2003

# Tiffany Jacobs Diener v. Erich Ross Diener : Reply Brief

Utah Court of Appeals


Brian M. Barnard, James L. Harris Jr.; Utah Legal Clinic; attorneys for appellant.
John W. Call, USB; Nygaard, Coke and Vincent, LC; attorneys for appellee.

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IN THE UTAH COURT OF APPEALS

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| **TIFFANY JACOBS DIENER,** | : | **REPLY BRIEF** |
| | : | **OF APPELLANT** |
| Petitioner/Appellee, | | |
| | : | 20030330-CA |
| vs. | | |
| | : | |
| **ERICH ROSS DIENER,** | | |
| | : | |
| Respondent/Appellant. | | |
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AN APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (3/25/2003), BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT, The Hon. Frank G. Noel, Judge, presiding.

(Trial Court Case No. 98-490-1948 DA)

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**ORAL ARGUMENT REQUESTED**

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**IN THE UTAH COURT OF APPEALS**

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Respondent/Appellant, Erich Diener, by and through counsel, submits the following reply brief:

## REPLY TO APPELLEE'S ISSUES PRESENTED FOR REVIEW

Appellee Tiffany Jacobs Diener did not file an appeal. Her gratuitous recitation of "issues presented for review" in Mr. Diener's appeal is not helpful. The opening brief filed by appellant, Erich Ross Diener, sets forth the issues presented for review and now before this Court. No other issues are before the court.

## REPLY TO APPELLEE'S STATEMENT OF FACTS

The record does not support Tiffany Diener's statement of certain facts:

1. Tiffany states "Mr. Diener told Tiffany that he considered [$5000.00 paid toward his] tuition a loan . . . ." Brief of Appellee, p. 4 (citing Transcript, p. 56). Nowhere does the record contain such a statement. Rather, the money Tiffany paid to help Erich attend Harvard for a semester was identified as an "investment in [the parties'] future." Transcript, p. 61. Regardless, there is no mention of the "Harvard" money in the original decree. Transcript, p. 62.

2. Tiffany indicates that she "purchased a number of things for Erich's benefit prior to the marriage because Mr. Diener often talked her into buying such things, saying that he would pay Tiffany back later." Brief of Appellee, p. 4. There is no mention of these items nor any indication of pre-marital debts (if indeed such existed) in the original decree. See Decree (R. 36); Transcript, p. 9. Furthermore, there is no mention of any debts (if indeed such existed), that Erich owed to Tiffany in the decree. Transcript, p. 9.

3. Tiffany makes much of a whole life insurance policy that was purchased. Brief of Appellee, p. 3 & 4. The sole reference in the record to that policy is vague:

Q. [By John Call] She also had a life insurance policy, a whole life policy that was purchased for her after her parents died?
A. [By Erich Diener] Okay.
Q. Do you recall that?
A. I think so, yes sir?
Q. During the marriage was that ever cashed out?
A. It may have been.

Transcript, p. 36. There is no evidence or indication in the record as to the cash value. Thus, Ms. Diener's reference is not helpful.

4. Tiffany indicates, "Mr. Diener reviewed the matter [divorce] at least once with a Judge Advocate General attorney . . ." Brief of Appellee, p. 4. That is not accurate. Erich generally consulted with a JAG attorney while stationed at Fort Meade, Maryland in 1997 several months prior to the instigation of the divorce action. Transcript, p. 4 & 7. The divorce action was not filed until March 13, 1998. Thus, Mr. Diener did not have the matter "reviewed" by a JAG attorney. Furthermore, he was not represented by counsel at the time of the divorce decree or in the original proceeding. Transcript, p. 4 & 16.

5. Tiffany asserts that "Mr. Diener admitted that he discussed with Tiffany the higher child support and his desire that Tiffany not pursue an alimony claim . . . ." Brief of Appellee, p. 5. Again, that is not entirely accurate. Erich testified that had no discussions with Tiffany in negotiations

for settlement of the divorce regarding increased child support in exchange for waiver of alimony. Transcript, p. 42-43.

