

1985

Mary Helen Owen v. Robert James Owen : Brief of Respondent

Utah Supreme Court

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Pete N. Vlahos; Attorney for Appellant.

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1986 20478

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY HELEN OWEN,)	
Plaintiff & Appellant,)	RESPONDENT'S BRIEF
vs.)	Case No. 20478
ROBERT JAMES OWEN,)	
Defendant & Respondent.)	

BRIEF OF RESPONDENT

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ISSUES PRESENTED

1. Did the District Court abuse its discretion in the judgment and decree of divorce ordered by the Court?
2. Has the appellant followed the proper procedure for seeking a change in the District Court's decree?

STATEMENT OF THE CASE

Statement of Facts

Attached hereto as Exhibit A is an entire transcript of the District Court proceedings in this matter consisting of nine (9) pages. The transcript itself evidences that while no written stipulation was filed herein, nearly all of the issues determined by the Court were based upon the agreement of the parties.

SUMMARY OF ARGUMENTS

1. The District Court's decision should not be overturned because there was no abuse of discretion.

2. The Appellant has simply changed her mind since the January 2, 1985 hearing, and is trying to avoid her own agreement.

3. The Appellant should have sought her requested remedies in the District Court through a Motion filed pursuant to URCP 60, and not by filing this Appeal.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD NOT BE OVERTURNED BECAUSE THERE WAS NO ABUSE OF DISCRETION.

Appellant claims the District Court abused its discretion in not awarding to Appellant alimony or an interest in her former husband's retirement plan. The transcript attached hereto as Exhibit A makes clear that neither of these items were sought by Appellant at the hearing in the District Court. A review of the entire transcript also evidences that this was not an adversary proceeding but was more in the nature of a settlement conference at which both parties appeared and indicated terms with which they were in agreement. Based upon the agreements of the parties, the Court issued its decision. The Court clearly was not abusing its discretion when it

issued the decision because the decision was based almost entirely upon terms agreed to by the parties.

The long established standard of review with respect to divorce cases was stated by this Court in Lord v. Shaw, 682 P.2d 853, 856 (Utah 1984).

In divorce cases, absent an abuse of discretion we will not substitute our judgment for that of the trial court. This Court has refused to reverse the decision of the trial court in a divorce case when the evidence does not clearly show that the trial court erred or abused its discretion. This Court accords considerable deference to the findings and judgment of the trial court due to its advantageous position. [citations omitted].

See also Jeppson v. Jeppson, 682 P.2d 69 (Utah 1984); Openshaw v. Openshaw, 639 P.2d 177 (Utah 1981); Bernard v. Attebury, 629 P.2d 892 (Utah 1981) (Supreme Court won't disturb trial court's discretion unless definite and firm conviction that court below committed clear error of judgment in weighing relevant factors); Despain v. Despain, 610 P.2d 1303 (Utah 1980) (discretionary power disturbed only in presence of clear abuse thereof); Owen v. Owen, 579 P.2d 911 (Utah 1978) (trial court decision not disturbed unless evidence so preponderates against findings that inequity or injustice resulted). This Court in Lord refused to overturn the trial court's decision since "the trial court stated sufficient reasons for its decision." 682 P.2d at 856. The trial court in the instant case also found and stated sufficient reasons for its decision and therefore should not be overturned.

II. THE FACT THAT PLAINTIFF HAS NOW CHANGED HER MIND AND SEEKS TO AVOID THE TERMS OF HER OWN AGREEMENT DOES NOT CONSTITUTE GROUNDS FOR A REVERSAL OF THE DISTRICT COURT'S DECISION.

A review of the entire transcript of the hearing in the District Court evidences that the matter was essentially a verbal stipulation in which a few items were not agreed upon, but were simply presented to the court for determination. Attached hereto as Exhibit B is an Affidavit of Frank M. Wells, counsel for the Appellant in the original proceedings. Mr. Wells' affidavit specifically explains that the Appellant:

(a) did not want any interest in the Respondent's retirement fund;

(b) did not seek nor desire any alimony support from the Respondent;

(c) did not desire possession of the home of the parties.

Based upon the transcript and the affidavit of Mr. Wells, it is clear that the Appellant, at some time following the January 2, 1985 hearing, changed her mind. This is certainly not grounds to reverse the decision and decree of the District Court.

III. THE APPELLANT SHOULD HAVE SOUGHT HER REQUESTED REMEDIES IN THE DISTRICT COURT THROUGH A MOTION FILED PURSUANT TO URCP 60, AND NOT BY FILING THIS APPEAL.

