

2006

Monte Bambrough v. Maria Bambrough : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MONTE BAMBROUGH,)	
)	BRIEF OF THE APPELLANT
Petitioner/Appellee,)	
)	
vs.)	Court of Appeals No. 20061176-CA
)	
MARIA BAMBROUGH,)	Second District Court No. 900902374
)	
Respondent/Appellant.)	Priority Category No.

BRIEF OF APPELLANT

Appeal from a Decree of Divorce Entered by the
Second Judicial District Court, State of Utah, Weber County,
Honorable Ronald O. Hyde, Retired District Court Judge

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Respondent-Appellant requests oral argument

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UTAH APPELLATE COURTS
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TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
STANDARD OF APPELLATE REVIEW.....	2
DETERMINATIVE LAW.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	5
SUMMARY OF ARGUMENT.....	8
ARGUMENT.....	11
I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED MS. BAMBROUGH FAILED TO ESTABLISH REASONABLE NEEDS OF CHILD SUPPORT BEYOND THE GUIDELINES.....	11
II. TRIAL COURT ERRED WHEN IT FAILED TO MAKE SPECIFIC FINDINGS AND ALLOW RELEVANT EVIDENCE PURSUANT TO UCA §78-45-7(3)(A-H).....	15
III. THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AWARD MS. BAMBROUGH TAX EXEMPTION.....	18
IV. ATTORNEY FEES.....	20
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

Cases Cited

<u>Baker v. Baker</u> , 866 P.2d 540 (Utah Ct.App. 1993).....	9, 10, 11, 15, 20
<u>Bell v. Bell</u> , 810 P.2d 489 (Utah Ct.App. 1992).....	11, 20
<u>Burt v. Burt</u> , 799 P.2d 1166 (Utah Ct.App. 1990).....	11, 20
<u>Durfee v. Durfee</u> , 796 P.2d 713 (Utah Ct.App. 1990).....	19, 20
<u>Hill v. Hill</u> , 841 P.2d 722 (Utah Ct.App. 1992).....	17
<u>Jeffries v. Jeffries</u> , 752 P.2d 909 (Utah Ct.App. 1988).....	16, 17
<u>Reinhardt v. Reinhardt</u> , 963 P.2d 757 (Utah Ct.App. 1998).....	9, 10, 12, 17
<u>Ruker v. Dalton</u> , 589 P.2d 1336, 1338 (Utah Ct.App. 1988).....	17
<u>Stettler v. Stettler</u> , 713 P.2d 699 (Utah Ct.App. 1985).....	19, 20
<u>Thompson v. Thompson</u> , 709 P.2d 360 (Utah Ct.App. 1985).....	2
<u>VanDyke v. VanDyke</u> , 2004 UT App 37, ¶9, 86 P.3d 767.....	2
<u>Wall v. Wall</u> , 157 P.3d 341 (Utah Ct.App. 2007).....	2
<u>Watson v. Watson</u> , 837 P.2d 1 (Utah Ct.App. 1992).....	11, 20

Statutes

UTAH CODE ANN. §75-45-7(3)(a-h).....	1, 2, 9, 10, 15, 16, 21
UTAH CODE ANN. §78-45-7.2.....	2, 11, 12, 17
UTAH CODE ANN. §78-45-7.12.....	2, 11
UTAH CODE ANN. §78-45-7.14.....	2
UTAH CODE ANN. §78-45-7.21.....	2, 18
UTAH CODE ANN. §78-2(a)-3(2)(h).....	1

Addendum

October 5, 2007 Memorandum Decision.....	1
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MARIA BAMBROUGH,)	Second District Court No. 900902374
)	
Respondent/Appellant.)	Priority Category No.

The jurisdiction of this case is vested with the Utah Court of Appeals pursuant to UTAH CODE ANN. §78-2a-3(2)(h) (as amended, 1996).

1. The trial court abused its discretion when it ruled Ms. Bambrough failed to establish reasonable needs of child support beyond the guidelines.
2. Trial court erred when it failed to make specific findings and allow relevant evidence pursuant to UCA §78-45-7(3)(a-h).
3. The court abused its discretion when it failed to award Ms. Bambrough tax exemption.
4. Attorney Fees.

STANDARD OF APPELLATE REVIEW

1. The standard of review for this Court to overturn a trial Court's modification of Decree of Divorce is a showing that "The evidence clearly preponderates against the Findings or that the trial Court has abused its discretion" Thompson v. Thompson, 709 P.2d 360 (Utah 1985).

