

1978

# Marilyn Mandarino Owen v. Robert Ballard Owen : Reply Brief of Plaintiff-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARILYN MANDARINO OWEN,	)	
	)	
Plaintiff and Appellant,	)	
	)	
vs.	)	Case No. 15330
	)	
ROBERT BALLARD OWEN,	)	
	)	
Defendant and Respondent.	)	

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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Appeal from the Third Judicial District Court of Salt  
Lake County, Honorable Stewart M. Hanson, Sr., Judge

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PLAINTIFF-APPELLANT'S REPLY BRIEF

NATURE OF THE CASE

This matter is before the Supreme Court on appeal from a decision of the Third Judicial District Court of Salt Lake County, State of Utah, denying Plaintiff-Appellant's petition for modification of a divorce decree as to child support payments.

DISPOSITION OF CASE BY LOWER COURT

The lower court ruled that there had been no substantial change of circumstances since the decree and denied Plaintiff-Appellant's petition for modification of child support.

RELIEF ON APPEAL

Appellant seeks to have this Court reverse the judgment of the lower court and to grant Plaintiff-Appellant's request for modification of the divorce decree.

## STATEMENT OF FACTS

Plaintiff-Appellant files this reply brief to answer Respondent's unfair characterization of her financial situation and his misrepresentation of the facts as discussed in his brief.

The statement of facts in the two previously-filed briefs appear to be undisputed as far as what events have occurred up to the present time in this case. However, there appears to be sharp disagreement as to what inferences and assumptions can be drawn from the undisputed facts.

Respondent, in his brief, characterizes the Appellant as an irresponsible money-manager, who has dug her own grave and must now bury herself in it. He further alleges that she is totally unconcerned about her children's welfare and is simply attempting to increase her own standard of living by trying to get "disguised alimony" (Respondent's Brief p.14). He further misrepresents that she quit a job in order to create an impoverished appearance to harass the Respondent through her allegedly unfounded court actions (Respondent's Brief p.14). Appellant submits that she would indeed be an irresponsible money-manager if she sat back and watched her children forego the necessities of life without attempting to make her former husband share in the cost of such necessities.

## ARGUMENT

POINT I. RESPONDENT HAS MISREPRESENTED APPELLANT'S FINANCIAL SITUATION AND HER PRESENT ATTEMPT TO MODIFY RESPONDENT'S CHILD SUPPORT OBLIGATION.

A. Appellant's unemployment at the time of the hearing.

Respondent's brief first attacks Appellant's present income situation and accuses her of "taking steps to set up artificial grounds" for a modification of the divorce decree (Respondent's Brief p.11). For example, Respondent accuses the Appellant of quitting her job in order to present a picture of poverty to the court (Respondent's Brief p.6). However, Appellant testified that she quit her job under fire; that she had a choice of quitting or being fired. (Tr. p.4) She did not quit because she discovered she "disliked working" or because she found working "distasteful" as Respondent suggests. (Respondent's Brief p.7)

At the hearing, Appellant elaborated on the reasons for leaving her job. One of the several reasons was that her bosses were dissatisfied with her typing skills since she suffered the burns on her hand. (Tr. 5) A quick reading of the transcript quickly dispels any notion that Appellant quit her job to "set up" a destitute financial picture for this modification hearing. Furthermore, Plaintiff stipulated in court that she had the capacity to earn \$600.00 every month, although she was unemployed at the time of the hearing. Thus, it is unfair to harp upon her unemployment as a ploy to gain sympathy with the court.

B. Appellant does not have "unclean hands."

Respondent claims that Appellant has "unclean hands" and accuses her of lying about her income sources. (Respondent's Brief p.10) In particular, Respondent points out that Appellant never listed on her "income affidavit" that she was receiving an average of about \$250.00 a month from her father. (Respondent's Brief p.10)

Appellant testified, however, that she could not list her father's contributions as income because she did not receive a set amount each month. Instead, every so often her father came to her rescue and gratuitously bailed her out. (Tr. pp. 19-20) To accuse Appellant of lying for not listing unsolicited, irregular and unexpected gifts from her father which she after-the-fact estimated to average \$250.00 a month seems to be unfair.

The true facts are that she is no longer receiving any assistance from her father who is presently in a rest home. (Tr. p.7)

It is also interesting to note that Respondent accuses Appellant of lying for not listing irregular gifts as income, but at the same time he testified that he doesn't list his \$5,000.00 equity in the home among his assets because he doesn't know when he will receive it. (Tr. p.31) He also failed to list that asset on his response to Appellant's Interrogatories. (Tr. p.31) Respondent continued to assert on the stand that the

\$5,000.00 was not an asset even though Appellant's counsel asked him if he would sell it (the interest) for \$4,000.00. He responded that he would not. It appears to be a misrepresentation of the facts to accuse Appellant of lying for not listing irregular gifts as income when Respondent refuses to list equity in a house as an asset.

