absence of any findings, however, it is not possible to assess what method was used for determining Peterson's obligation. Even if the district court were to make findings that an "appropriate and just" award would exceed the highest amount in the guidelines, the extrapolation performed by Ball improperly overstates Peterson's support obligation. It is therefore necessary to remand this issue for further consideration by the trial court.

**VII. The trial court erred in determining that there had been a material change in circumstances, warranting a modification of Peterson's child support obligations under *Utah Code Ann.* § 78-45-7.2(6) because, if properly calculated, Peterson's support obligations under current guidelines do not vary by more than 25% from the previous support order.**

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A material change in circumstances warranting modification of a child support award is defined by statute in Utah to exist present "if there is a difference of at least 25% between the existing order and the guidelines." *Utah Code Ann.* § 78-45-7.2(6). Thus, the relevant inquiry for a district court to make in assessing the existence of a material change in circumstances not whether there has been an increase in **incomes** but rather whether the increases in the parties' incomes would produce a 25% different result in child support **obligation**. The Findings of Fact and Conclusions of Law entered by the district court in this case unambiguously demonstrate that the court focused on the wrong issue:

The Court finds that there has been a material change of circumstances of at least 25% and a modification of the previous decree is in order . . . The previous monthly gross income of the Defendant was found to be \$10,500. The Court finds that the Defendant's monthly gross income is now \$14,583, and that the monthly gross income for the Plaintiff shall be imputed at the minimum wage level.

Based upon the above figures, child support should be awarded to Plaintiff in the amount of \$1520.00 pursuant to the child support schedules.

[R. at 1120] (emphasis added). Clearly the district court focused on the increase in Peterson's monthly salary and not on whether that increase would modify his support obligation by more than 25%. *See Brooks v. Brooks*, 881 P.2d 955, 959 (Utah App. 1994) (holding that there was no material change of circumstances even where there was a dramatic change in parties' incomes

because the existing award was based on another state's guidelines and the new incomes did not produce a 25% change under Utah's guidelines.) Under precisely the same reasoning as Brooks, this matter should be remanded to the district court for a determination as to whether there has been a 25% change in the level of support previously ordered. In light of the numerous errors outlined above, Peterson's support obligation will certainly need to be recalculated. When this obligation is properly recalculated, Peterson believes that it will not vary from the previously ordered amount by 25%.

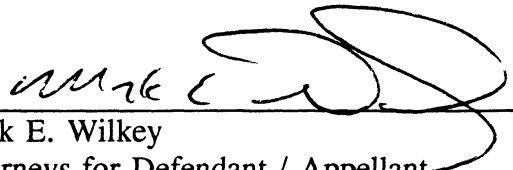
### CONCLUSION

The brief filed by Appellee Gayle Ball does not substantially dispute the issues raised by Peterson on this appeal. Ball has not disagreed with a single point of law or argued that any of Peterson's "Issues on Appeal" were not properly preserved. On virtually all points, Ball has simply asserted that the district court had sufficient discretion to support its determinations in this case. Peterson has properly identified the standards of review applicable to this issues in this appeal. Many of the alleged errors involve interpretation and application of statutes, which are not matters within the district court's discretion. Even as to the issues committed to the discretion of the district court, such discretion must be rationally exercised and supported by adequate findings. For the reasons stated above, Appellant Peterson hereby requests that this Court reverse and remand to the district court for further consideration the order modifying decree of divorce entered herein on January 30, 1995.

RESPECTFULLY SUBMITTED this 2<sup>d</sup> day of August, 1995.

KIMBALL, PARR, WADDOUPS, BROWN & GEE

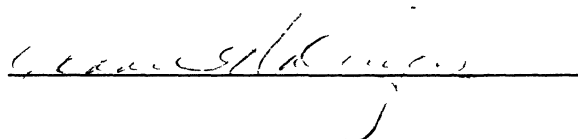
By:

  
Mark E. Wilkey  
Attorneys for Defendant / Appellant

### CERTIFICATE OF SERVICE

On the 21<sup>st</sup> day of October, 1995, a true and correct copy of the foregoing was served by United States Mail, first-class postage prepaid, on the following:

