

IN THE FAMILY COURT OF BRAXTON COUNTY, WEST VIRGINIA:
~ 17TH FAMILY COURT CIRCUIT ~

FILED CLERK'S OFFICE

**IN RE: The Child of: DONNA SUE SKIDMORE, Petitioner, and
WALTER BURKE SKIDMORE, Respondent.**

2008 MAY 22 AM 10 49

J.W. MORRIS, CLERK *Tb*
BRAXTON CO CIR COURT

CIVIL ACTION NO.: 98-D-18

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 24th day of April, 2008, came the Petitioner-Ex-Wife-Mother, in person, without counsel, too came the Respondent-Ex-Husband-Father, in person, by and through his counsel, Daniel R. Grindo, both parties appearing before the undersigned Court, pursuant to the hearing and trial on the Mother's Petition for Modification filed on August 29, 2007, and her Petition for Modification filed on January 15, 2008. Upon review of the evidence and pleadings, the Court makes the following **FINDINGS OF FACT and CONCLUSIONS OF LAW:**

A. Two children were born of the marriage of the parties, to-wit: Amber Michelle Skidmore, born August 25, 1988, and Janet Marie Skidmore, born October 14, 1991.

B. That the parties were married on March 11, 1989. They separated on January 8, 1998. The Husband filed for divorce in Civil Action No. 98-D-18 on February 9, 1998.

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C. That by Order entered by the Honorable Danny O. Cline, Judge, on April 1, 1998, the parties were divorced. They were divorced upon the grounds of irreconcilable differences. Custody was awarded to the Mother, the Father was given Schedule A Visitation, and child support was set at eight hundred dollars (\$800.00) per month beginning March 1, 1998.

D. That by entry of a Nunc Pro Tunc Order reflecting the hearing of May 12, 1999, and entered on May 17, 1999, by the Honorable Danny O. Cline, Judge, the Divorce Order was amended to reflect joint custody and further proceedings regarding child support were to be conducted.

E. By entry of an Order entered on May 20, 1999, by the Honorable Danny O. Cline, Judge, child support was modified to four hundred dollars (\$400.00) per month effective April 1, 1999.

F. That the Father filed a second Petition for Modification on June 11, 2002, for custody. By Order reflecting the hearing of February 21, 2003 and entered on March 3, 2003, the Father's child support was reduced from four hundred dollars (\$400.00) per month to two hundred, thirty-eight dollars and twenty-nine cents (\$238.29) per month effective March 1, 2003.

G. By Order reflecting the hearing of June 16, 2003 and entered on June 30, 2003, the Father's child support obligation was reduced to two hundred dollars (\$200.00) per month effective June 1, 2003. As regards to subject child, Janet Marie Skidmore, the parties were to have joint decision-making responsibility,

but the time that the child spent between the parties was on a "50-50 basis". That Order further provided as follows:

N. That the parties should exchange income information, including federal and state tax returns, with all schedules and W-2's, each year by February 15, and, said parties shall report to the BCSE any change in gross of income within 15 days of any significant change in gross income; however, said reporting requirement should not be necessary if the change in gross income is less than a 15 percent;

The Child Support Formula showed that the Father had the ability to pay two hundred, sixty dollars and two cents (\$260.02) per month in child support. That Order was later amended by Order entered on August 4, 2003 for other reasons.

H. On August 29, 2007, the Mother filed her first Petition for Modification requesting a modification as regards Parenting Plan and increase in child support. She stated that "Janet (15 years old) wishes to be with Mother/sole custody with all decision-making by Mother/change of tax of claiming of child."

I. That on September 21, 2007, the Mother filed a Parenting Plan wherein she would exercise a significant decision-making for the subject child, and the child, Janet Marie Skidmore, would stay with her "with option to visit if wishes". The Mother further stated that "child may occasionally want to see Father supervised for an hour or two when decides to."

J. That by Temporary Order entered on September 26, 2007, the hearing scheduled for October 25, 2007 at 2:00 p.m. was continued to November 21, 2007 at 9:30 a.m. The Mother's Motion to Temporary Modify the Parenting Plan was denied. The child was referred to a counselor, either Olga Gioulous or Brenda

Hinkle, for a report to be written by November 1, 2007 and to "address what child custody preference is, whether it is a 'reasonable and firm' preference, and not made or influenced because of 'undue influence', fraud or duress."

K. That by a Case Management Conference Order held and entered on October 11, 2007, the parties were sent for mediation and discovery was permitted and to be concluded by November 15, 2007.

L. That by Order reflecting the hearing of November 21, 2007 and entered on December 10, 2007, the matter was continued until March 29, 2008 at 9:00 a.m. The parties agreed to seek the services of Brenda Hinkle, Counselor.

M. On January 16, 2008, the Mother filed her second Petition for Modification, requesting, in addition, "back support due to not working because of health problems and Mr. Skidmore not turning in increase in income from 2002-2003-2004-2005-2006 and 2007."

N. In the Father's " Response to Petitioner's second Petition for Modification" filed on February 11, 2008, the Father filed his personal tax return and for Skidmore Trucking, Inc. for 2007, his personal and corporate return for 2006.

