

1986

Wanda Maureen Peterson v. Michael L. Peterson : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Wanda Maureen Peterson v. Michael L. Peterson*, No. 860040.00 (Utah Supreme Court, 1986).
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SUPREME COURT

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)))))))))

Case No. _____

APPELLANT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is a civil action dealing with the modification of a divorce decree provision regarding the disposition of real property.

DISPOSITION OF THE CASE BY THE LOWER COURT

Subsequent to the entry of a Decree of Divorce in the Fourth Judicial District Court of Utah County, defendant initiated an Order to Show Cause proceeding seeking modification of a Stipulation and the Decree provision relative to the real property of the parties. The lower court modified the Decree to require the plaintiff to pay to the defendant \$70 per month rental on the family home.

NATURE OF RELIEF SOUGHT ON APPEAL

The plaintiff seeks reversal of the lower court's order and requests that the parties' financial obligations be returned to their former status, thereby eliminating the imposition of the rental payment upon the plaintiff.

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IN THE SUPREME COURT IN AND FOR
THE STATE OF UTAH

WANDA MAUREEN PETERSON,	:	
Plaintiff,	:	APPEAL BRIEF
vs.	:	
MICHAEL L. PETERSON,	:	Civil No. 57,643
Defendant.	:	Case No. _____

FACTS

This matter initially came before the Fourth District Court on the 29th day of July, 1981. A Decree of Divorce was entered as between the parties on the 21st day of August, 1981. Pursuant to agreements and stipulations made between the parties to the action and based upon the Findings of Fact and Conclusions of Law entered by the Court, paragraph 9 of the Decree of Divorce provides as follows:

The plaintiff is awarded the possession of the family home of the parties for a period of five (5) years. From five (5) years from the date of the entry of the Decree of Divorce, the plaintiff is given the option to purchase the family home of the parties by paying to the defendant the sum of \$18,500.00. In the event the plaintiff chooses not to purchase the family home of the parties then the defendant is given the option to purchase the family home of the parties by paying to the plaintiff the sum of \$18,500.00. In the event neither the plaintiff nor the defendant chooses [sic] to

purchase the family home of the parties, the home is ordered to be sold and all obligations owed on the home and costs incident towards the sale of the home satisfied, and the proceeds derived therefrom divided equally between the plaintiff and the defendant.

The defendant's equity was thus predetermined.

Paragraph 5(h) of the Findings of Fact and Conclusions of Law entered concurrently with the Divorce Decree stated that in conjunction with her possession of the family home, the plaintiff was required to pay the first and second mortgage payments thereon.

Less than one year later, on July 26, 1982, an Order to Show Cause was issued by the Court having been initiated by the defendant. In its Affidavit seeking the Order, the defendant alleged, as a change of circumstances, that the plaintiff had remarried and the defendant was in need of his equity from the home. It sought an order from the Court to force the sale of the home or force the plaintiff to pay the defendant the sum of \$18,500.00, his equity in the home.

On September 29, 1983, the Court denied the defendant's request stating:

In this matter the Court does not find a sufficient compelling reason to modify the stipulation entered into at the time of the divorce. Using the case of Foulger v. Foulger, 626 P.2d 412, as a guide, the Court finds in the case at hand that the parties at the time of the stipulation were both represented by counsel, that the stipulation was the product of an agreement

between the parties. The parties were questioned by the Court and they indicated that they understood the stipulation, that both were dating and in fact considering remarriage, and finally, that the stipulation was approved by the Court. The Court having been the Trial Court on the Foulger Case felt that stronger compelling reasons existed in that case than does exist in the evidence presented in the case now before the Court. There is no evidence that the property has deteriorated but, in fact, has been improved. Accordingly, the Court denies defendant's Motion to Modify Divorce Decree with respect to the real property.

In that same decision, pursuant to the request of the defendant, the Court granted him the custody of the couple's minor son and deleted his support payments to the plaintiff with respect to the son.