J. Spencer Ball  
Attorney for Appellee  
2040 E. Murray Holladay Road, Suite 209  
Salt Lake City, Utah 84117



# **ATTACHMENT "A"**

**TO REPLY BRIEF**

***(Mehra v. Mehra)***

**Subodh K. MEHRA, Defendant-  
Appellant-Cross-  
Respondent,**

**v.**

**Rachna MEHRA, Plaintiff-Respondent-  
Cross-Appellant.**

**No. 73748.**

**Supreme Court of Missouri,  
En Banc.**

**Nov. 19, 1991.**

Marriage dissolution decree was entered by the Circuit Court, St. Louis County, Steven Goldman, J., in which child support guidelines were applied to monthly incomes in excess of \$10,000. Husband and wife appealed. Case was transferred and the Supreme Court, Rendlen, J., held that: (1) award of legal custody of children to wife was not error; (2) trial court erroneously ordered child support in excess of maximum guidelines amount without specific finding that maximum amount was unjust or inappropriate; (3) wife's expert was qualified to testify to value of medical equipment; (4) accepting wife's valuation of office condominium was not error; (5) remand was required to determine income from apartment building; (6) ordering husband to cause corporation to transfer insurance policy to wife was not error; (7) awarding attorney fees to wife was not error; and (8) wife was properly ordered to sign declaration that she would not claim children as income tax dependents.

Affirmed in part, reversed in part, and remanded.

Covington, J., concurred in part, concurred in result in part, and filed separate opinion in which Robertson, C.J., and Blackmar, J., joined.

**1. Divorce ⇌184(6)**

Supreme Court must sustain trial court's decree in dissolution proceeding unless there is no substantial evidence to support it, it is against weight of evidence, or it erroneously declares or applies law.

**2. Divorce ⇌184(4, 7)**

Supreme Court defers to fact finder's determinations of credibility, viewing evidence and permissible inferences therefrom in light most favorable to dissolution decree, disregarding all contrary evidence and inferences.

**3. Divorce ⇌4**

Child custody statute, which was adopted after petition for dissolution was filed, did not apply in that proceeding. V.A.M.S. § 452.375, subd. 3.

**4. Divorce ⇌298(1)**

Award of legal custody of children to wife and temporary custody with visitation rights to husband was not abuse of discretion in marriage dissolution proceeding where wife had been primary influence in lives of children and wife's parenting decision often conflicted with those of husband. V.A.M.S. § 452.375, subd. 2.

**5. Divorce ⇌312.7**

Allegations that one daughter moved in to live with husband after trial of marriage dissolution proceeding would be considered as to custody and support on remand of decree which awarded legal custody to wife and temporary custody with visitation rights to husband. V.A.M.S. § 452.375, subd. 2.

**6. Divorce ⇌308**

Child support award based in dissolution proceeding where parents' gross monthly income exceeded \$10,000 was erroneously calculated using straight line extrapolation from a percent of income for child support based on \$10,000 monthly income where no specific finding was made that award based on \$10,000 scheduled income was unjust or inappropriate. V.A.M.S. § 452.340.

**7. Parent and Child ⇌3.3(7)**

Court-ordered child support, as provided by statute, is to be amount reasonable or necessary for support of child when balanced against parents' ability to pay and family's standard of living. V.A.M.S. § 452.340.



**8. Evidence** ⇨543(4)

Wife's expert witness was qualified to testify regarding value of equipment used in medical practice in dissolution proceeding where expert had visited practice to examine equipment in question, including x-ray and computer equipment, and was familiar with secondhand market for medical equipment.

**9. Evidence** ⇨546

Qualifications of witness to render expert opinion lie within trial court's discretion.

**10. Evidence** ⇨488

Trial court was entitled to accept wife's valuation of office condominium when valuing condominium in dissolution proceeding, even though husband testified that market value of condominium was \$55,000 less, where wife was joint owner.

**11. Divorce** ⇨287

Remand of dissolution decree was necessary to determine income from apartment building where record did not provide substantial evidence to support a finding of the monthly income from property.

**12. Divorce** ⇨252.3(4)

Dissolution decree properly ordered husband, as sole shareholder of medical corporation, to cause corporation to transfer two insurance policies on husband's life to wife where husband made no showing that transfer could not be accomplished; trial court did not allocate corporate assets themselves as marital property.

**13. Divorce** ⇨227(1)

Ordering husband to pay wife \$47,190 in attorney fees was not abuse of discretion in marriage dissolution proceeding; award was less than bill for legal services.

**14. Divorce** ⇨223

Award of attorney fees in marriage dissolution proceeding is within discretion of trial court.

**15. Divorce** ⇨308

Ordering wife to execute written declaration that she would not claim children as income tax dependents was not error, even though mother was custodial parent.