Utah Rule of Civil Procedure 60 provides procedures

which may be followed at the trial court level to obtain the remedies which are sought by Appellant in this appeal. Appellant's appeal at this time is improper and untimely for the reason that she has failed to exhaust her remedies at the District Court level. Appellant certainly could have chosen to bring the matter back before Judge Wahlquist pursuant to a Rule 60(a) or 60(b) motion. If Appellant had any additional information which she felt Judge Wahlquist should have received at the hearing but did not receive, such information or evidence might then have been presented. The trial judge could then properly have determined whether such additional relief was appropriate.

The Appellant's present course of action certainly attempts to work an unfairness upon the trial judge by indicating the judge abused his discretion, when in fact the judge only ordered essentially that which the Appellant consented to and requested.

Finally, Appellant's request that the Respondent be required to pay her attorney's fees on this Appeal is astounding. How is the Respondent responsible for the attorney's fees which Appellant has incurred? Respondent was not represented by legal counsel at the hearing, and essentially agreed to everything which plaintiff and her attorney presented. Appellant and her new attorney have made no attempt to seek Respondent's cooperation in any type of modification of the decree. Respondent has done

absolutely nothing to cause Appellant to incur additional attorney's fees or costs. Equity demands that Respondent not be required to pay any costs or expenses for which he is blameless.

CONCLUSION

For the reasons stated above Respondent respectfully requests this Court to affirm the lower court's decision and decree, and dismiss this appeal. Appellant certainly should receive no award for her attorney's fees and costs incurred inasmuch as both the remedies sought and the procedures followed are improper and were certainly not necessitated by any action on the part of the Respondent.

DATED this 11th day of June, 1985.

15/

REED W. HADFIELD

15/

BEN H. HADFIELD
MANN, HADFIELD & THORNE
Attorneys for
Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing to Pete N. Vlahos, Attorney for Appellant, at 2447 Kiesel Avenue, Ogden, Utah 84401, postage prepaid, this 11th day of June, 1985.

15/

Secretary

1 MR. WELLS: YOUR HONOR, I MIGHT INDICATE TO THE
2 COURT THAT MR. OWEN IS PRESENT IN COURT. IF YOU WANT TO COME
3 AND SIT HERE.

4 THE COURT: HAVE HIM COME UP SO THAT I'M SURE
5 THAT HE HEARS.

6 MARY HELEN OWEN,
7 THE PLAINTIFF, CALLED AS A WITNESS BY
8 AND IN HER OWN BEHALF, BEING FIRST DULY
9 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MR. WELLS:

12 Q PLEASE STATE YOUR NAME.

13 A MARY HELEN OWEN.

14 Q YOUR HUSBAND WAS A RESIDENT AND HAD BEEN FOR THREE
15 MONTHS OF WEBER COUNTY PRIOR TO FILING THIS ACTION, IS THAT
16 CORRECT?

17 A YES.

18 Q AND YOU HAD BEEN A RESIDENT OF WEBER COUNTY UNTIL YOU
19 SEPARATED FROM HIM, IS THAT CORRECT? .

20 A YES.

21 Q AND WAS THAT IN OCTOBER?

22 A YES. OCTOBER I WENT IN THE HOSPITAL.

23 Q OKAY. THAT WAS INCIDENT TO ALCOHOL TREATMENT, IS THAT
24 CORRECT?

25 A YES.

1 Q NOW, HE SUBSEQUENTLY HAS BEEN IN ALCOHOL TREATMENT, IS
2 THAT CORRECT, ALSO?

3 A YES.

4 Q HOWEVER, I GUESS THAT'S PRETTY MUCH WHAT HAS GENERATED
5 YOUR BEING HERE TODAY?

6 A YES.

7 Q OKAY. NOW, IN LIGHT OF THAT, IS THERE A CHANCE OF
8 RECONCILIATION OF THE MARRIAGE?

9 A I WANT THE DIVORCE.

10 Q OKAY.

11 A I NEED THE FREEDOM AND THE TIME. MY SOBRIETY MEANS A LOT.

12 Q IN OTHER WORDS, YOU HAVE DIFFICULTY IN MAINTAINING
13 SOBRIETY WHILE YOU'RE AROUND HIM?

14 A IT HAS BEEN SO THAT WAY. I WOULDN'T MIND SEEING HIM.
15 WE GET ALONG WELL TOGETHER, BUT AS FAR AS GOING BACK TOGETHER
16 NOW UNTIL I'M MUCH STRONGER, NO.