6. Tiffany asserts "After the parties agreed to the terms, Tiffany moved back to Salt Lake City and pursued the divorce action." Brief of Appellee, p. 5. If this assertion were accurate, then she entirely failed to put the "agreed upon terms" in the divorce papers. Neither the parties' original settlement stipulation nor the original decree recite the terms of this alleged increased child support agreement. The parties' unwritten "agreement" is so indefinite and amorphous and so lacking in terms to be unenforceable.[1]

7. Ms. Diener states, "Pursuant to their agreement, the parties entered into a stipulation whereby Mr. Diener agreed to pay $400 a month in child support." Brief of Appellee, p. 5. However, no finding in the original Findings of Fact in 1998 support any such bargain or agreement, or support child support in excess of the guidelines (see R. 26). No indication of any such bargain or agreement is found in the parties' Stipulation

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[1] The terms in the Stipulation and Settlement Agreement (R. 10) specifically decline alimony: "This is a brief marriage of 3-1/2 years duration. The parties are able-bodied and able to provide for their own support and neither shall pay alimony to the other." Stipulation, p. 4 (R. 13). The original Findings of Fact reads identical (R. 29). Finally, the Decree of Divorce declines alimony. Decree, p. 3 (R. 35).

and Settlement Agreement (see R. 10). Finally, there is no indication of any such bargain or agreement in the parties' Decree of Divorce (see R. 33).

8. Ms. Diener recites a litany of figures related to Mr. Diener's alleged income. Brief of Appellee, p. 6-7. She concludes that "Mr. Diener received income between $1,751 and $2,281 per month." Brief of Appellee, p. 7. Those figures were not findings made by the lower court. See Findings of Fact, Conclusions of Law and Order (R. 203-205).

9. Ms. Diener states "Mr. Diener . . . terminated his employment with Tucci's . . ." and "he terminated his employment with TEKsystems . . . ." Brief of Appellee, p. 7. These statements are distortions. Tiffany appears to suggest that Mr. Diener voluntarily ended employment with these employers. There is no such evidence to support such a suggestion. Rather, Mr. Diener testified that no further work was available to him through TEKsystems. Transcript, p. 24. No evidence was offered as to Mr. Diener's termination of employment from Tucci's. See Transcript, p. 22.

10. Appellee states that "Mr. Diener was earning about $1,450 a month at the time of trial." Brief of Appellee, p. 7. The lower court, however, found that Mr. Diener's "gross income

is approximately $1,032.00 per month . . . ." 3/25/2003 Order, p. 3 (R. 205).

11. Appellee suggests that "Mr. Diener occasionally attempts to qualify [his stipulation that $1,750.00 be imputed to him] by saying it was offered only if the trial court found that there was a substantial change of circumstances and only if the trial court would indeed modify the child support provisions . . . ." Brief of Appellee, p. 9. Appellee suggests that Mr. Diener was trying to be "clever" by the stipulation. Id. Appellee's accusation is baseless and inaccurate. Mr. Diener's stipulation was acknowledged by the court as follows:

> Although his most recent financial declaration shows his actual income at ~$245.00 per month, for the sole purpose of calculating child support provided a modification is granted in the current proceeding, defendant stipulated that income may be imputed to him at a total of $1,750.00 per month which approximates what would have been his income had [he] been working full time . . . ."

Order Re: Trial Date, p. 2 (R. 144)(emphasis added)(copy attached hereto). Mr. Diener stipulated that the amount of $1,750.00 could be used for the purpose of calculating child support, if the court found basis for modification. Transcript, p. 29. The purpose behind Mr. Diener's stipulation was to facilitate settlement/resolution of this matter, and to benefit his child. Erich Diener testified that he did not actually earn that amount.

Transcript, p. 29. That amount represented what he would earn if he were able to work full-time at his current rate.

## REPLY ARGUMENT

### I. THE LOWER COURT ERRED IN REFUSING TO APPLY § 78-45-7.2 (6).

Tiffany Diener's position stems from an alleged agreement between the parties that Mr. Diener would pay increased child support as "a bargained-for consideration where each of the parties made significant concessions in reaching that agreement." 3/25/2003 Order, p. 2 (R. 203). As set forth more fully in Mr. Diener's principle brief, there was no finding in the original Findings of Fact in 1998 with regard to any such bargain (see R. 26). There is no indication of any such bargain in the parties' Stipulation and Settlement Agreement (see R. 10). Finally, there is no indication of any such bargain in the parties' Decree of Divorce (see R. 33).