Only three months later, once again upon the initiation of the defendant, an Order to Show Cause was issued by the Fourth District Court seeking an order that the plaintiff pay to the defendant 1/2 of the fair rental value of the home and secondly seeking child support from the plaintiff in the sum of \$130.00 to be paid to the defendant for the care of the minor son, Jeff, whose custody he had sought and gained in the previous Order to Show Cause hearing. For a change of circumstances warranting such an order, the defendant alleged essentially the same things as he had in the previous affidavit; that the plaintiff was remarried, that his income was insufficient for his needs and, additionally that he now had the care and custody of the minor son.

Once again the Court found that a sufficient change in circumstances had not been demonstrated to warrant any modification of the decree.

About 8 months later, the defendant, for the third time, petitioned the Court for an Order to modify the Decree and require the plaintiff to pay to the defendant the reasonable rental value of the home. The defendant again alleged the plaintiff's remarriage and the defendant's reduced income as the changed circumstances warranting modification. Additionally he alleged that because of the plaintiff having paid off the second mortgage, he was entitled to receive rent payments from her for living in the home.

Contrary to its prior findings and rulings, the Court, upon the third hearing, decided that these occurrences were indeed tantamount to a material change in circumstances "not contemplated at the time of the stipulation between the parties, namely, the remarriage of Mrs. Peterson and the retiring of the second mortgage upon the property..."

Based thereon, the Court ordered the plaintiff to pay the defendant the sum of \$70.00 rental on the home while occupied by her.

The plaintiff alleges that such a Finding and Order was a clear abuse of the Court's discretion and thus appeals.

POINT I

UTAH LAW IS CLEAR THAT A SIGNIFICANT CHANGE OF
MATERIAL CIRCUMSTANCES IS REQUIRED IN ORDER
TO JUSTIFY THE MODIFICATION OF AN
ORIGINAL DIVORCE DECREE.

Under Utah law, for the trial court to modify a Divorce Decree it is required that the party seeking the modification demonstrate that the circumstances prevailing at the time of the original decree have undergone a substantial change, that such changes are material and that the nature of the changes warrant a modification. See Christensen v. Christensen, 628 P.2d 1297 (Utah 1981), Kessimakis v. Kessimakis, 580 P.2d 1090 (Utah 1978), Zaharias v. Zaharias, 652 P.2d 1312 (Utah 1982).

This requirement was set forth by the Utah Supreme Court as early as 1916, when the Court in Cody v. Cody, 47 Utah 456, 154 P 952, at 957 stated:

I have no doubt that, under the statute, when judicial action is properly invoked, the Court, as to orders which relate to alimony, custody of children, and award for their support, when they are continuing and over which the Court retains a continuing jurisdiction, is authorized on a proper showing to modify the decree in such particulars. But a further essential to such relief and which is universally agreed upon, is that there must be averments and proof of a change of circumstances or conditions of the parties.
(Emphasis added)

Moreover, because of the unique nature of real property and the complicated nature of its relation to such things as taxes,

insurance, mortgages and title registration, the Courts have tended to require an enhanced showing of alteration in the material circumstances of the parties when a modification is sought which relates to real estate.

In a case very much similar to that of the present, the Utah State Supreme Court recently held:

Where a disposition of real property is in question, however, Court should properly be more reluctant to grant a modification. In the interest of securing stability in titles, modifications in a Decree of Divorce making disposition of real property are to be granted only upon a showing of compelling reasons arising from a substantial and material change in circumstances.

Foulger v. Foulger, 626 P.2d 412 (Utah 1981).

The Court in Foulger went on to hold that matters which are within the contemplation of the parties at the time of stipulation or divorce can hardly be thought of as circumstances sufficiently radical to justify modification. Specifically the Court stated "in the instant case, no such compelling reasons have been shown to exist which warrant the modification granted. Matters such as payments on the home, and maintenance and upkeep thereof, certainly must have been within the plaintiff's contemplation at the time she agreed to the disposition set forth in the original Divorce Decree."