**16. Divorce** ⇨286(8)

Supreme Court gives deference to trial judge when reviewing valuation of property in marriage dissolution proceeding; trial judge is in best position to assess credibility of witnesses and apply proper values to property.

**17. Evidence** ⇨489

Trial court was entitled to disregard wife's uncontradicted testimony concerning valuation of her medical practice; refusal to include \$25,000 unsecured debt allegedly used to purchase equipment for practice was not error.

**18. Divorce** ⇨252.2

Trial court is to make just division of marital property in dissolution proceeding after consideration of pertinent factors such as contribution of each spouse to acquisition of marital property, value of property set apart to each spouse, and economic circumstances of each spouse at time division is to become effective; division need not be equal. V.A.M.S. § 452.330, subd. 1.

**19. Divorce** ⇨252.2

Division of marital property was just, even though not exactly equal, where division of assets was roughly equal. V.A.M.S. § 452.330, subd. 1.

**20. Divorce** ⇨252.3(1)

Trial court properly excluded pharmacy corporation's repayment of husband's loan from marital property in dissolution decree where husband had advanced funds to corporation and repayment was used to buy husband's separate home.

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Mark S. Corman, Clayton, Christopher Karlen, St. Louis, Edward K. Fehlig, Clayton, for defendant-appellant-cross-respondent.

Robert F. Summers, Theresa Counts Burke, St. Louis, for plaintiff-respondent-cross-appellant.

RENDLEN, Judge.

In this dissolution proceeding, both husband (Subodh K. Mehra) and wife (Rachna

Mehra) appeal from the trial court's decree. The parties were married in India in 1973, and their two daughters, Shaila, now 16, and Anjali, now 8, were born in the United States. The parties are physicians, licensed to practice in Missouri, with a combined monthly income of \$19,395.00 at the time of trial.

[1, 2] The trial court appointed the Honorable Franklin Ferriss as Master and accepted his recommended Findings of Fact and Conclusions of Law. We granted transfer from the Missouri Court of Appeals, Eastern District, to examine the application of the Missouri child support guidelines to monthly incomes in excess of \$10,000. Applying the standards of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), we must sustain the trial court's decree unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Further, we defer to the factfinder's determinations of credibility, viewing the evidence and permissible inferences therefrom in the light most favorable to the decree, disregarding all contrary evidence and inferences. *Wynn v. Wynn*, 738 S.W.2d 915, 918 (Mo.App.1987); *Ware v. Ware*, 647 S.W.2d 582, 583-84 (Mo.App.1983).

#### Child Custody

[3] Husband first contests the trial court's award of legal custody to the wife and temporary custody with visitation rights to him, contending the court should have awarded joint legal custody pursuant to § 452.375.3, RSMo Supp.1988. This subsection, added in 1988, reads as follows:

The general assembly finds and declares that it is the public policy of this state to assure children frequent and meaningful contact with both parents after the parents have separated or dissolved their marriage, and that it is in the public interest to encourage parents to share decision-making rights and responsibilities

ties of child-rearing. In order to effectuate this policy, the court shall determine the custody arrangement which will best assure that parents share such decision-making responsibility and authority and such frequent and meaningful contact between the child and each parent, as is indicated in *the best interests of the child under all the relevant circumstances* (emphasis supplied).

However, this amendment was not in effect at the time the petition in this case was filed on October 26, 1987, and is therefore inapplicable here. *In re Marriage of Ross*, 772 S.W.2d 890, 892 (Mo.App.1989).

[4, 5] Nonetheless, assuming *arguendo* the amendment is applicable, child custody must be determined in accordance with "the best interests of child," § 452.375.2, RSMo Supp.1988, *see also* § 452.375.2, RSMo 1986 (containing the same criterion), and we do not find the trial court's judgment erroneous in this respect. The statutes do not limit the discretion of the trial court to reject joint custody, and the court found that the wife has been "the primary influence in both daughters' lives" and that her parenting decisions often conflict with those of the husband. In his testimony husband admitted a difficulty in communicating with his wife regarding the children. Imperative to the best interests of the child in a joint custody arrangement are "[t]he commonality of beliefs concerning parental decisions and the ability of the parents to cooperate and function as a parental unit." *Massman v. Massman*, 749 S.W.2d 717, 720 (Mo.App.1988). "Unless [parental] guidance has some uniformity it may well be worse than no guidance at all." *Lipe v. Lipe*, 743 S.W.2d 601, 602 (Mo.App.1988). This first point is denied.<sup>1</sup>

#### Child Support

[6] We find merit, however, in husband's challenge to the trial court's child support award. The court based its award on the Missouri Child Support Guideline Schedule of Basic Child Support Obliga-

proceedings, the trial court should review such allegations, and if true, determine the proper course as to custody and support in accordance with the directions given in this opinion.