O. By Order reflecting a Telephone Conference on February 4, 2008, entered on March 31, 2008, the child interview was arranged.

P. It was not disputed that the Mother had not received corporate or personal tax returns for the Father since 2003, until after she filed her second Petition for Modification. The Father claims that he was unaware of the provisions in a prior

order requiring such disclosure.

Q. By Temporary Order reflecting the hearing of March 24, 2008, sole custody of the child, Janet Marie Skidmore, was awarded to the Mother "due to DV against Father by Cindy Facemire." The Father's parenting time was to be monitored at Tri-County Visitation Center or by agreement. The parties were to contact Tri-County Visitation Center within forty-eight (48) hours.

R. By Order reflecting the hearing of March 24, 2008, the trial scheduled for March 26, 2008 at 9:00 a.m. was continued due to Notice of Scheduling Conflict to April 24, 2008 at 9:30 a.m.

S. That at the trial on April 24, 2008, the Mother introduced evidence of the Father's income from 2003. See Mother's Exhibit #1, #2, #3 and #4.

T. In calculating the difference between the Child Support Formula, which would have been utilized had the Father's tax returns be available, and the court ordered child support, the Father would owe a total of seven thousand, nine hundred, fifteen dollars and seventy-six cents (\$7,915.76) without interest. See attached Chart, labeled as Family Court Exhibit A. The Chart takes into account that the older child Amber would have graduated in the year of 2006. Further noted is the Mother's receipt of State Medical Card due to her disability commencing in 2006. Calculations do not include the sale of equipment in the Father's business in the year of 2006 resulting in an additional twenty-three thousand dollars (\$23,000.00) due to the fact of such selling of equipment was not recurring

income.

U. While generally speaking the Court has no jurisdiction to retroactively modify child support obligations, see Goff v Goff 177 W.Va. 742, 356 S.E.2d 496 (1987), Hudson v Peck 183 W.Va. 300, 395 S.E.2d 544 (1990), W.Va. §48-14-201, and W.Va. Code 48-14-203, our court has permitted retroactive modifications before the filing of a Petition to Modify retroactive to the date of a change of custody, see Supcoe v Shearer, 204 W.Va. 326, 512 S.E.2d 583 (1998), and other circumstances when retroactive modifications were permitted. In this particular case, the last order contained a provision wherein the Father was to give copies to the Mother of his tax returns and associated documents. It was not disputed that he failed to do so. The Mother did not receive them until she filed her second Petition for Modification. Her delay or inaction in seeking a modification of child support could not be deemed a waiver. "In waiver, both knowledge of the fact basic to the exercise of the right and the intent to relinquish that right are essential elements. Since knowing intent is an essential element of true waiver, it can never arise constructively or by implication. 19 MJ Waiver §3.

V. That the Father argues that although he did not file for a Petition to reduce his child support obligation, since child support was to be recalculated, he should have the benefit of any such reduction. According to the aforesaid Chart from October 2007 through December 2007, his obligation would have reduced more than 15 percent to one hundred, eighty-six dollars and fifty-one cents

(\$186.51). The Mother opposes that reduction and the Father's Motion was denied for his failure to actively seek a modification himself either by petition or a counter-claim.

DATED this 21st day of May, 2008.



ROBERT REED SOWA
(17TH Family Court Judge
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Skidmore
Grindo

<u>YEAR</u>	<u>FAMILY COURT EXHIBIT USED</u>	<u>MOTHER'S INCOME</u>	<u>FATHER'S INCOME</u>	<u>CALCULATED CHILD SUPPORT</u>	<u>POSITIVE DIFFERENCE FROM \$260.02</u>	<u>FATHER'S ADDITIONAL OBLIGATION</u>
2003	3A 3B	\$1014	\$1512.42	\$339.84	\$ 79.82 x 4	= \$ 319.28
2004	4A 4B	\$1014	\$1835.58	\$417.47	\$157.45 x 12	= \$1889.40
2005	5A 5B	\$1014	\$2092.17	\$471.72	\$211.75 x 12	= \$2541.00
2006	6C 6D	- 0 -	\$1557.91	\$523.86	\$263.84 x 12	=\$3166.08
October 2007 thru Dec. 2007	1	- 0 -	\$1244.08	\$186.51	N/A	- 0 -
2008	2	- 0 -	\$1244.08	\$248.00	N/A	- 0 -
						\$7915.00

FAMILY COURT EXHIBIT A

5-20-08

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CERTIFICATE OF SERVICE

I, Robert Reed Sowa, the undersigned Family Court Judge, do hereby certify that I have mailed a true and exact copy of the **FINDINGS OF FACT AND CONCLUSIONS OF LAW** by first class mail with the United States Postal Service, in an envelope properly stamped and addressed, on the 22ND day of May, 2008, to said parties at the following addresses:

Daniel R. Grindo, Esquire
622 Elk Street
Gassaway, WV 26624

Donna S. Skidmore
415 Stony Creek Road
Sutton, WV 26601


ROBERT REED SOWA
Family Court Judge