It is clear that the defendant's burden, under the facts of this case, required him to show that there had been, since the time

of the entry of the original divorce decree, significant and material changes in the circumstances of the parties. Additionally, since there was an agreement between the parties which involved real property, the defendant's burden is enhanced require that he show the following:

- (1) That there are compelling reasons arising from:
- (2) Substantial and
- (3) material changes in circumstances,
- (4) which were not within the contemplation of the parties at the time of any prior stipulations, or agreements at the time of the divorce.

The facts which the defendant presented to the trial court to sustain his burden were insufficient on all counts. The defendant having so failed, the trial court should have proceeded no further. By continuing, it clearly abused its discretion in subsequently modifying the original order.

POINT II

THE DEFENDANT FAILED TO MAKE A SUFFICIENT EVIDENTIARY SHOWING TO JUSTIFY THE TRIAL COURT'S FINDINGS AND MODIFICATION.

(a) The Defendant Has Failed to Demonstrate a Substantial Change of Material Circumstances Since the Entry of the Decree of Divorce.

In the short time span of about 2 1/2 years since the entry of the Decree of Divorce, the Court has been subjected to no less than three Order to Show Cause hearings initiated by the defendant, a

based on substantially the same allegations of changed circumstances and all seeking to modify the real property arrangement which the parties originally stipulated to.

In the first two Orders to Show Cause, the Court held that the defendant had failed to show a sufficient change in material circumstances to warrant modification. In its memorandum submitted in support of the third petition for modification, defendant's own counsel states that "the facts in this case have not substantially varied since the 31st day of March, 1983, at which time this matter was before the Court for hearing on defendant's motion to modify the decree to provide for reasonable rental on the home upon the basis that the income of the defendant had substantially reduced and plaintiff's income had increased. Plaintiff had also remarried since the divorce and was living in the home with her present husband." Thus, by the Court's finding and by the admission of defendant's own counsel, the facts in this case have not substantially varied since the time of the entry of the decree. This being the case there was not a sufficient basis for the Court to look further.

In Gale v. Gale, 123 Utah 277, 258 P.2d 986 (1953), the wife was awarded custody of the four minor children of the marriage and the husband ordered to pay child support at the monthly rate of \$25.00 per child. Eighteen months later the wife sought an increase in child support to \$35.00 per month, but the Court

refused even this seemingly reasonable request because the wife failed to demonstrate any change in circumstances. Citing to Chaffee v. Chaffee, 63 Utah 261, 225 P 76 (1924), the Gale Court supports the long standing principle in domestic law:

The legal principle controlling in this case is that a divorce decree may not be modified unless it is alleged, proved and the trial court finds that the circumstances upon which it was based have undergone a substantial change. (Emphasis added)

Reiterating this same requirement are the current cases of Haslam v. Haslam, 657 P.2d 757 (Utah 1982), and Leah v. Bowers, 658 P.2d 1213 (Utah 1983), and those previously cited in Point I.

As a consequence of divorce and the subsequent necessity of separate residences and maintenance, there is a substantial likelihood that because of the division of assets, each party to the divorce will experience a lower standard of living than they enjoyed as a family. As the Gale Court stated, "when one blanket is cut to fit two beds, it seldom will cover them both." Thus, mere need on the side of one party or the other is not the sole consideration and not even a primary consideration in the Court's review of a petition for modification. In this light, the defendant's contention that he is "in need" of his equity from the home, is not sufficient justification to modify the decree.

The showing of substantial and material change in circumstances is a requirement which not only protects the Courts

from being overburdened by the constant rehashing of the circumstances relative to each party's situation subsequent to the divorce, but also protects the parties from harrassment, paranoia in their daily affairs and "ping-pong" custody hearings. The need for the standard has often been recognized by the courts, one of which proffered:

Absent such a requirement, a Decree of Divorce would be subject to ad infinitum appellate review and readjustment according to the concepts of equity held by succeeding trial judges.

Foulger, 414.