Appellee incorrectly states Mr. Diener's "position . . . changed when it became obvious that his income had not changed enough to prove a substantial change in circumstances." Brief of Appellee, p. 10. That is incorrect. Mr. Diener argued, "The decree of divorce should be modified and amended to recalculate defendant's child support obligations, etc. in light of the

substantial change of circumstances of both parties." Petition for Modification, ¶ 8 (R. 45-46)(underlined emphasis added).

In addition, Mr. Diener argued early in this matter that he is entitled to a modification based upon both a substantial change to the parties' circumstances and pursuant to the passage of three (3) years "since the divorce decree was entered." Defendant's Response to Motion to Dismiss Petitioner for Modification, p. 1-2 (R. 58-59). The lower court allowed Mr. Diener to argue for a modification on both grounds. Both were preserved below and are ripe for review on appeal.

The cases cited by Tiffany Diener in support of her brief, are inapposite. The cases cited involve specific written agreements, with specified terms incorporated into the parties' decree. Those cases instruct that parties are bound by a written property settlement; those cases do not support the same for an unwritten "agreement."

In Land v. Land, 605 P.2d 1248 (Utah 1980), the appellate court was called upon to interpret "the term 'equity' as it appeals in the stipulation and property settlement agreement." Id. at 1249. Thus, there was a clear, written agreement for the court to review. Indeed, the "decree specifically adopted the provisions of the written stipulation . . . ." Id. Thus, "the law limits the continuing jurisdiction of the court where a

property settlement agreement has been incorporated into the decree . . . ." Id. at 1251.

In Hill v. Hill, 841 P.2d 723 (Utah 1990), again, the appellate court was called upon to review written terms of a divorce decree, that varied from statutory rights ("The agreed decree provided for termination of support upon the death or emancipation of a child. The decree stated four events that would constitute emancipation but stated that emancipation would be postponed if [a child was enrolled in higher education]." Id. (underlined emphasis added)). Herein, neither the original stipulation nor the original decree contain the terms that Tiffany now seeks to enforce. There is no mention whatsoever of any bargained-for-exchange agreement asserted by Tiffany.

In Despain v. Despain, 627 P.2d 526 (Utah 1981), the obligor spouse "entered into a stipulation and property settlement agreement with the plaintiff, which was approved and incorporated in the decree by the trial court." Id. at 526 (underlined emphasis added). The defendant in Despain

> failed to observe the distinction between those cases involving the statutory power of the court in a divorce proceeding to enter orders concerning support that thsoe cases in which the parties in a divorce action has settled their property rights by agreement, the terms of which are incorporated in a decree.

Id. at 527 (underlined emphasis added). The appellate court continued, "The limitations on the power of the court to order support do not limit the rights of the husband and wife to contract with respect to the education of their children as a part of an agreement settling their property rights." Id.

From Land and Despain, it is clear that lower courts retain jurisdiction to enforce the written terms of parties' agreements that are incorporated in a decree.[2] The court herein, however, lacks jurisdiction to enforce an unwritten, oral agreement some five (5) years after it was allegedly made. If the bargained-for-exchange that Tiffany Diener alleges was incorporated in the parties' decree, Erich Diener would have no claim. However, Tiffany Diener seeks to enforce an agreement that was neither written at the time it was allegedly made, nor incorporated into the parties' settlement stipulation and decree.

Finally, appellee argues that Mr. Diener attempts "to rely . . . on a new statute to retain the benefit of his bargain i.e., not having to defend claims [by Tiffany] . . . ." Brief of Appellee, p. 13. The statute in question, Utah Code Ann. § 78-45-7.2 (1953 as amended), is not a "new statute." It was enacted in 1989, when the child support guidelines were first

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[2] In addition, the court would have jurisdiction to modify based upon statutory grounds set forth by the legislature.

established. The statute indicates "The guidelines apply to any judicial or administrative order establishing an award of child support entered on or after July 1, 1989." Utah Code Ann. § 78-45-7.2 (1) (1953 as amended).[3] The statute was in effect when the parties' decree was entered. Thus, Ms. Diener is less than accurate in describing the pertinent statute as "new."