1. Husband notes that Shaila, the elder daughter, moved in with him after trial, and this, of course, was not in evidence before the trial court. As we remand the cause for further

gations as applied by the Circuit Court of St. Louis County. This schedule, based on the Income Shares Model developed by the National Center for State Courts, was prepared by the Missouri Child Support Guidelines Task Force, funded by the Missouri Bar Association Family Law Section and the Missouri Department of Social Services, and was first published at 735-736 S.W.2d Missouri Cases, p. XL, in 1987. Pursuant to the direction of the legislature, § 452.340.7, RSMo Supp.1989, the schedule has since been adopted as Form 14 of our Rules, coincident with Rule 88.01, on October 2, 1989, and made mandatory as of April 1, 1990. The schedule sets forth the amount of child support as a proportion of the combined gross monthly income of the parents. At \$100 monthly income, the basic child support for two children is thirty-seven percent of income, and though with each \$100 increase in monthly income, the amount of child support increases, the percentage ratio of "support-to-income" decreases steadily to 15.5 percent when it reaches \$8400. For monthly incomes from \$8400 through \$10,000 the support percentage is 15.5 percent, and the schedule ends at the \$10,000 monthly income level with \$1,550 in child support for two children.<sup>2</sup> This case presents the important question of interpreting these guidelines when the parties have a monthly income in excess of \$10,000.

[7] The trial court, finding the parties' combined gross monthly income to be \$19,395, made a straight line extrapolation of the 15.5 percent ratio and calculated the children's support at \$3000 per month ( $\$19,395 \times .155 = \$3,006.23$ ), with husband to

pay 65.6 percent of this amount and wife to pay the remainder. We interpret the schedule differently. Court-ordered child support, as provided by statute, is to be an amount "reasonable or necessary" for support of the child, § 452.340, RSMo 1986, "and not to provide an accumulation of capital." *Heins v. Heins*, 783 S.W.2d 481, 483 (Mo.App.1990), which must be balanced against the parents' ability to pay and the family's standard of living. See *Wynn v. Wynn*, 738 S.W.2d 915, 919 (Mo.App.1987); *Wiesbusch v. Deke*, 762 S.W.2d 521, 523 (Mo.App.1988) *Reed v. Reed*, 775 S.W.2d 326, 330 (Mo.App.1989); *Pursifull v. Pursifull*, 781 S.W.2d 262, 264 (Mo.App.1989); *In re Marriage of Cope*, 805 S.W.2d 303, 308 (Mo.App.1991); § 452.340(3), (4), and (6), RSMo 1986. Further statutory factors for consideration are "[t]he father's primary responsibility for support of his child," § 452.340(1), "[t]he financial resources of the child," § 452.340(2), and "[t]he physical and emotional condition of the child, and his educational needs." Section 452.340(5). The amounts indicated on the schedule are but a presumption of the proper level of support, given the monthly income of the parties, and we find the trial court's mode of extrapolation beyond the confines of the schedule unjustified in the absence of any specific finding that the \$1550 figure is unjust or inappropriate. Further, the record does not reflect how the court determined husband must pay \$800 per month towards the children's "special needs," which include private educational expenses of \$1,133.33 per month. Accordingly, we remand the cause for fur-

2. The pattern of gradual steady reduction of child support as a percentage of monthly income is as follows:

<u>Monthly Income</u>	<u>% for Child Support</u>	<u>Change in % for Support</u>
\$100	37.0%	—
\$1000	30.5%	6.5
\$2000	24.7%	5.8
\$3000	22.7%	2.0
\$4000	21.0%	1.7
\$5000	19.2%	1.8
\$6000	18.0%	1.2
\$7000	16.8%	1.2
\$8000	15.8%	1.0
\$9000	15.5%	0.0
\$10,000	15.5%	0.0

er proceedings consistent with this opinion.<sup>3</sup>

*Valuation of Southside Medical Group, P.C. and Office Condominium*

The parties founded Southside Medical Group, P.C., their medical practice, in 1981, and leased to the corporation an office condominium on Mackenzie Road. At the time of trial, husband held 90 shares of stock in Southside and wife held 10. Husband was awarded the condominium and all shares in Southside, but he complains the court erred in overvaluing the property thus awarded to him.