C. Appellant's "229% increase in income."

Respondent next asserts that Appellant has "manipulated her income to present a destitute picture" and asserts that she has enjoyed a 229% increase in income since the time of the divorce. (Respondent's Brief p.14) Such an assertion not only mischaracterizes her attempt to modify Respondent's child support obligation but is completely ridiculous arithmetically and logically. For example, to come up with that percentage, counsel for the Respondent conveniently chose the highest monthly salary that Appellant has ever earned. Next, he multiplies that by 12 to get a fictional yearly income and then adds the child support Respondent pays to come up with an entirely speculative yearly income. (Respondent's Brief pp.3,6) Of course, the fact that such an amount was never received by Appellant does not prevent Respondent's counsel from using that figure to calculate what her percentage increase in salary has been. To obtain a base figure for calculating Appellant's increase in income, Respondent's counsel adds only her child support and alimony received in 1973.



(Respondent's Brief, p. 3) He conveniently forgets to include the \$672.00 she received in 1973 from a real estate contract.

(Tr. p.6) He also fails to include the \$225.00 average monthly help her father gave her. It is interesting to note, however, that when Appellant did not include that latter sum in her affidavit, Respondent's counsel accused her of "lying."

(Respondent's Brief, p.10) Nevertheless, he also conveniently fails to include it in her income when to do so makes his arguments look better. Thus, he has successfully manipulated her highs and lows to the point that she is allegedly now making more than enough for her needs.

Such a computation is faulty. If counsel wishes to compare percentages, he would need to start with all sources of income for the Appellant in 1973. In that year (the time of the divorce) she received \$672.00 off a real estate contract. (Tr. p.6) She also received \$2,400.00 that year in child support and \$1,800.00 in alimony. She also received approximately \$250.00 each month from her father. (\$3,000.00 that year) (Tr. p.7) Thus, Appellant's income for that first year was \$7,772.00.

As to her present income, Appellant received \$600.00 net for the first five months of 1977 and stipulated that she would be capable of earning \$600.00 gross every month thereafter or about \$500.00 net. Her total net "earnings" would then equal \$6,500.00. Her child support is \$2,400.00. She no longer receives income from the real estate contract, alimony or her

father. Thus, her net income this year was \$8,900.00. Therefore, her increase in net spendable income has been about 14% in four years -- a far cry from the 229% Respondent's counsel suggests. Respondent's attempt to discredit Appellant's financial situation is a blatant attempt to mislead the court and only accentuates the weakness of his argument against the increase in child support.

In addition, even if Appellant did enjoy any income increase since the time of the divorce, such an increase was contemplated by the terms of the decree itself. Appellant was the mother of a preschool child at the time of the divorce and obviously unable to work fulltime. She was given alimony for 18 months. That alimony has long since terminated and now that both children are in school, Appellant can work more. Thus, it is unfair to attempt to penalize her for earning more money when in reality she is only accomplishing what the decree of divorce contemplated. The fact that she has worked since her alimony was terminated is no basis for denying an increase in child support on the grounds that her income has increased over the years. Such an accusation is unfair. It is obvious that any benefits the children receive from their father also indirectly benefit their mother and frees up money for other purposes, but to characterize that as a "disguised" attempt for alimony seems to be an attempt to cloud the issue of a child support modification.

D. Respondent's alleged "26% increase" in income.

Respondent's counsel attempts to disguise Respondent's

increase in income by alleging that Appellant has enjoyed a 229% increase in income since the time of the divorce. Such reasoning has been discussed above.

Respondent's increase in income during the same period of \$13,944.00 to \$19,008.00 should really speak for itself. He supports only himself on that amount (less his child support obligations) while Appellant supports herself and two children on \$8,900.00 in net spendable income (including child support payments). Such a sum represents a figure less than half as large as Respondent's income.

In addition, Respondent's counsel argues that Respondent's increase from \$13,944.00 to \$19,008.00 has been eaten up in increased costs of living. (Respondent's Brief, p.15) If that is true, it is only because he is now living alone in a three-bedroom condominium. (Tr. p.32)

Also, Respondent's counsel appears to have made another arithmetic error. He asserts that Respondent has enjoyed a 26% increase in income in the four years since the divorce. (Respondent's Brief pp. 3, 6, 15) Although Respondent's gross income figures speak for themselves, a quick mathematical calculation shows the increase to be 36%, not the listed 26%.

Finally, it should be noted in any comparison of Respondent's income for the years 1973 and 1977 that the Respondent no longer pays Appellant any alimony and his net spendable income has

increased \$1,800.00 a year by that fact alone. Thus, his net spendable income has actually increased more than the bare gross figures listed above.

E. Appellant's equity in her house does not release Respondent from his obligation to support his children. Next, Respondent argues that the Appellant does not need additional child support because he asserts that she is sitting on a virtual gold mine. He asserts that she has at least \$25,000.00 equity in her home. However, Respondent does not suggest how Appellant is to tap that great source of wealth.