17 Q THERE ARE THREE CHILDREN OF THE MARRIAGE?

18 A TWO.

19 Q TWO CHILDREN?

20 A TWO SONS.

21 Q TWO SONS. AND YOU WOULD LIKE THE COURT TO ENTER AN
22 ORDER OF SUPPORT -- CHILD SUPPORT FOR THOSE CHILDREN, IS THAT
23 CORRECT?

24 A YES.

25 MR. WELLS: NOW, I MIGHT INDICATE TO THE COURT

1 THAT MR. OWEN INDICATES HIS NET INCOME IS \$746 EACH TWO WEEKS,
2 AND I WOULD SUPPOSE THAT MIGHT BE AROUND \$1,800 A MONTH GROSS,
3 BUT I'M NOT CERTAIN OF THAT, YOUR HONOR.

4 THE COURT: WHAT DO YOU EARN?

5 MR. OWEN: THAT, I'M NOT SURE WHAT THAT IS, BUT
6 THE TAKE-HOME IS 746.

7 THE COURT: DO YOU GET PAID ON AN HOURLY BASIS?

8 MR. OWEN: YEAH.

9 THE COURT: WHAT IS YOUR HOURLY PAY?

10 MR. OWEN: I THINK IT'S TWELVE FIFTY-SEVEN.

11 THE COURT: WHO DO YOU WORK FOR?

12 MR. OWEN: IT'S THE FEDERAL GOVERNMENT, SO
13 THERE'S A LOT OF TAKE-OUT ON THAT.

14 THE COURT: WHAT GRADE ARE YOU?

15 MR. OWEN: WHAT GRADE?

16 THE COURT: UH-HUH.

17 MR. OWEN: GS-11.

18 THE COURT: WHERE DO YOU WORK?

19 MR. OWEN: HILL FIELD.

20 THE COURT: YOU MAY PROCEED.

21 MR. WELLS: THAT LOOKS TO BE SOMETHING OVER 2,000
22 AT TWELVE FIFTY-SEVEN, YOUR HONOR.

23 Q NOW, ABOUT THE ONLY MATTER OF DISTRIBUTION TO BE DEALT
24 WITH WOULD BE A ONE-HALF EQUITY LIEN ON THE RESIDENCE WHICH
25 YOU WOULD LIKE TO HAVE, REALIZING HE IS GOING TO REMAIN IN

1 THE RESIDENCE, IS THAT CORRECT?

2 A YES, IT IS. I NEED THE MONEY FOR THE CHILDREN.

3 Q WELL, AND THEN YOU WOULD TAKE THE '74 COUGAR OF THE TWO
4 VEHICLES?

5 A YES.

6 Q OKAY. NOW, YOU HAVE NO IDEA WHAT THAT -- WHAT THE VALUE
7 OF THE HOME IS AT THE PRESENT TIME?

8 A NO.

9 MR. WELLS: I MIGHT INDICATE TO THE COURT THAT
10 THE -- MR. OWEN HAS NO IDEA EITHER, SO WE WOULD HAVE TO
11 OBTAIN AN APPRAISAL ON IT TO OBTAIN THAT.

12 Q THERE'S AN \$8,000 OUTSTANDING OBLIGATION AT ST. BENE-
13 DICT'S FOR YOUR ALCOHOL TREATMENT, IS THAT CORRECT?

14 A YES.

15 Q ARE YOU PRESENTLY EMPLOYED?

16 A NO.

17 Q DO YOU HAVE PROSPECTS OF EMPLOYMENT?

18 A NO. I'VE BEEN LOOKING, BUT CAN'T FIND A JOB. I HAVE
19 ALL THE WRONG SKILLS.

20 Q AND THEN YOU WOULD LIKE MR. OWEN TO BE RESPONSIBLE FOR
21 MY ATTORNEY FEE HERE TODAY, IS THAT CORRECT?

22 A (WITNESS NODS.)

23 MR. WELLS: OKAY. NOTHING FURTHER, YOUR HONOR.

24 THE COURT: HOW LONG HAVE YOU HAD THIS PROBLEM?

25 THE WITNESS: I HAVE BEEN SEVERELY DRUNK FOR A

1 WHOLE YEAR BEFORE I WENT IN THE HOSPITAL.

2 THE COURT: HAVE YOU BEEN UNDER TREATMENT BEFORE?

3 THE WITNESS: NO.

4 THE COURT: THIS IS THE FIRST TIME?

5 THE WITNESS: (WITNESS NODS.)

6 THE COURT: WHAT DO YOU SAY ABOUT ALL THIS? IS
7 THERE SOMETHING YOU WANT TO TELL ME?

8 MR. OWEN: WELL, I -- I DON'T WANT THE DIVORCE,
9 BUT I -- I UNDERSTAND HOW SHE FEELS, AND IF THAT'S WHAT SHE
10 REALLY NEEDS --