[8,9] Gerald Magruder, the wife's expert, testified regarding the value of the Southside medical practice, and the husband contends Magruder was incompetent to testify as to the value of the equipment. This contention is not well taken. Magruder testified he had visited Southside to examine the equipment in question and was familiar with the secondhand market for medical equipment, having valued used equipment in connection with the sale of medical practices. The qualifications of a witness to render an expert opinion lie within the trial court's discretion, *Tharp v. Oberhellman*, 527 S.W.2d 376, 379 (Mo. App.1975), and we find no abuse of discretion on the record here. Further, we do not find that the court's valuation of X-ray and computer equipment leased to the corporation by husband, based on Magruder's testimony is against the weight of the evidence or unsupported by substantial evidence.

3. Though our Rule 88.01 and Form 14 were not effective at the time the circuit court entered judgment on July 1, 1989, see *Mueller v. Mueller*, 782 S.W.2d 445, 448-49 (Mo.App.1990) (Rule 88.01 and § 452.340.7, RSMo Supp.1989, not retroactive), its decision was based on the same schedule and we find the principles enunciated above applicable in construing our Rule and the accompanying form. Rule 88.01 states that "[t]here is a rebuttable presumption that the amount of child support calculated pursuant to Civil Procedure Form No. 14 is the amount of child support to be awarded," and "[i]t is sufficient in a particular case to rebut the presumption that the amount of child support calculated

[10] In valuing the Mackenzie Condominium, the trial court apparently accepted the \$190,000 valuation, including "leasehold improvements," given in wife's First Amended Statement of Property, leaving a net equity of \$28,000 in light of the \$152,000 mortgage on the property. Husband contests this valuation, arguing the market value of the property is \$125,000 with balance of \$154,000 due on the mortgage, leaving no market value at all. Husband and wife, as owners of the property, were both competent to testify as to its value, *Schulze v. C & H Builders*, 761 S.W.2d 219, 223 (Mo.App.1988), and we are obliged to defer to the factfinder's determination of credibility, *Wynn v. Wynn*, 738 S.W.2d at 918, which weighed in favor of the wife.

Husband finally complains leasehold improvements were improperly counted in valuing both the condominium and the medical practice. The trial court awarded husband the condominium, "together with all leasehold improvements thereto," and set its fair market value at \$180,000. In valuing the assets held by the medical practice, the court included \$28,000 in "equipment and leasehold improvements," based on a balance sheet prepared by Magruder. A footnote to Magruder's "equipment and leasehold" figure, however, indicates that it does not include the condominium, and the following page of Magruder's report demonstrates that the full amount listed as "equipment and leasehold" was actually the value of equipment alone, thus the addition of the term "leasehold" appears to have been inadvertent both on Magruder's balance sheet and in the trial court's find-

pursuant to Civil Procedure Form No. 14 is correct if the court or administrative agency enters in the case a written finding or a specific finding on the record that the amount so calculated, after consideration of all relevant factors, is unjust or inappropriate." Further, the concurring opinion of Covington, J., cites the statutory factors of § 452.340, RSMo Supp.1990. Section 452.340 was amended in respect to these factors in 1988, and that amendment is not applicable to this case, in which the petition was filed October 26, 1987. *In re Marriage of Ross*, 772 S.W.2d 890, 892 (Mo.App.1989).

ings. This did not result, however, in any improper valuation of the assets, as husband would have us believe, thus this point is denied.

#### *Tucker Property*

[11] The parties were partners with another couple in the 1812 Tucker Partnership, whose sole asset is a four-unit apartment building at 1812-1814 Tucker, owned and operated by the partnership. The trial court awarded the Mehra's partnership interest to husband, attributing to it a net monthly income of \$205, but husband contends the operating expenses exceed the rental on the building, resulting in a net monthly loss of \$542, thus the venture cannot possibly be income-producing. Wife counters that husband may claim a \$6,231 tax benefit in depreciation on the property.

The trial court apparently derived the \$205 income figure from the partnership balance sheet designating "owner withdrawals" of \$3700 for the first nine months of 1988, which, divided by the couple's one-half interest in the partnership, results in a monthly quotient of \$205.55. The balance sheet, however, does not account for the mortgage payments, though evidence of such payments was presented at trial.