2. The standard of review "... about the legal adequacy of the trial court's statements present issue of law, which are reviewed for correctness." Wall v. Wall, 157 P.3d 341 (Utah Ct.App. 2007) (citing, VanDyke v. VanDyke, 2004 UT App 37, ¶9, 86 P.3d 767 (Utah Ct.App. 2004))

DETERMINATIVE LAW

UTAH CODE ANN. §78-45-7, §78-45-7.2; §78-45-7.12, §78-45-7.14 and §78-45-7.21 frames the issues of this case.

STATEMENT OF THE CASE

Nature of the Case: This appeal originates from the provision within the Order from the bench trial of September 26, 2006, wherein Ms. Bambrough was denied a child support amount beyond the statutory guidelines and denial of a change of tax exemption.

Course of Proceedings:

1. On March 3, 2005, Ms. Bambrough filed a Petition to Modify Decree of Divorce in the Second District Court, Weber County, Ogden Department, requesting the Court to:

- (1) make a finding it is in the best interest of the parties' minor child,

Casey, that she continue to attend Xavier College Preparatory and continue to participate in extracurricular activities;

- (2) increase child support to an appropriate and just amount to cover expenses for the minor child and continue until September 2008;
- (3) to require Mr. Bambrough to pay one-half the cost of a vehicle purchased for the child, Casey, and payment of one-half cost of auto insurance premiums not to exceed \$500.00 per month;
- (4) award the tax exemption and child income tax credit to Ms. Bambrough every year;
- (5) award Ms. Bambrough attorney fees of \$670.00 for attorney in Arizona; and
- (6) award attorney fees and costs associated with bringing modification in Utah.

(R. 028-34 Mod. of Div.) (Exhibits to Mod. of Div. not attached or in record)

2. The parties were divorced on January 3, 1991. (R. 028- Mod. Dec. of Div.)

Child support was sent at \$350.00 for one child. (R. 168-Memo. Dec.) (R. 004 Dec. of Div.) In May 1998, the original child support was increased to \$637.00 (R. 29-Mod. Dec. of Div.; Memo. Dec. 168) The May 1998 modification support was based on Ms. Bambrough earning \$1000.00 per month and Mr. Bambrough earning \$6,901.00 per month. (R. 29-Mod. Dec. of Div.)

3. On March 4, 2005, Ms. Bambrough filed a Motion for Order to Show Cause and Order to Show Cause In Re Contempt. (R. 035-040-Motion for OTSC and OTSC Contempt).

4. On April 11, 2005, the matter was heard before District Court Commissioner,

Douglas Thomas. (R. 083-87-Order on OTSC) By stipulation, Mr. Bambrough agreed to pay \$826.00 per month for child support to begin April 1, 2005 on a temporary basis.

(R. 084-Order on OTSC) The \$826.00 child support order was based upon Mr. Bambrough's agreed upon income of \$12,346.00 and Ms. Bambrough's income \$4,231.00 (R. 087-Order on OTSC-Child Support Worksheet).

5. On March 1, 2006, a Pre-trial Conference Hearing was heard before District Court Commissioner Douglas Thomas. (R. 146-148-Rec. and Order on Pre.Tr.Conf.) Certain discovery needed to be completed and the matter was continued to May 15 2006. (R. 146-147-Rec. and Order on Pre.Tr.Conf.)

6. On May 15, 2006, a second Pre-trial Conference Hearing was heard before District Court Commissioner Douglas Thomas. (R. 150-153-Rec. and Order on Pre.Tr.Conf.) The certified issues for bench trial before the Honorable Ernie W. Jones were:

- (1) Whether there has been an increase in and the amount of any increase in Mr. Bambrough's income from the time child support was last modified;
- (2) Ms. Bambrough's request for an increase in child support for the parties' daughter, Casey, to \$2,500.00 per month;
- (3) Whether the termination date of child support should be beyond May 2008 and end of Summer;
- (4) Whether Mr. Bambrough should have to pay for one-half of a motor vehicle for Casey and one-half of the automobile insurance;
- (5) Whether or not Ms. Bambrough should be awarded the tax

exemption and child tax credit yearly rather than every other year;
and

(6) Whether either party is awarded attorney fees.