(b) The Defendant Has Not Presented Evidence Sufficient to Warrant Modification of the Stipulated Disposition of the Real Property Involved.

In seeking to resolve the differences between the parties in the original divorce matter, the parties discussed and agreed to certain matters, one of which was the disposition of the home. This subject was dealt with at length in the findings of the Court and in paragraph 9 of the Decree as set forth in its entirety above under Plaintiff's "Facts."

At a subsequent Order to Show Cause hearing, initiated by the defendant, seeking to alter the terms of paragraph 9, the trial court found:

In this matter the Court does not find a sufficient compelling reason to modify the stipulation entered into at the time of

the divorce. Using the case of Foulger v. Foulger, 626 P.2d 412, as a guide the Court finds in the case at hand that the parties at the time of the stipulation were both represented by counsel and that the stipulation was the product of an agreement between the parties. The parties were questioned by the Court and they indicated that they understand the stipulation, that both were dating and in fact considering marriage, and finally, that the stipulation was approved by the Court. (Decision of Judge Sam, September 29, 1982). (Emphasis added)

In the case of Callister v. Callister, 1 Utah.2d 34, 261 P.2d 944 (1953), the Utah court clearly recognized the sanctity of property settlements as distinguished from alimony settlements. making such a distinction, the Court cited to Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15 (1945) appearing to adopt with approval the following language therefrom:

This does not mean that payments under property settlement agreements may be modified even though incorporated in the Decree. They may not. [Citations omitted] But in such a situation there is not the same policy. The settlement of property rights should be final in order to secure stability of titles. Support allowances on the other hand should be subject to the discretion of the Court as justice may require... It has been loosely stated generally in passing that the divorce court has no jurisdiction to modify a decree based upon a property settlement agreement. [Citations omitted] However, that does not mean that the Court does not have jurisdiction on an application for modification to decide correctly or incorrectly whether the Decree is based upon a property settlement agreement, and is not subject to modification, or is based upon alimony or support allowance covenants, and is subject to modification."

This inflexible position as to property settlements has not been adopted in toto by the Utah Court, but the Court has taken a position which requires that when one seeks to modify the provisions of a Divorce Decree relative to real property, the burden he must carry is substantially greater than that which must be shown in seeking a modification of alimony or support. In Despain v. Despain, 610 P.2d 1303, (Utah 1980), the plaintiff sought modification of a provision of the separation agreement by which the plaintiff relinquished "any and all other claims against the [defendant] so as to constitute a complete separation and division of the marital estate." In so doing, the plaintiff gave up any and all rights which she may have otherwise had to the value of a trust which had been set up by her husband.

Upon motion, after nearly two years subsequent to the signing of the agreement and its incorporation into the Decree of Divorce, the plaintiff sought and the trial court granted an order requiring an accounting of the trust property and an award to the plaintiff of one half interest in the trust res. On appeal, the Supreme Court explained and held as follows:

Under defendant's argument, plaintiff contracted away all rights to the trust res pursuant to paragraph 10 of the separation agreement and property settlement forged by the parties. In exchange for the \$75,000.00 payment from defendant, asserts defendant, plaintiff relinquished "any and all other claims against the defendant." By defendant's view, the trial court, upon adopting the parties' agreement as part of the Decree of Divorce, became bound by its terms and may not now modify such terms. We agree.

This issue was most recently before the Court in Land v. Land, [605 P.2d 1248 (Utah 1980)] wherein we observed that the outright abrogation of the provisions of a property settlement agreement is to be resorted to with great reluctance and only for compelling reasons.