The trial court apparently disbelieved husband's testimony and it is the exclusive province of that court to weigh the evidence. *Cole v. Plummer*, 661 S.W.2d 828 (Mo.App.1983). Because we are unable to determine from the record whether its judgment in this respect is supported by substantial evidence, we direct the court on remand to further examine this issue.

#### *Insurance Policies*

[12] Husband next charges error in the trial court's order to husband "as sole shareholder of [Southside Medical Group, P.C. to] cause [the] corporation to transfer" two insurance policies on his life to Rachna Mehra. Husband relies on cases such as *In re Marriage of Ward*, 659 S.W.2d 605, 607 (Mo.App.1983), where the court held:

4. Compare *Secor v. Secor*, 790 S.W.2d 500, 502-503 (Mo.App.1990), where the parties agreed that property held by corporation of which hus-

The trial court's action in classifying the corporate assets as marital property, and dividing them between the parties, was reversible error. A marital dissolution decree may not purport to affect property of a corporation that is not a party to the litigation, even if the corporate stock is primarily or entirely owned by one of the parties to the dissolution action. The trial court was limited to a disposition of the *stock* of the corporation which was admitted by both parties to be marital property. The trial court has no jurisdiction to enter a decree dividing property that is not owned by either spouse. (Citations omitted.)

See also *Penn v. Penn*, 655 S.W.2d 631 (Mo.App.1983); *In re Marriage of Schulz*, 583 S.W.2d 735, 742 (Mo.App.1979); *V.M. v. L.M.*, 526 S.W.2d 947, 952 (Mo.App.1975). These cases may be distinguished, however, on the basis that here the trial court did not allocate the corporate assets themselves as marital property, but directed husband, as sole shareholder under the court's decree, to cause the corporation to transfer the two insurance policies on his life to Rachna Mehra.<sup>4</sup> Husband makes no showing this cannot be accomplished, and we conclude the trial court did not misapply the law in this regard. *Murphy v. Carron*, 536 S.W.2d at 32.

#### *Attorney's Fees*

[13,14] Husband finally contends the court erred in ordering him to pay wife \$47,190 in attorney's fees (\$42,558 to Schecter & Watkins, P.C. and \$4,632 to Ebert, Meness & Kriegel), and further argues the court impermissibly awarded fees for wife's expert witnesses. The bill submitted by Schecter & Watkins was \$58,785.65, including \$7503.50 in fees for the expert witnesses. The court's award for Schecter & Watkins, "as and for their attorney's fees and expenses incurred in respect of this matter," is less than the bill for legal services alone and does not by its terms include fees for the expert witness-

band was sole shareholder were marital assets and court treated the corporation as an alter ego of the parties.

es, thus we find husband's argument meritless. Further, an award of attorney's fees is within the discretion of the trial court, *Caruthers v. Caruthers*, 679 S.W.2d 358, 360 (Mo.App.1984), and we find no abuse of discretion from this record.

#### *Income Tax Dependents*

[15] The trial court granted husband the right to claim the children as dependents for federal and state income tax purposes and ordered wife to execute a written declaration that she will not claim the children as dependents. Wife argues the court had no authority to order her to execute the form, but such an argument was specifically rejected in *Vohsen v. Vohsen*, 801 S.W.2d 789, 791-92 (Mo.App.1991), following the view expressed by a majority of jurisdictions that have spoken to the subject. Annotation, *Allocation of Dependency Exemption*, 77 A.L.R.4 786, 791 (1990). *Vohsen* noted the 1984 amendments to the Internal Revenue Code which provided the custodial parent is generally entitled to the income tax exemption for dependent children unless the custodial parent signs a written declaration not to claim the children as dependents and the declaration is attached to the noncustodial parent's tax return. The court noted the amendment "was made to eliminate the need for the Internal Revenue Service to resolve conflicts when both parents claimed a child as a dependent," and "when the parent cannot agree on who is to receive the exemption, it will be appropriate for our trial courts to determine this issue." 801 S.W.2d at 791-92. The court further observed that under the Internal Revenue Code, it is insufficient for the trial court simply to rule that the noncustodial parent take the exemption, and "to effectuate such an allocation, a trial court must order the custodial parent to annually sign the prescribed declaration, presently IRS Form 8332." *Id.* at 792. In accord with the majority view and persuaded by the rationale and ruling of *Vohsen*, we hold the trial court did not err in ordering wife to execute the waiver form.