11 THE COURT: CAN YOU HANDLE THE VISITATION WITH
12 THE CHILDREN?

13 MR. WELLS: Q IS THAT A PROBLEM?

14 THE COURT: DO YOU NEED ME TO SET CERTAIN HOURS
15 FOR VISITATION OR CAN ALL THIS BE WORKED OUT?

16 THE WITNESS: IT CAN BE WORKED OUT.

17 THE COURT: WHAT DO YOU SAY?

18 MR. OWEN: PARDON? I DIDN'T HEAR.

19 THE COURT: ABOUT VISITING THE CHILDREN AND THIS
20 TYPE THING, DOES THE COURT NEED TO MAKE ORDERS ON THAT OR CAN
21 YOU JUST HANDLE THAT ON A REASONABLE BASIS?

22 MR. OWEN: I WOULD THINK THAT COULD BE WORKED
23 OUT BETWEEN US, I HOPE. ONE QUESTION I'VE GOT, THOUGH, IS
24 WHAT -- OKAY. HALF OF THE EQUITY WHICH THE HOUSE WOULD BE
25 VALUED AT, AND WHEN OR HOW WOULD I PAY THAT OR WHAT -- HOW

1 DO I DO THAT?

2 THE COURT: USUALLY THIS IS SPELLED OUT IN THE
3 STIPULATION, BUT IT'S NOT IN THIS CASE. WHAT DO YOU SAY?

4 MR. WELLS: WELL, I WOULD THINK THAT THE STANDARD
5 OF THE COURT WOULD BE IN THE EVENT HE REMARRIES OR SELLS HIS
6 HOME OR THE YOUNGEST CHILD ATTAINS THE AGE OF MAJORITY,
7 UNLESS HE'S OBVIOUSLY ABLE TO TAKE OUT A SECOND MORTGAGE TO
8 SATISFY THE EQUITY LIEN.

9 THE COURT: OR COHABITS, USUALLY HAVE THAT IN IT.
10 WHAT ELSE? THE YOUNGEST CHILD IS HOW OLD NOW?

11 THE WITNESS: NINE.

12 MR. OWEN: I'M GOING TO NEED, YOU KNOW, HELP
13 WITH THEM.

14 THE COURT: IS THERE ANYTHING ELSE EITHER ONE OF
15 YOU WANT TO TELL ME ABOUT THIS?

16 MR. OWEN: PARDON?

17 THE COURT: DO YOU WANT TO TELL ME ANYTHING SO
18 THAT I WILL UNDERSTAND?

19 MR. OWEN: I DON'T KNOW WHAT TO SAY. SHE -- I
20 KNOW -- THINK THAT WE REALLY LOVE EACH OTHER, BUT I GUESS
21 WE'RE NOT GOOD FOR EACH OTHER. I DON'T KNOW.

22 THE COURT: DOES SHE HAVE THE PROBLEMS SHE TALKED
23 ABOUT?

24 MR. OWEN: YES.

25 THE COURT: IS THERE ANYTHING ELSE YOU WANT TO

1 TELL ME?

2 THE WITNESS: NO, EXCEPT THAT I AM CAPABLE OF BEING
3 A MOTHER, AND I HAVE LEARNED A GREAT DEAL FROM MY PROGRAM,
4 AND I'M GOING INTO COUNSELING MYSELF, AND I HOPE TO WORK AT
5 ST. BENEDICT'S WHEN I GET ENOUGH BACKING.

6 THE COURT: THE COURT'S WILLING TO GRANT A DI-
7 VORCE. IT MAY BE ON THE BASIS OF MENTAL CRUELTY. BUT THE
8 COURT WILL REQUIRE THE WAITING PERIOD.