The Court went on to state "[I]n the absence of compelling equitable considerations, the terms of the property settlement agreement are not to be abrogated", thus reversing the order requiring an accounting and division of the trust res. (Emphasis added)

This position was subsequently reinforced in the Foulger case supra, wherein it was stated:

Where a disposition of real property is in question, however, courts should properly be more reluctant to grant a modification. In the interest of securing stability in titles, modifications in a Decree of Divorce making disposition of real property are to be granted only upon a showing of compelling reasons arising from a substantial and material change in circumstances. (Emphasis added)

A review of the record will show that in each of the three times the defendant petitioned the trial court for a modification the facts he alleged as constituting a substantial change of fact were pretty much the same. In the first two instances the Court found adequate and substantial reasons why the modification should not be granted, yet, at the third hearing, with substantially the same facts before the Court, and even with the defendant's own counsel admitting in his memo that "the facts in this case have

not substantially varied since the 31st day of March, 1983...", the Court somehow decided that the same facts constituted a change of circumstances. Under the facts, it is inconceivable to this plaintiff that such a finding could occur absent a finding of abuse of the trial court's discretion.

Unless something can be said for persistence, no circumstances have occurred which would suffice under the legal requirements, as set forth above, to affect the property disposition as agreed upon by the parties and as decreed by the Court. It seems clear from the record and from the numerous instances in which the plaintiff has been required to respond to Orders to Show Cause that the defendant's motive in continuing this procession is to harass the plaintiff, disrupt her life, salve his bitter feelings about her new husband living in the residence, which was once shared by them, to recant on the property agreement which he has now become disenchanted with, and to get his money out of the property as quickly as he can. His motives are made clear by the testimony given by him at the hearing held before Judge Sam on March 31, 1983:

Q. Now we came into court and entered into an agreement in September of last year that custody would be formerly [sic] changed and you were awarded custody of Jeff?

A. Yes.

Q. There were a lot of issues that were heard in September, why didn't you ask for support in September of last year?

A. That was the same time that we came in and asked for the change of the equity in the home

and I felt that I would get that so I didn't ask for child support.

Q. After the Judge ruled and said that the home need not be sold or you need not be awarded any equity out of that, that upset you did it not?

A. Yes, because I felt that even though the home was a part of both of us and that we were separating at that time, I thought you know that is fine. As long as the home is left for my wife and my girls that is fine, but I will not have somebody else living in my home rent free and make more money than me. That is not right.

Q. Well, you withheld making payment for child support, did you not?

A. Yes sir I did.

Q. We had to come back to court to get that straightened out did we not?

A. Yes we did.

Q. And it was concluded that your wife was correct in her record did we not?

A. That is right.

Q. And you had to pay that money did you not?

A. Yes I did.

Q. And that upset you did it not?

A. Yes it did.

Q. You are still upset and that is why you filed this current action it is not?

A. That is not true.

Q. And you are going to be continually upset until that house is sold?

A. Well, I don't think I will really be continually upset but it does, it bothers me to know that you got \$18,500.00 sitting there that is not making you any interest at all. It is not working for you, it is not doing anything.

Q. Well, you have remarried have you not?

A. Yes.

(Transcript of the March 31, 1983 hearing, pp. 19-20)

In light of this testimony and in view of the numerous instances on which the defendant has petitioned the Court to achieve his objectives, which are contrary to the settlement agreement arrived at by the parties and adopted by the Court, this Court's

language in several instances speaks directly to this defendant. In the case of LeBreton v. LeBreton, 604 P.2d 469 (Utah 1979), which involved the reconsideration of a property distribution made in a divorce decree, Justice Hall in his dissenting opinion stated:

I am constrained to note that if matters of this type are to be viewed as within the continuing jurisdiction of the Court, any litigant, once satisfied with a stipulated divorce settlement, but becomes disenchanted therewith because of a change in market values, (up or down), need only appeal to the Court to give him a second chance by way of reformation. Such is not the law of contracts and should not be the law of "equity" as it pertains to decrees of divorce which divide property based upon stipulations.