(R. 151-Rec. Pre-Trial Order)

7. On September 25, 2006, a bench trial was held before the Honorable Ernie W. Jones. Ms. Bambrough represented herself, pro se. (R. 183-Order on Mod. Dec. of Div.) Mr. Bambrough was represented by counsel, Martin W. Custen. (R. 183-Order on Mod. Dec. of Div.) Mr. Bambrough's position was there had been a "material change in circumstance" and this was not challenged at trial. (Tr. Feb. 21, 2007; 75:25, 75:1-3)

8. On October 5, 2006, in a memorandum decision, the trial court denied Ms. Bambrough's child support amount beyond the child support guidelines of \$826.00 and extending child support two months; her request for change in tax exemption status; and her request for one-half payment of car and auto insurance. The Court granted Ms. Bambrough's \$1,500.00 in attorney fees. (R. 168-193-Mem. Decision; Addendum two, pp 3-5) The Order was entered on December 5, 2006. (R.186-Notice of Entry)

STATEMENT OF FACTS

1. Ms. Bambrough was pro se at the bench trial September 26, 2006. (Tr. Feb. 21, 2007; 1:6-7). Ms. Bambrough asked the court to adjust Mr. Bambrough's child support obligation to \$2,500.00 per month. (Tr. Feb. 21, 2007; 4:3-6). Ms. Bambrough testified she arrived at the \$2,500.00 based on the child, Casey's, expenses and needs, schooling needs, Mr. Bambrough's increase income by a percentage of his income and Mr.

Bambrough's failure to exercise visitation. (Tr. Feb. 21, 2007; 30:1-3; 37:13-15; 106:3-4)

Ms. Bambrough testified Mr. Bambrough was awarded every other weekend,

Wednesdays and Summer vacations which was an expense he no longer incurs. (Tr. Feb. 21, 2007; 37:21-23)

2. Ms. Bambrough asked the court to continue the child support beyond May 2008 and have child support continue through June and July 2008. (Tr. Feb. 21, 2007; 4:7-8 and 37:2-4) Ms. Bambrough testified Casey has dual enrollment that allows Casey to work on a higher degree while at the same time attending high school. (Tr. Feb. 21, 2007; 36:17-21) Ms. Bambrough testified this dual enrollment requires Casey to attend classes the months of June and July 2008 on the Xavier Preparatory College campus (hereinafter "Xavier"). (Tr. Feb. 21, 2007; 37:2-4) Ms. Bambrough stated Casey will receive her a high school diploma and associates degree from Rio Salado College at her graduation ceremony in May 2008 because of her dual enrollment. (Tr. Feb. 21, 2007; 4:10-15)

3. Ms. Bambrough's testified the tuition for Xavier is \$11,311.00 a year. (Tr. Feb. 21, 2007; 35:5-9) Ms. Bambrough testified with the costs of books, transportation and extracurricular activities, the cost was probably \$13,000.00 a year for Casey to attend Xavier. (Tr. Feb. 21, 2007; 35:7-9)

4. Ms. Bambrough testified the reason for enrolling Casey in Xavier was due to several factors: (1) the public school district's enrollment; (2) Casey's desire for higher

education due to her testing in the gifted and talented program; (3) Casey's commitment to school; (4) no AP classes offered to Casey until her senior year of public school; (5) no gifted and talented program at the school district where Casey would attend public school; and (6) what Casey wanted to do with her education to include where she was headed in her education. (Tr. Feb. 21, 2007; 32:4-5; 34:14-25; 35:1-2; 54:3, 25; 55:1) Ms. Bambrough testified Casey was invited to attend Xavier due to her test scores and ability to perform. (Tr. Feb. 21, 2007; 34:22-23). Ms. Bambrough testified Casey had to qualify for entrance at Xavier (Tr. Feb. 21, 2007; 34:18-19)

5. Ms. Bambrough testified she purchased a vehicle (2003 Toyota Corolla) for the benefit of the minor child for \$10,000.00 with \$5,000.00 borrowed from her mother and the remaining \$5,000.00 to be paid. (Tr. Feb. 21, 2007; 40:14-16) Ms. Bambrough testified the car payments had not started pending the outcome of the trial. (Tr. Feb. 21, 2007; 40:18-22). A figure of \$568.00 was proffered in opening arguments as a car payment Ms. Bambrough incurs on behalf of the minor child, Casey. (Tr. Feb. 21, 2007; 9:17-22) Ms. Bambrough testified the vehicle purchase was due to Casey's attendance at Xavier, the amount of both parent's income, her issue with her employer for transportation of Casey to and from school, Casey's extracurricular activities, and her internship at the Science Center and volunteer hours at the Library. (Tr. Feb. 21, 2007; 39:20-25 and 40: 1-7)

6. Ms. Bambrough testified Casey's automobile insurance costs are \$1,196.50

every six months. (Tr. Feb. 21, 2007; 41:18-19) Ms. Bambrough asked the court to have Mr. Bambrough pay one-half of the costs or \$1,196.50 per year for her remaining two years until eighteen. (Tr. Feb. 21, 2007; 41:19-20)

7. Ms. Bambrough asked the court to award her the child tax exemption the remaining two years. (Tr. Feb. 21, 2007; 41:24-25) Ms. Bambrough testified she relied on the law wherein the tax exemption should benefit the party who has more percentage of time with the child. (Tr. Feb. 21, 2007; 42:3-5)