#### *Property Valuation*

[16] Following the parties' separation but prior to dissolution of their marriage, they sold their marital abode and divided the proceeds, each purchasing a new residence. Wife argues the trial court overvalued the furnishings in husband's home and undervalued the furnishings in her home. Giving deference to the trial judge, who is in the best position to assess the credibility of witnesses and apply proper values to the property, and we hold his valuations are supported by substantial evidence and not against the weight of the evidence. *Siegenthaler v. Siegenthaler*, 761 S.W.2d 262, 266 (Mo.App.1988).

[17] Wife next contends the court erred in undervaluing her medical practice. In calculating the value, the court explicitly refused to include a \$25,000 unsecured debt to Boatmen's Bank, finding the loan was not required to be used in wife's medical practice. Wife argues her uncontradicted testimony shows the funds bought equipment needed for the practice. The trial court, however, was entitled to disregard even uncontradicted testimony, *Intertherm, Inc. v. Coronet Imperial Corp.*, 558 S.W.2d 344, 348 (Mo.App.1977), and we do not find its conclusion against the weight of the evidence.

#### *Division of Marital Property*

[18, 19] Wife claims the division of marital property "should have been fairly close to equal" because there was no marital misconduct to justify unequal distribution. The court is to make a just division of property after consideration of pertinent factors such as the contribution of each spouse to the acquisition of the marital property, the value of the property set apart to each spouse, and the economic circumstances of each spouse at the time the division of property is to become effective, § 452.330.1, RSMo 1986, but a "just" division need not be equal. *Siegenthaler*, 761 S.W.2d at 266; *Ware v. Ware*, 647 S.W.2d at 584. Regardless, adding to wife's calculations the equity in the parties'

homes, as well as the jewelry set apart to her under the court's decree, the division of assets is roughly equal, thus we find the point without merit.

*Loan to Anjusha Corporation*

[20] Finally, wife claims the court erred in failing to distribute as marital property \$20,000 in loans repaid to husband from Anjusha Enterprises Limited, a corporation formed by the parties to obtain a franchise from Medicine Shoppe International and operate a pharmacy under that name. The parties were initially the sole shareholders of Anjusha, and the pharmacist managing the operation later obtained some shares. The couple advanced approximately \$10,000 to Anjusha at its formation in September 1986, and husband testified that during the next two years following he lent approximately \$43,000 in addition. Anjusha later obtained a loan of \$93,000 from Boatmen's Bank, and husband received \$20,000 from this amount as repayment for monies earlier advanced to the corporation, using the funds toward the down payment on his home. Wife contends the \$43,000 was lent to the corporation from marital funds and that the \$20,000 repayment, of which she was unaware until the time of trial, should have been distributed by the court as a marital asset. The trial court found, however, that husband had advanced the funds to the corporation and the repayment was not "squandered or secreted" by him. We cannot say this finding is unsupported by substantial evidence or is against the weight of the evidence.

We affirm the trial court's decree in all respects except its child support award and its attribution of a \$205 net monthly income to the Tucker property, which we reverse. The cause is remanded for further proceedings to consider these matters and the situation as to the custody of Shaila in a manner consistent with this opinion.

HOLSTEIN and BENTON, JJ., and HIGGINS, Senior Judge, concur.

COVINGTON, J., concurs in part and concurs in result in part in separate opinion filed.

ROBERTSON, C.J., and BLACKMAR, J., concur in part and concur in result in part in opinion concurring in part and concurring in result in part of COVINGTON, J.

THOMAS, J., not participating because not a member of the Court when case was submitted.

COVINGTON, Judge, concurring in part and concurring in result in part.

I concur with the principal opinion with the exception of the issue of child support; on that issue I can concur only in result. With respect, I disagree with the principal opinion that the problem presented is one of "an interpretation of the schedule." The schedule is silent when the family income exceeds \$10,000, thus does not apply. *Furthermore, I fear that the effect of the language of the principal opinion may serve to deter trial courts from entering appropriate awards in excess of the scheduled amount.*

The amount of support scheduled to be awarded upon a \$10,000 monthly income is not a presumed ceiling beyond which any award is suspect in that it might "provide an accumulation of capital;" If applicable, the schedule serves only as a presumed minimum in this case. Since the schedule does not apply when the family income exceeds \$10,000 per month, the trial court should then be guided by the considerations set forth in § 452.340, RSMo Supp. 1990. The relevant factors include:

- (1) The financial needs and resources of the child;
- (2) The financial resources and needs of the parents;
- (3) The standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) The physical and emotional condition of the child, and his educational needs.