Erich Diener is entitled to an adjustment of child support based upon the passage of three (3) years and the non-temporary difference of 10% pursuant to Utah Code Ann. 78-45-7.2 (6) (1953 as amended)(subsequently renumbered to subsection (8)). In light of the passage of three (3) years from the date the decree was entered herein, the court below erred by refusing to recalculate child support pursuant to the guidelines and order Erich Diener to pay the resulting amount.

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[3] Furthermore, the statute mandates "Notice of the opportunity to adjust a support order under Subsections (6) and (7) shall be included in each child support order issued or modified after July 1, 1997." Utah Code Ann. § 78-45-7.2 (8)(subsequently renumbered to subsection (10)). This provision was enacted nearly one (1) year prior to entry of the parties' decree herein, prepared by Tiffany Diener's counsel. The decree failed to contain such a notice.

**II. THE LOWER COURT ERRED IN FAILING TO FIND A SUBSTANTIAL CHANGE IN THE PARTIES' CIRCUMSTANCES:**

Ms. Diener now acknowledges that "a showing of a substantial, or material change in the circumstances [can] modify . . . bargained-for terms in a decree." Brief of Appellee, p. 11; see also Brief of Appellee, 18.[4] The lower court, found

> Because the Defendant's financial circumstances have not changed substantially, the Court finds that there is no substantial change in circumstances upon which to justify modification of the child support Order under § 78-45-7.2 (7), Utah Code.

3/25/2003 Order, p. 6 (R. 207). As set forth in Mr. Diener's principle brief, such a conclusion does not flow from the testimony presented at trial, nor does it flow from the subsidiary findings made by the court.

Ms. Diener asserts that "the trial court had ample evidence to impute income to Mr. Diener in excess of his income at the time of the divorce . . . ." Brief of Appellee, p. 15.[5] The lower court, however, made findings that clearly establish a

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[4] Appellee admits that Mr. Diener can adjust child support pursuant to a substantial change in circumstances. However, appellee argues that the "three (3) year rule" does not apply. The distinction is illogical. Both are statutory rights. Both rights must be included in all decrees pursuant to Utah Code Ann. § 78-45-7.2 (1953 as amended). Appellee's concession defeats the claim that there is an enforceable agreement.

[5] The lower court did not impute income to Mr. Diener. To do so, the court must make specific findings. Utah Code Ann. § 78-45-7.5 (1953 as amended).

substantial change in the parties' circumstances. The lower found:

> [Mr. Diener] was temporarily employed by Circuit City, . . . making about $1,200.00.
>
> [Mr. Diener] was employed by TEKsystems . . ., from July 1998 through September 2001 . . . . [He lost said] job because of the down-turn of the economy and the computer technology industry.
>
> [Mr. Diener] was unemployed from September 2001 through November 2001.
>
> [Mr. Diener] was employed at Tucci's restaurant from November 2001 through October 2002, earning approximately $1,560.00 per month, including tips.
>
> * * *
>
> [Mr. Diener] worked on contract for TEKsystems . . . in 2002. He earned a total of $3,655.00 . . . .
>
> * * *
>
> [Mr. Diener] has provided technical computer assistance and consulting to the Utah Legal Clinic in trade for legal services . . . [totaling $1,200.00 in 2001 and $1,912.50 in 2002].
>
> * * *
>
> [Mr. Diener] enlisted in the Utah National Guard in 2002. [He] earns approximately $245.00 per month.
>
> [Mr. Diener] began working part-time for Gateway Academy . . . . * * * [His] gross income is approximately $1,032.00 per month . . . .

3/25/2003 Order, p. 3-4 (R. 204-205)(numbering omitted). Finally, the court specifically found that Mr. Diener requires a college degree "to again obtain gainful employment at a reasonable rate of pay." 3/25/2003 Order, p. 4 (R. 205).

In spite of these specific findings, the court concluded that Erich Diener's "financial circumstances have not changed substantially .. . ." 3/25/2003 Order, p. 6 (R. 207). Such a conclusion is erroneous. Erich Diener's financial circumstances have changed substantially. His ability to earn has been substantially altered, and his earnings have significantly decreased.