8. Ms. Bambrough testified she paid prior counsel \$1500.00 for legal services. (Tr. Feb. 21, 2007; 43:11) Ms. Bambrough asked the court to award her this amount. (Tr. Feb. 21, 2007; 43:6-9)

SUMMARY OF ARGUMENT

1. Ms. Bambrough's position is she provided sufficient evidence to rebut the child support guidelines from \$826.00 to \$2,500.00. (Tr. Feb. 21, 2007; 4:3-6) Ms. Bambrough testified to Casey's reasonable expenses and argued that to keep the \$826.00 monthly child support would result in an unjust and inappropriate child support award and not in the best interest of Casey. Ms. Bambrough testified of Casey's reasonable needs as follows: (1) the public school district's enrollment; (2) Casey's desire for higher education due to her testing in the gifted and talented program; (3) Casey's commitment to school; (4) no AP classes offered to Casey until her senior year of public school; (5) no gifted and talented program at the school district where Casey would attend public

school; and (6) what Casey wanted to do with her education to include where she was headed in her education. (Tr. Feb. 21, 2007; 32:4-5; 34:14-25; 35:1-2; 54:3, 25; 55:1)

Ms. Bambrough argued Mr. Bambrough's significant increase in his income. In 1998, his income was \$6,901.00 per month and her income at \$1,000.00 per month which resulted in a child support award of \$637.00. Now, Mr. Bambrough's income is \$15,839.00 per month and Ms. Bambrough \$5,416.66 per month. Ms. Bambrough argues, the trial court abused its discretion by not finding she had met the statutory requirements to rebut the guidelines pursuant to UCA § 78-45-7.12 to trigger the trial court to make additional and specific findings on all seven factors pursuant to UCA §78-45-7(3)(a-h). Ms. Bambrough argues, even if the court found there was insufficient evidence for a \$2500.00 child support award, the trial court had sufficient evidence to determine that \$826.00 was not a just and appropriate child support award in light of the parties' respective income against the reasonable needs of the child, Casey. Reinhardt v. Reinhardt, 963 P.2d 757, 759-760 (Utah 1998)

2. Ms. Bambrough argues the trial court erred when it failed to make specific findings pursuant to UCA §78-45-7(3)(a-h). This Court has previously stated "[A] trial court need consider these enumerated factors only when there is sufficient evidence to rebut the guidelines set forth in [UCA] section 78-45-7.14." Baker v. Baker, 866 P. 2d 540, 545 (Utah Ct.App. 1993) The record shows the minor child, Casey, was academically bright, had a desire to excel in school, tested in the gifted and talented

program, and had other goals for higher education. (Tr. Feb. 21, 2007; 32:4-5; 34:14-25; 35:1-2; 54:3, 25; 55:1) The record shows the parties have a combined monthly income of \$21, 255.66. (R. 169-Memo. Dec.) When fashioning a child support amount beyond the guidelines, a trial court, “. . . must consider and make specific findings **on all appropriate and just factors, including the children’s reasonable needs** [emphasis added] .” Reinhardt v. Reinhardt, 963 P.2d 757, 759-760 (Utah 1998).

Ms. Bambrough argues she provided sufficient evidence for Judge Jones to find she had “sufficient evidence to rebut the guidelines.” With this statutory requirement met, the trial court should have made specific findings pursuant to UCA §78-45-7(3)(a-h) to meet the requirement of “. . . all appropriate and just factors.” Id. at 760

3. Ms. Bambrough argues she should have been awarded the minor child as a tax exemption for the remaining two years. (Tr. Feb. 21, 2007; 41:24-25) The court abused its discretion by not finding that Ms. Bambrough, if not successful in obtaining an increase in child support, did provide sufficient testimony to show a change in circumstance. Ms. Bambrough was limited in what evidence she introduced since certain evidence was not allowed, to wit: Mr. Bambrough’s lack of visitation, expenses paid for Casey beyond child support and his needs and situation. (Tr. Feb. 21, 2007; 68:8) Ms. Bambrough was unable to introduce evidence on all relevant factors of section 78-45-7(3)(a-h). Baker v. Baker, 866 P. 2d 540, 545 (Utah Ct.App. 1993) Ms. Bambrough argues the tax exemption should have been awarded to her since the trial court ordered

the statutory guideline child support amount of \$826.00 per month. (R. 170-Memo. Dec.)

4. Ms. Bambrough argues for attorney fees on appeal as she was awarded attorney fees at the trial court level and “. . . when fees in a divorce have been awarded below the party who then prevails on appeal, fees will also be awarded to that party on appeal.”