Section 452.340.1(1)-(4), RSMo Supp.1990.<sup>1</sup>

ROYAL BANKS OF MISSOURI, f/k/a  
Royal Bank of Mid-County, and f/k/a  
Citizens Bank of University City, Ap-  
pellant,

v.

Harold L. FRIDKIN, Respondent.

No. 73793.

Supreme Court of Missouri,  
En Banc.

Nov. 19, 1991.

Rehearing Denied Dec. 17, 1991.

Lender brought action under \$10,000 guaranty of \$50,000 note made by gubernatorial campaign committee. The Circuit Court, Jackson County, Vincent E. Baker, J., granted judgment for guarantor, and lender appealed. The Court of Appeals affirmed and remanded, and lender appealed. The Supreme Court, Benton, J., held that: (1) \$10,000 guaranty had latent ambiguity to extent it purported to guaranty \$10,000 note, justifying consideration of external matters; (2) circumstances surrounding execution of guaranty and note demonstrated guarantor's intent to be obligated to pay \$10,000 of note; and (3) failure of committee's treasurer to execute note did not render it invalid.

Reversed and remanded with direction.

**1. Guaranty** ¶27

Rules of construction applicable to guaranty are same as applied to other contracts.

1. As the principal opinion notes, the statutory factors applicable in the present case were those

**2. Evidence** ¶448

Parol evidence rule bars extrinsic evidence, unless integrated contract is ambiguous.

**3. Guaranty** ¶92(1)

Determination as to whether guaranty is ambiguous is question of law to be decided by court.

**4. Contracts** ¶143(2)

"Latent ambiguity" arises where writing on its face appears clear and unambiguous, but some collateral matter makes meaning uncertain.

See publication Words and Phrases for other judicial constructions and definitions.

**5. Contracts** ¶147(1)

Cardinal principle is to determine intent of parties when latent or patent ambiguity exists in writing.

**6. Contracts** ¶147(1, 2), 170(1)

In order to determine intent of parties, court will consider entire contract, subsidiary agreements, relationship of parties, subject matter of contract, fact and circumstances surrounding execution of contract, practical construction parties themselves have placed on contract by their acts and deeds, and other external circumstances that cast light on intent of parties.

**7. Evidence** ¶452

Latent ambiguity in writing must be developed by extrinsic evidence.

**8. Evidence** ¶452

Evidence of note that fit description in guaranty in all respects except for principal amount, coupled with fact that note in amount stated in guaranty did not exist, created latent ambiguity that necessitated consideration of external matters to determine true intent of parties regarding whether guaranty pertained to note.

**9. Guaranty** ¶40

Circumstances surrounding execution of \$10,000 guaranty and \$50,000 note demonstrated agreement designed to limit

in effect in 1987.



# **ATTACHMENT "B"**

## **TO REPLY BRIEF**

**(Excerpt from "Dealing with Special Problems in Divorce")**

Attached is the case of Mehra v. Mehra (Supreme Court of Missouri, November 19, 1991), which held, in a statutory scheme similar to the Utah Uniform Child Support Guidelines, with the highest level being \$10,000 gross income per month, that it was improper for the Court to make a "straight line extrapolation" and the focus should be to determine the amount "reasonable or necessary for the support of the child." This case has been interpreted by some of the Court Commissioners and Judges in Utah to indicate that if the Utah Legislature had intended a straight line extrapolation under the Uniform Child Support Guidelines, they would have provided for such.

Some Judges may make a straight line extrapolation, but there is no consensus among the judiciary as to how that extrapolation should be made. In the Mehra opinion, the Court attempted to make an extrapolation by a percentage ratio.

One way to extrapolate beyond the Guidelines by a percentage ratio is as follows:

- Take column for number of children.
- What is the dollar increase in support for each \$100.00 increment.
- Calculate the amount of the income in excess of the top of the table.
- Divide by 100.
- Multiply result by support increment per \$100.

Example: If the combined gross income is \$13,500.00 for two children, the support increment is \$8.00 per \$100.

Take the combined gross income of \$13,500.00, less the highest amount on the chart (\$13,500 less \$10,100.00) = \$3,400.00.  $\$3,400.00 \div 100 = 34$  increments. Multiply 34 increments by \$8.00 per 100 increment = \$272.00 + the highest level on the chart of \$1,672.00. This is the total gross monthly income for support purposes.

There is no consensus as to how the Judges and Commissioners are handling this issue and it would really be determined on a case-by-case basis and the preference of the particular Commissioner or Judge assigned to the case.