Tiffany Diener argues that "the trial court would have imputed at least $1,750 monthly income to Mr. Diener . . . and $1,192 to Tiffany . . . ." The lower court did not do so. Rather, the lower court found that Mr. Diener's "gross income is approximately $1,032.00 per month . . . ." 3/25/2003 Order, p. 3 (R. 205). Mr. Diener stipulated that an amount of $1,750.00 could be used for the purpose of calculating child support, only if the court found basis for modification.[6] Transcript, p. 28; Order Re: Trial Date (R. 144). Mr. Diener did not waive his right to claim a substantial change in circumstances. He should be permitted to request modifications pursuant to § 78-45-7.2 (6)&(7)(1953 as amended). Mr. Diener did not stipulate that

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[6] Mr. Diener argued that minimum wage ($886.00) be imputed to Tiffany Diener. Mr. Diener did not argue that an income of $1,192.00 be imputed to Tiffany Diener. Memorandum of Law/Trial Memorandum Re: Child Support, p. 4-5 (R. 156-157).

amount be used to determine whether there was a change in his earnings, as asserted by Tiffany.

Tiffany Diener misstates Erich's argument regarding the change in Tiffany Diener's circumstances. See Brief of Appellee, p. 15. Erich Diener has never suggested that the court solely focus on Tiffany Diener's new circumstances. Rather, the court must view the overall change in both parties' circumstances.

The language of the statute reads:

> (7) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.
> (b) For purposes of Subsection (7)(a), a substantial change in circumstances may include:
> (i) material changes in custody;
> (ii) material changes in the relative wealth or assets of the parties;
> (iii) material changes of 30% or more in the income of a parent;
> (iv) material changes in the ability of a parent to earn;
> (v) material changes in the medical needs of the child; and
> (vi) material changes in the legal responsibilities of either parent for the support of others.

Utah Code Ann. § 78-45-7.2 (7)(a)&(b) (1953 as amended). The language in the statute references both parties. Herein, there have been substantial changes in both parties' lives. Indeed, the lower court made specific findings that should have resulted in a legal conclusion that there are substantial changes to both parties' circumstances.

In light of the overall, substantial change in the parties' circumstances, the lower court erred in failing to recalculate child support pursuant to the guidelines.

**III. THE BEST INTERESTS OF THE CHILD CAN BE MET BY A REDUCTION OF CHILD SUPPORT.**

Appellee misstates Mr. Diener's argument regarding the whether a reduction could ever be in the best interests of child. Appellee states, "Mr. Diener will be hard-pressed to establish . . . that it would be in 'the best interests' of his minor daughter for her father to pay a significantly reduced child support payments because the custodial parent is not earning any income." Brief of Appellee, p. 16 (underlined emphasis added).

Such was never Mr. Diener's argument. Rather, Mr. Diener asks this Court to consider whether it would ever be in the best interests of the child to decrease child support. See generally Transcript, p. 80-81 ("[C]an you conceive of a situation where reducing someone's child support would be in the best interest of the child?"). The issue presented for review is set forth in Mr. Diener's principle brief: "Is it ever in the child's best interest to reduce support?" Brief of Appellant, p. 3.

Appellee largely ignores the analysis in Overby v. Overby, 698 So.2d 811 (Fl. 1997). The Overby court recognized that a "need for retraining when a skill is no longer needed and the

need for increased education to enhance income [could be] important factors that may be considered [in reducing child support]." Id. In that case, the Florida judiciary resolved that "the focus should be whether the temporary reduction will be in the best interests of the [child]." Id. A temporary reduction would be permissible if the long term effect would benefit the children.[7]

Arizona has similarly recognized the importance of a temporary modification of a child support that may lead to long term economic benefit for the child. Little v. Little, 975 P.2d 108, 111 (Ariz. 1999). Appellee ignores this aspect of the Arizona decision, and rather cites language mandating "the duty [to support one's children] persists, with full authority in the State to enforce it." Id. at 114. Mr. Diener has never sought to abdicate his duty of support. Rather, he has sought to have his child support obligation calculated as per the statutory guidelines. Thus, his position fully comports with the Tiffany's citation to the Little case.

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[7] "In light of today's fast paced changing age of technology, trial judges will have to evaluate, on a case by case basis, whether a temporary reduction in child support payments due to a payor's pursuit of an enhanced education will eventually be legally beneficial to the recipients." Overby, 698 So.2d at 815.