Baker v. Baker, 866 P.2d 540, 547 (Utah Ct.App. 1993) (quoting Watson v. Watson, 837 P.2d 1, 8 (Utah App. 1992) (quoting Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1992) (quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990))

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED MS. BAMBROUGH FAILED TO ESTABLISH REASONABLE NEEDS OF CHILD SUPPORT BEYOND CHILD SUPPORT GUIDELINES

When the combined income of the parties is in excess of the child support guidelines, the trial court must determine “. . . an appropriate and just child support amount . . .” pursuant to UCA §78-45-7.12 which states:

If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount shall be ordered on a case-by-case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support.

In addition, a trial court must make specific findings 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.” UCA §78-45-7.2.

UTAH CODE ANN. §78-45-7.2, states, in part:

(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.

(3) A written findings 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.

To assist the trial court in determining whether or not a party is successful in rebutting the child support guidelines is to look at the “reasonable needs” of the child in light of the obligor’s increased income. Reinhardt v. Reinhardt, 963 P.2d 757 (Utah Ct.App. 1998).

In Reinhardt, it specifically states:

In child support cases where parental income exceeds the guidelines, the parties must introduced evidence to establish reasonable needs of the children. A demonstration of an increase in the obligor’s income alone is not sufficient to increase the child support order. The increase in ability to pay must be considered in light of the children’s actual needs in fashioning an “appropriate and just” child support award under section 78-45-7.12 .
Id. at 760.

At trial, Ms. Bambrough argued for a child support increase beyond the child

support guidelines from \$826.00¹ to \$2,500.00 per month. (Tr. Feb. 21, 2007; 3:21-25, 4:1-2 and 4:5) The \$826.00 amount is the highest child support obligation based on one child with parents who have a combined gross monthly income between \$10,001.00 and \$10,100.00.

Ms. Bambrough's testimony to rebut the statutory guideline child support of \$826.00 to \$2500.00, included: (1) the public school district's enrollment rate, (2) Casey's desire for higher education due to her testing in the gifted and talented program, (3) Casey's commitment to school, (4) no AP classes offered to Casey until her senior year, (5) no gifted and talented program at the school district where Casey would attend public school, (6) what Casey wanted to do with her education to include where she was headed in her education, and (7) costs of an automobile and automobile insurance. (Tr. Feb. 21, 2007; 34:14-25; 35:1-2; 54:3, 25; 55:1, 32: 4-5; 39:20-25; and 40:14-25) Ms. Bambrough further testified Casey was invited to attend Xavier due to her test scores and ability to perform. (Tr. Feb. 21, 2007; 34:22-23). Ms. Bambrough testified Casey had to qualify. (Tr. Feb. 21, 2007; 34:18-19) . Ms. Bambrough testified Casey's private school tuition, books and extracurricular activities were approximately \$13,000.00 per year or

¹ At the April 11, 2005 hearing, the parties stipulated to \$826.00 per month of child support to be paid by Mr. Bambrough to Ms. Bambrough. The parties income used for purposes of the child support worksheet was \$4,231.00 for Ms. Bambrough and \$12,346.00 for Mr. Bambrough which is a combined monthly income of \$16,077.00. This child support amount was temporary in nature because it remained a trial issue as evidenced by the issues certified at the Pre-trial Conference on May 15, 2006. (Addendum 3, p.2)

\$1083.33 per month. (Tr. Feb. 21, 2007; 35:5-9) Ms. Bambrough testified she had purchased a vehicle for the minor child to assist in the transportation of her to Xavier school (22 miles) and to provide Casey with her own vehicle for transportation to and from her internship at the Science Center and volunteer hours at the Library. (Tr. Feb. 21, 2007; 39:20-25 and 40:1-7) Ms. Bambrough testified she paid \$10,000.00 for the vehicle with \$5,000.00 borrowed from her mother and the remaining \$5,000.00 to be paid. (Tr. Feb. 21, 2007; 40:14-16) Ms. Bambrough testified the car payments had not started pending the outcome of the trial. (Tr. Feb. 21, 2007; 40:18-22). A figure of \$568.00 was proffered in opening arguments as a car payment. (Tr. Feb. 21, 2007; 9:17-22)

In this case, the parties have a combined income of \$21,255.66.² (R. Memo. Dec. 169) The trial court could find that based upon the income of the parties along with the reasonable needs of the child, that to impose the statutory guidelines of child support would be unjust and inappropriate. The records reflects that Casey's tuition, books and extracurricular activities reach approximately \$13,000.00 per year or \$1,083.33 per month. (Tr. Feb. 21, 2007, 35:7-9) Now add the cost of the automobile insurance of \$199.41 per month and a car payment of \$568.00 per month and this creates a need of