More succinctly and more recently, in the case of Land v. Land, 605 P.2d 1248 (Utah 1980), Justice Hall, this time writing for a unanimous court, stated forcefully:

True it is that, in making a division of property by a decree of divorce a trial court is governed by general principles of equity. It is likewise true that the Court retains continuing jurisdiction over the parties and may modify the decree due to a change in circumstances, equitable considerations again to govern. It must, however, be added that, when a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the Court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the Court where property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons. (Emphasis added)

The facts stated by the defendant in support of his allegation of changed circumstances, do not come anywhere near the threshold of meeting the burden as set forth in the case law above. Were he seeking a modification of the alimony or child custody, the Court may have perhaps been within its bounds in modifying the decree. Under the present circumstances, however, the Court clearly misapplied the law and abused its discretion.

(c) The Facts Which the Defendant Cites as Substantial Changes in Material Circumstances Are Changes Which Were Originally Contemplated By the Parties in Arriving at the Stipulated Agreement and Were Changes Which Were Reasonably Certain and Fixed.

In arriving at terms in a divorce agreement or stipulation or either which are amenable to both sides it is understood that there are possibilities for change in the future which should be dealt with as they arise. For instance, it is reasonably certain that as children grow their needs will increase. It is also reasonably certain that there will be income fluctuations to which each party might be subject and it is also certain that collateral circumstances might create a situation where custody arrangements other than that provided in the divorce will be necessary. Because of these natural changes which are reasonably certain to occur, the Court has imposed the standard of requiring a substantial change in material circumstances before any modification of the decree will

be made. Otherwise, the Court would be subjected to a great number of modification hearings based on the flimsiest of excuses.

In attempting to avoid this situation, the Court and the parties to the action are able to make provision in the decree aimed toward the resolution of future circumstances which are reasonably likely to occur. In order to eliminate one bone of contention which might have arisen between the parties to this action, they agreed to forego disputes over the real estate by making it possible for either party to buy out the other's equity and if that was not possible then after five years the house was to be sold with the defendant getting his equity as fixed by the Court at the time of the Decree. During the interim the plaintiff was charged with making the payments on both the first and second mortgage on the home, keeping up the insurance, paying the taxes and maintaining the property. The plaintiff has assumed this obligation faithfully. It was, in fact, noted by the Court in its September 29, 1982 decision that the property "...in fact has been improved" through the efforts of the plaintiff.

The two major conditions upon which the defendant claims he should be granted relief from the Decree are that the plaintiff has remarried and secondly that she has retired one of the two mortgages against the home by paying it off. Both of these circumstances were practically foregone conclusions at the time the parties entered the agreement. The latter of the two

conditions was fixed and certain and Judge Sam himself, in his September 29, 1982 decision again stated that "the parties were questioned by the Court and they indicated that they understood the stipulation, that both were dating and in fact considering marriage, and finally, that the stipulation was approved by the Court." (Emphasis added)

These conditions having been within the knowledge of the parties at the time of the stipulation, it was implicit that should the occurrence of these conditions require adjustments or provision such would have been handled within the language of the Decree or Stipulation. Because both parties expected that any developments in this regard would have been handled at the time of the Decree and, moreover, assumed that any foreseeable circumstances relative to the house would be dealt with by the language of the Decree, it is unfair for the defendant to now say that these anticipated and foreseeable occurrences constitute a change in material circumstances. Had the plaintiff sold the house or had some other circumstances as drastic as that occurred in conjunction with her remarriage, it may have been appropriate for the Court to view this as a substantial change in material circumstances sufficiently compelling to overcome the stipulation of the parties. But such is not the case.

Paragraph 9 of the Divorce Decree, which terms from the stipulation agreed to by the parties, was an integral part of t

division of the parties' assets. It is only one of the many concessions and compromises that were necessary in order to resolve the marital differences between the parties in this case in amicable fashion.