Erich Diener is neither voluntarily unemployed nor voluntarily underemployed. The trial court specifically found that Mr. Diener requires a college degree "to again obtain gainful employment at a reasonable rate of pay." 3/25/2003 Order, p. 4 (R. 205). In determining the best interests of the child, this Court should allow a reduction in child support based upon the facts herein, and set child support as per the statutory guidelines.

**IV. MR. DIENER DOES NOT HAVE UNCLEAN HANDS.**

Appellee asserts "Mr. Diener admitted he did not tell Tiffany he was earning $55,000 a year . . . ." Brief of Appellee, p. 18 (citing Transcript, p. 39). That assertion distorts the trial testimony and misleads this Court. The actual testimony referenced by appellee is as follows:

> Q. [By John Call] Let's talk a little bit about your employment with TEKsystems: During the time you were erning $55,000 a year, did you offer to pay more child support?
> A. [By Erich Diener] No, sir.
> Q. Did you ever go to Tiffany and say, "Gosh, I'm making more, I'd like to pay a little more?"
> A. No, sir.

Transcript, p. 39. Nowhere is there any indication of deceit, fraud, or misdeeds on behalf of Mr. Diener in this exchange. Nowhere is there any indication that Mr. Diener hid his income

from Tiffany.[8] Indeed, Tiffany was aware at all times of Mr. Diener's various employers. Nothing prevented Tiffany from seeking a modification of the child support obligation based upon Mr. Diener's earnings at TEKsystems.

## CONCLUSION AND RELIEF SOUGHT

The lower court erred in denying Erich Diener's request to modify the decree to adjust child support. Erich Diener is entitled to an adjustment in child support pursuant to Utah law after the passage of three (3) years. Furthermore, Erich Diener is entitled to a modification based upon the substantial change in the parties' circumstances. Finally, the lower court erred in finding a bargained-for exchange of alimony for increased child support, particularly in light of the fact that no mention of said bargain is found in the parties' original divorce papers.

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[8] The parties' Decree of Divorce does not contain a provision whereby the parties must exchange income information on a yearly basis. Any suggestion that Mr. Diener "hid" his income is baseless.

The lower court should recalculate child support pursuant to the guidelines, based upon the parties' current income, and order Erich Diener to pay the resulting amount.

RESPECTFULLY SUBMITTED this 21st day of NOVEMBER 2003.

UTAH LEGAL CLINIC
ATTORNEYS FOR RESPONDENT/APPELLANT

by _____
BRIAN M. BARNARD
JAMES L. HARRIS, Jr.

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to:

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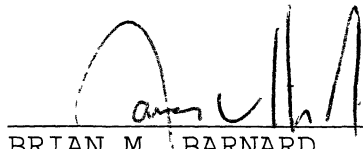
UTAH LEGAL CLINIC
Attorneys for RESPONDENT/APPELLANT

by: 

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# ATTACHMENT

Order Re: Trial Date (R. 143).

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

SALT LAKE DEPARTMENT

| | | |
|---|---|---|
| TIFFANY JACOBS DIENER, | : | ORDER RE: TRIAL DATE |
| Plaintiff, | : | |
| vs. | : | Case No. 98-490-1948 DA |
| ERICH ROSS DIENER, | : | (Hon. F. NOEL)<br>(Comm. Michael Evans) |
| Defendant. | : | |

THE ABOVE CAPTIONED MATTER having come before the court for a telephone scheduling conference on January 7, 2003 at 10:15 a.m., the plaintiff being represented by John Call, the defendant being represented by Brian M. Barnard, based thereon and for good cause appearing,

IT IS HEREBY ORDERED:

This matter is set for a one (1) day bench trial on Thursday, February 6, 2003 beginning at 10:00 a.m. on defendant's petition for modification;

The parties shall submit written trial briefs dealing with any applicable issues of law on or before Wednesday, February 5, 2003 at noon; and,

Although his most recent financial declaration shows his actual income at ~$245.00 per month, for the sole purpose of calculating child support provided a modification is granted in the current proceeding, defendant stipulated that income may be imputed to him at total of $1,750.00 per month which approximates what would have been his income had been working full time at Tucci's, where he was most recently employed.

Dated this 23 day of JANUARY 2003.

BY THE COURT

FRANK NOEL
Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER RE: TRIAL DATE to:

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UTAH LEGAL CLINIC
Attorneys for Defendant

by
BRIAN M. BARNARD

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