² Ms. Bambrough does not argue on appeal the trial court's finding of Mr. Bambrough's average monthly income of \$15,839.00 per month. (R. 177-F of F and Concl. Of Law) Ms. Bambrough states that the \$15,839.00 is an increase from the last modification in May 1998 where he his income was \$6,901.00. (Tr. Feb. 21, 2007; 3:24). . Mr. Bambrough's position was a "substantial and material change" in circumstances to modify child support. (Tr. Feb. 21, 2007, 75:25, 77:8, 10; 79:2; and 108:21)

\$1,850.74 per month. (Tr. Feb. 21, 2007; 9:17-22; 41:18-19) This amount does not include the obvious expenses of food, shelter, other extracurricular activities, and other costs associated with raising a child. Parties who enjoy a combined income of \$21,255.66 have a greater ability to provide and can incur more expenses in raising a child. Ms. Bambrough argues that a private school, car and car insurance can be held as reasonable needs given the combined income.

Based upon the foregoing, Ms. Bambrough provided sufficient evidence for the trial court to conclude that the \$826.00 is an inappropriate and unjust child support obligation.

II. TRIAL COURT ERRED WHEN IT FAILED TO ALLOW RELEVANT EVIDENCE PURSUANT TO UCA §78-45-7(3)(a-h).

When a party seeks to modify a child support order and offers “. . . sufficient evidence to rebut the guidelines . . . ,” the trial court must make specific findings on several relevant factors. Baker v. Baker, 866 P. 2d 540, 545 (Utah Ct.App. 1993) These factors are found in UTAH CODE ANN. §78-45-7(3)(a-h), which states:

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.

In this case, Ms. Bambrough began to ask questions of Mr. Bambrough regarding the seven relevant factors as described above. She started with Mr. Bambrough's "standard of living." (Tr. Feb. 21, 2007, 65:13-15) The record shows Mr. Bambrough's counsel objected to relevance because there was a dispute about whether or not the case was within the guidelines. (Tr. Feb. 21, 2007, 66:5-9) The Court did grant "... a little leeway." (Tr. Feb. 21, 2007 66:14-15) Ms. Bambrough asked a few questions regarding Mr. Bambrough's home and car. (Tr. Feb. 21, 2007, 66:21-25 and 67: 1-10). Ms. Bambrough attempted to seek information about Mr. Bambrough's "situation" and "needs" by asking Mr. Bambrough about his last contact with Casey, what expenses he had paid for Casey in the last four years, and what expenses he incurred beyond child support. (Tr. Feb. 21, 2007, 67:10-11; 68:9-25 and 69:1-4) At this time, an objection by Mr. Bambrough's attorney was made based on relevance and the Court sustained the objection. (Tr. Feb. 21, 2007; 69:10) The trial court erred by not allowing Ms. Bambrough to seek further information regarding Mr. Bambrough's "situation" and determine his "needs" as required by UCA §78-45-7(3)(a-h).

In Jeffries v. Jeffries, 752 P.2d 909 (Utah Ct.App. 1988) it states that this section "... requires a trial court to consider at least the seven factors listed therein. Further,

those factors constitute material issues upon which the trial court must enter findings of fact. . . . [T]he court must enter specific findings of fact on each of the factors . . .” Id. at 912. Furthermore, “. . . [t]he findings’ should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” Jeffries v. Jeffries, 752 P.2d 909, 911 (Ut. Ct.App. 1988) (quoting Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah))

In Jeffries, this Court specifically found the trial court failed to enter findings on all the factors and remanded for further findings. Id. at 911. In addition, this Court specifically found the record was “. . . not so clear and uncontroverted as to support the amount of child support . . .” Jeffries v. Jeffries, 752 P.2d 909, 911 (Utah Ct.App. 1988) And, when a “. . . trial court [fails] to consider and make findings on statutorily mandated factors is itself an abuse of discretion. Hill v. Hill, 841 P.2d 722 (Utah Ct.App. 1992) (citing Jeffries v. Jeffries, 752 P.2d 909, 911-12 (Utah Ct.App.1988)

Here, Ms. Bambrough was not given the opportunity to introduce additional evidence sufficient for the trial court to make specific and detailed findings on all seven factors and to show that having the statutory guideline amount of \$826.00 would be “. . . unjust, inappropriate [and] not in the best interest of the child.” Hill v. Hill, 841 P.2d 722, 724 (Utah Ct.App. 1992)

In this case, Judge Jones did not , “. . .consider and make specific findings **on all appropriate and just factors, including the children’s reasonable needs** [emphasis

added] .” Reinhardt v. Reinhardt, 963 P.2d 757 (Utah Ct.App. 1998) Judge Jones should have found Ms. Bambrough provided sufficient testimony regarding Casey’s reasonable expenses to rebut the guidelines and admit further testimony and evidence on the seven factors in light of the parties’ income. More specific findings are needed to determine the remaining seven factors, to include, standard of living and situation of the parties, needs of Mr. Bambrough, Ms. Bambrough and Casey, the ages of the parties, and responsibilities for support to others pursuant to UCA §78-45-7(3)(a-h).

III. THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AWARD MS. BAMBROUGH TAX EXEMPTION

The Decree of Divorce allocated the child tax exemption to each party every other year. (R. 003-Dec. of Div.) Ms. Bambrough asked the court to allocate the tax exemption for the remaining two years for her use. (Tr. Feb. 21, 2007; 41:24-25)

UTAH CODE ANN. §7-45-7.21, states:

- (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 person.

When a party seeks to modify a Decree of Divorce, “. . . the threshold requirement for relief is a showing of a substantial change of circumstances occurring since the entry of the decree and not contemplated in the decree itself.” Durfee v. Durfee, 796 P.2d 713 (Utah Ct.App. 1990) (citing Stettler v. Stettler 713 P.2d 699, 701 (Utah 1985)).

Ms. Bambrough testified of the expenses she incurs on behalf of the minor child. If Mr. Bambrough is not required to assist with Casey’s education, needs for a car and car insurance, then there is sufficient evidence to award Ms. Bambrough the child tax exemption. (R. 170-Memo. Dec.) Ms. Bambrough is required now to pay \$1083.33 (\$13,000.00 a year) per month for tuition and books for Casey, make a car payment of \$568.00, car insurance of 199.41 per month and all other expenses for a child, to include, housing, clothes, food, extracurricular activities, etc. with the offset of \$826.00 per month. (Tr. Feb. 21, 2007; 35:5-9; 9:17-22))

Ms. Bambrough attempted to elicit testimony from Mr. Bambrough as to his past visitation with the minor child so she could establish his lack of visitation and the extra burden on her to pay for additional costs. (Tr. 67:11) Ms. Bambrough was prevented from gaining testimony from Mr. Bambrough sufficient to support her claim that she

provides for substantially more of Casey's monthly costs and expenses. (Tr. Feb. 21, 2007; 68:8) Ms. Bambrough was prevented from introducing further testimony to met her burden of showing a material change in circumstance had occurred beyond her testimony of costs. Durfee v. Durfee, 796 P.2d 713 (Utah Ct.App. 1990) (citing Stettler v. Stettler 713 P.2d 699, 701 (Utah 1985) The court erred when it prevented Ms. Bambrough from seeking further testimony from Mr. Bambrough about his visitation, past expenses paid and his needs.

IV. ATTORNEY FEES

Ms. Bambrough was awarded attorney fees at the trial court in the amount of \$1,500.00. Ms. Bambrough seeks attorney fees on appeal and "when fees in a divorce have been awarded below the party who then prevails on appeal, fees will also be awarded to that party on appeal." Baker v. Baker, 866 P.2d 540, 547 (Utah Ct.App. 1993) (quoting Watson v. Watson, 837 P.2d 1, 8 (Utah App. 1992) (quoting Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1992) (quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990))

CONCLUSION

The trial court abused its discretion when it failed to find Ms. Bambrough introduced sufficient evidence to rebut the child support guideline of \$826.00 per month for one child and have the court make specific and detailed findings on all seven factors pursuant to UCA §78-45-7(3)(a-h).

Ms. Bambrough argues that if Ms. Bambrough is not required to pay more than \$826.00 per month in child support, there was sufficient evidence to show she provides for substantially more of Casey's monthly costs and expenses. The matter should be remanded back to the trial court for further findings and evidence.

DATED this 13 day of July, 2007.



DENISE P. LARKIN
Attorney for the Respondent-Appellant
Maria Bambrough

CERTIFICATE OF SERVICE

I, Denise P. Larkin, certify that on the 13 day of July, 2007, I served a copy of the attached Brief of the Appellee upon Martin W. Custen, the counsel for appellee in this matter, by mailing to him by first class mail with sufficient postage prepaid to the following address:

Martin W. Custen
1004 24th Street
Ogden, Utah 84401



Denise P. Larkin
Attorney for Respondent-Appellant

Tab 1

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Memorandum Decision
no. 900902374

2. The Court finds that Petitioner's annual grouse income is as follows:

2002	\$207,785 <u>- \$30,000</u> (stock sale) \$177,595
2003	\$247,863 <u>-\$81,660</u> (wife's income) \$167,756
2004	\$234,000 <u>-\$38,000</u> (relocation cost) \$185,000
2005	\$220,000
2006	\$200,000

3. Over the past five years (2002-2006), the Petitioner has averaged \$190,000 per year or \$15,839 per month in gross income and \$11,087 in net income.