9 CALCULATE HIS INCOME ON THE BASIS OF THE FIGURES STATED
10 AT \$12.57 AN HOUR, AND FOLLOW THE CHART.

11 IF AT LEAST LOW OPTION HEALTH INSURANCE IS AVAILABLE TO
12 HIM AT THE BASE, HE SHOULD CARRY IT.

13 MR. OWEN: I ALREADY GOT IT. I GOT COVERAGE
14 FOR THE KIDS.

15 THE COURT: AND HE HAS A HALF-INTEREST IN THE
16 HOUSE AS OF TODAY. IT'S PAYABLE UNDER THE GENERAL PROVISIONS
17 COMMON IN DIVORCE SITUATIONS.

18 MR. WELLS: VERY WELL. AND THE ST. BENEDICT'S
19 BILL?

20 THE COURT: IS ANY OF THAT COVERABLE ON THE POL-
21 ICY AT ALL?

22 MR. WELLS: I THINK SO.

23 THE WITNESS: ONLY 2,500.

24 THE COURT: HOW MUCH?

25 THE WITNESS: 2,500.

1 THE COURT: SO HOW MUCH EXCESS IS THERE?
2 MR. OWEN: IT WOULD BE --
3 MR. WELLS: FIFTY-FIVE.
4 MR. OWEN: YEAH, 55.
5 THE COURT: IN THE EYES OF THE LAW, THEY WILL
6 MAKE HIM RESPONSIBLE FOR IT, BUT SHE SHOULD HELP WITH IT.
7 HE IS RESPONSIBLE FOR ONE-HALF OF IT.
8 HE PAYS \$300 TOWARDS ATTORNEY'S FEES, AND SHE MUST BEAR
9 ANYTHING ABOVE THAT.
10 MR. OWEN: OKAY.
11 THE WITNESS: THANK YOU, YOUR HONOR.
12 MR. OWEN: ONE QUESTION. CAN I ASK A QUESTION?
13 THE COURT: YES.
14 MR. OWEN: WHEN WILL I GET THE RULINGS OF -- IN
15 WRITING OF WHAT WENT ON HERE TODAY?
16 MR. WELLS: I'LL PREPARE IT AND MAIL IT TO YOU.
17 THANK YOU, YOUR HONOR.

18 CERTIFICATE

19 STATE OF UTAH)
20)
COUNTY OF WEBER)

21 THIS IS TO CERTIFY THAT THE FOREGOING NINE PAGES OF
22 TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
23 PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
24 CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

25 DATED AT OGDEN, UTAH THIS 11TH DAY OF FEBRUARY, 1985.

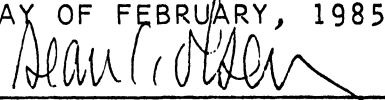

DEAN C. OLSEN

EXHIBIT B

AFFIDAVIT OF LEGAL COUNSEL

STATE OF UTAH)
 :SS
COUNTY OF WEBER)

Affiant, Frank M. Wells, being first duly sworn deposes and says:

1. I am an attorney duly licensed to practice in the State of Utah, with my principal place of business in Ogden, Utah, and did represent Mary Helen Owen in a divorce action entitled Civil No. 90750 in the Second District Court in Weber County, Utah.

2. When preparing a complaint for divorce I routinely include a request for alimony whenever I represent the wife. However, in Mrs. Owen's case she specifically instructed me not to request or seek any alimony award for her.

3. In the complaint which was prepared and filed for Mrs. Owen, the husband's civil service retirement was specifically mentioned and a prayer was made for her to receive a portion of that asset. Prior to the actual hearing on January 2, 1985 at 9:00 A.M., Mrs. Owen specifically instructed me not to seek any interest in Mr. Owen's civil service retirement fund. She indicated that she just wanted to get the divorce over with on the terms as they were presented at the hearing.

4. Prior to the January 2, 1985 9:00 A.M. hearing, Mrs. Owen also indicated to me that she did not desire to live in the family home, and that her only concern was that her interest in the home equity be preserved.

5. During my representation of Mrs. Owen, I advised her of her potential claims and property rights under existing law. It was her independent decision to proceed with the divorce on the terms as reflected in the transcript of the hearing. She stated to me that she did not want to pursue any of her other claims for property or support, and that the arrangements as they are reflected in the transcript were satisfactory to her.

Further affiant sayeth not.

DATED this 1st day of June, 1985.

Frank M. Wells
Frank M. Wells

Subscribed and sworn to before me this 1st day of June, 1985.

Robert A. Shell
Notary Public
Residing at: Ogden, Utah

My Commission Expires

5-1-88