If one party is now able to invoke conditions and circumstances that were then foreseeable to the party as a changed circumstance, then the stipulation and the agreement was given by that party in bad faith, and preclude him from equitable treatment by the Court. Without clean hands, he is not deserving of equitable relief. As to the plaintiff, who has complied fully with the terms and conditions set down by the Decree of Divorce and as agreed to by the parties, should the Decree of Divorce and the conditions thereto not operate in her favor, then an estoppel ought to be available to her to prevent the defendant from interfering with her use and ownership of the property so long as she continues to maintain paying the mortgage, taxes, insurance and protects the defendant's equity in the home. She has done all of this and relies upon his agreement that her right to use the home with no further obligations than those set out above would not be interfered with until August of 1986. That was the agreement as between the parties and that is the condition which the Court ought not to interfere with unless the plaintiff breaches her obligation in that regard or unless some other compelling, significant and material circumstance arises which would justify equitable relief.

The facts set forth by the defendant alleged to be material and substantial changes in circumstance are not only inadequate in that regard but were circumstances which were apparent to and contemplated by the parties in their agreement with regard to the home. Therefore, the facts set forth by the defendant ought not to be recognized by the Court as substantial and material changes compelling enough to modify the original decree.

POINT III

SHOULD THE PLAINTIFF BE REQUIRED TO PAY MONTHLY
RENTAL TO THE DEFENDANT, THE DEFENDANT WILL
GET AN ENHANCED RECOVERY

Pursuant to paragraph 9 of the Divorce Decree, the defendant has been guaranteed that he will receive \$18,500.00 from his equity in the home, either by purchase by the plaintiff or pursuant to its sale in 1986 as required by the Decree of Divorce. If the plaintiff is required to pay the defendant \$70.00 per month rental in addition to guaranteeing that he will receive \$18,500.00 upon sale of the home, the defendant's total recovery based on a rental period of 36 months, plus his equity, will be \$21,020.00.

In effect, should this Court affirm the trial court's decision, the plaintiff will have been effectively penalized for (1) having remarried and (2) having been diligent in retiring the debt which encumbered the family home. She has been diligent in making all payments with regard to the home and as aforementioned has made improvements to the property which have increased the

value of the home. She has further sought to improve matters for herself and the children by remarrying. For having done so the Court now seeks to impose upon her that which is for all practical purposes a punishment. By so doing the Court also grants to the defendant an unwarranted boon. He makes no payments (mortgage, taxes, nor insurance) in regard to the house, he makes no investment of time, labor or money in its maintenance, repair or improvement, yet he is guaranteed a return of \$18,500.00 plus, pursuant to order of the Court, an additional \$2,520.00 in rental fees.

Such an arrangement does not accord with the equitable considerations which the Court should have given to the entire situation and such a "punitive" order ought to be overturned.

CONCLUSION

The appellant in this case has made great efforts to comply with the original order of the Court, which order incorporated an agreement as stipulated to by the parties and which agreement was found to be amicable and equitable by the Court and by the parties at the time of divorce.

Any significant changes in circumstances which were certain and foreseeable by the parties at that time should have been dealt with in the language of the agreement and decree. Those conditions and circumstances which were contemplated by the parties at the time of the agreement, the controversy of which were implicitly


waived by the parties at the time of the agreement should have not later been considered by the trial court as material circumstances which could be invoked to alter the terms of the original divorce decree.

In short, the trial court abused its discretion and misapplied the law when it allowed the defendant to modify the decree on a showing of facts which did not even approach the threshold of the burden which the defendant was required to meet. The basis for his petition which sought a modification of the decree did not allege facts which constituted compelling reasons arising from substantial and material changes in circumstance.

Since it was a stipulation as agreed to by the parties and the Court and dealt with real property, the Court should have required a more significant showing than was presented. Its failure to so require was a manifest abuse of discretion, a misapplication of the law and was in disregard of the equities which ought to prevail in these hearings when and if the circumstances warrant its invocation.

Plaintiff-appellant therefore seeks that this Court overturn the judgment of the lower Court and order dismissal of the defendant's Order to Show Cause.

DATED this _____ day of June, 1984.


DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff-Appellee.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, to Michael D. Esplin, attorney for defendant, 43 East 200 North, P.O. Box "L", Provo, Utah 84603, this 18th day of June, 1984.


SECRETARY