4. The Court finds that Respondent's annual gross income is as follows:

2001	\$48,165
2002	\$48,218
2003	\$15,099
2004	\$51,239
2005	\$65,000

5. Petitioner is asking that child support remain at \$826 per month based on the work sheet cap.
6. In child support cases, when parental income exceeds the guidelines, the parties must introduce evidence to establish the reasonable needs of the child. An increase in income alone is not sufficient to increase the child

support order. The increase in ability to pay must be considered in light of the child's actual needs. *See Reinhardt v. Reinhardt*, 963 P.2d 757 (Utah 1998).

7. The Court finds that Petitioner has had an increase in income over the past five years.
8. The Court finds that the Respondent's income has increased since the 1998 modification.
9. However, the Court does not find that Respondent has established an increase in reasonable needs for the child.
10. The Respondent opted to place the child in a private school. There was no evidence that the child needed to be in a private school. The child did well in both public and private schools.
11. The respondent elected to purchase a car for the child. Again, the evidence does not establish the car is a necessary expense for the child.
12. The evidence also fails to establish how the Respondent arrived at a figure of \$2,500 per month for child support.
13. The tuition for the private school is about \$11,000 per year and the car cost \$10,000. The car insurance is about \$2,200 per year. Even if the Petitioner were responsible for one half of these costs it would not justify an increase in child support to \$2,500 per month.
14. The Court will set child support at \$822 effective as of April 2005.

II. Termination Date for Child Support.

15. The child turns 18 in March, 2008.

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Memorandum Decision
no. 900902374

16. The school year ends in May, 2008.
17. The Respondent is asking that child support extend until the end of the summer in 2008 because the child is taking college prep classes during that time period.
18. The Court finds, based on the divorce decree and state law, that the child support will terminate in May, 2008 when the child graduates from high school.

III. The Car and Insurance.

19. The Respondent is asking that the Petitioner pay one half of the car and car insurance, which was purchased by the Respondent for the child.
20. The Court can find nothing in the divorce decree that would require the Petitioner to pay for the car or car insurance.
21. The Court will deny Respondent's request to compel the Petitioner to pay for the car and car insurance.

IV. Tax Exemption and Tax Credit.

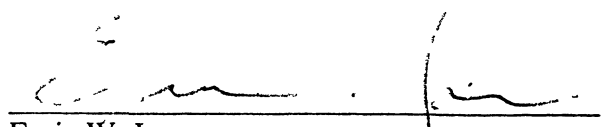
22. The Respondent is seeking to claim the child as a tax exemption each year because the Respondent has custody of the child every day of the year.
23. The divorce decree provides that the parties alternate the tax exemption every other year.
24. The Court will deny Respondent's request. The provisions in the decree will remain in effect—each party will alternate the tax exemption and tax credit every other year. Although it is true that the Respondent has custody of the child, the Petitioner is contributing to the child with child

custody of the child , the Petitioner is contributing to the child with child support. Based on the child support it is appropriate that the Petitioner claim the child on his tax return every other year.

V. Attorney's Fees.

25. The Respondent is seeking attorney fees in the sum of \$1,500, because she had to file this motion to modify the decree. The Respondent hired attorney Kenyon Dove in April 2005 to represent her in this matter.
26. The Petitioner is seeking attorney fees of \$5,000 to defend this action.
27. Petitioner is also seeking attorney fees of \$3,000 to defend this same motion in Arizona.
28. The Court will grant attorney fees to the Respondent of \$1,500.
29. The Court will deny attorney fees to Respondent of \$5,000.
30. The Court finds that Respondent prevailed on the motion to modify child support.
31. Also, the Court denies Petitioner's motion for attorney fees of \$3,000 in the Arizona action. The Court lacks jurisdiction over the Arizona case and, therefore, denies Petitioner's request for attorney's fees.
32. The Court requests Petitioner's attorney prepare the order consistent with this decision.

DATED this 15 day of October, 2006.


Ernie W. Jones
District Court Judge

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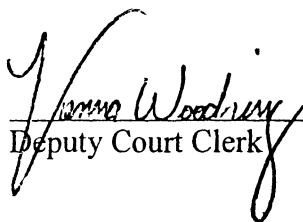
Memorandum Decision
no. 900902374

Certificate of Mailing

I hereby certify that on 10th of October, 2006, I mailed a copy of the foregoing
memorandum decision to counsel, as follows:

Maria Bambrough
16026 S. 44th Street
Phoenix, Arizona 85048

Martin W. Custen
Counsel for Petitioner
1004 24th Street
Ogden, Utah 84401


Deputy Court Clerk