Apparently she has two alternatives. First, she can mortgage the home. However, such action would only increase her monthly bills which she already cannot meet. Second, she can sell the home and move into an apartment. While such a solution is possible, Respondent can hardly be serious to suggest that his children be forced to move out of their home just to make ends meet when he has the resources to prevent that action. It would seem more profitable to reserve such a drastic action for later years, if needed, to give the children a college education or to meet unexpected emergencies as they occur. In addition, the price of an apartment may well prove to be more than her present house payment. Thus, Plaintiff should not be required to sell her home in order to obtain an otherwise unreachable equity which she has therein where Respondent has the means to prevent such action.

Several other considerations should be made with respect to Appellant's equity in her home.

First, the Plaintiff's equity in her home should not be used to disguise Defendant's responsibility to support his children. "Her" property should be distinguished from that of the children. The children need to look to both parents to support them. See Erickson v. Erickson, 8 Utah 2d 381, 335 P.2d 618, 619 (1959). Her equity in the house does not relieve Respondent from his obligation of adequately supporting his children.

Second, the Plaintiff did not receive a disproportionate amount of equity in the home at the time of the divorce. The vast majority of the present equity is the result of the rise in prices of homes in the Salt Lake Valley which has occurred recently, as well as her making four years of payments on the home with her father's help.

Third, aside from the fact that Respondent would benefit to the tune of \$5,000.00 cash if Appellant had to sell her home, he fails to mention that the only reason the couple was able to buy the house at all during the marriage was the fact that the Appellant's father contributed \$7,000.00 towards the purchase of their first house. (Tr. p.25)

Respondent needs to distinguish between money that is the Appellant's and the obligation which Respondent has to support his children.

Finally, testimony at the hearing suggests that the Respondent also has a substantial equity in his three bedroom condominium. (Tr. p. 34-36)

A recent case from the State of Oregon, MacDonald v. MacDonald, 566 P.2d 542 (Ore. 1977), is instructive and very much on point. Therein, both the husband and the wife had debts of approximately \$5,000.00. The court increased the former husband's child support obligation from \$110.00 per month to \$200.00 per month despite the fact the former wife had a "fairly substantial equity" in the home where she and the children lived and despite the fact that the former husband had no assets of any consequence. Similar to the present case, the Defendant's husband had an income of \$21,145.00. (Defendant-Respondent herein makes \$19,008.00 at his present salary. See Tr. p. 26)

F. Appellant's purchase of clothing. Respondent alleges that Appellant's purchase of \$375.00 worth of clothing for herself in January of 1977 illustrates her financial irresponsibility and that she has no meritorious argument for increased needs. (Respondent's Brief, p.4, 11, Tr. p.18) Appellant explained at the hearing how she had no clothing suitable for the employment she was able to obtain and was required to add to her clothing. The sum of \$375.00 for an entire working wardrobe does not appear to be high where she had to start from scratch.

POINT II. APPELLANT HAS PRESENTED SUFFICIENT EVIDENCE FOR THE COURT TO MODIFY THE DIVORCE DECREE.

A divorce modification hearing is an action in which the trial court has a large amount of discretion. However, Appellant submits that the lower court erred in its order denying Appellant's requested modification. Respondent's counsel did not submit any findings of fact and conclusions of law to the lower court for signature and the record does not contain any such pleadings. Therefore, this court must rely upon the transcript of the proceedings in determining whether the lower court abused its discretion and erred in its judgment.

At the conclusion of the hearing, Respondent's counsel argued that general inflation and increased ages of minor children could not be a basis for modification of a divorce decree. (Tr. p.42) Appellant has previously pointed out that such an argument is wrong. (Appellant's Brief pp. 6, 7) However, without any findings of fact or conclusions of law, Appellant has no way of knowing if the court erroneously believed the arguments of Respondent's counsel. If he so believed, this court must correct that erroneous belief and make its ruling on the facts under that doctrine.

Appellant showed at the lower court hearing that her children were going without some necessities of life (see Appellant's Brief pp. 3-5) while Respondent was living alone in his three bedroom condominium on his \$19,008.00 yearly income. (Tr. p.32)

Appellant submits that a reading of the transcript clearly shows that the lower court erred in denying her request to modify the divorce decree.

#### CONCLUSION

Despite Respondent's counsel's misrepresentation of the facts, his mathematical miscalculations and his allegations of bad faith on the part of the Appellant, the record and transcript clearly show that the lower court erroneously denied her modification petition.

It is true that benefits received by her children also indirectly benefit the Appellant. However, the present action is not a ploy to obtain "disguised alimony". Appellant's concern is that her children can eat properly (Tr. p. 16), have drapes on windows in their home (Tr. p. 14) and be able to participate in normal activities of life such as music lessons, etc. (Tr. p. 21)

As this Court stated in DeRose v. DeRose, 19 U.2d 77, 426 P.2d 221 (1967):

"Due to the seriousness of such proceedings [divorce] and the vital effect they have upon people's lives . . . changes should be made if that seems essential to the accomplishment of the desired objectives of the decree: that is, to make such an arrangement of the property and economic resources of the parties that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis for themselves and their children." 426 P.2d at 222.

Appellant respectfully submits that the instant case presents a situation where "changes should be made" to accomplish the "desired objectives of the decree" in order to provide adequately for the



minor children of the parties.

DATED this 7<sup>th</sup> day of March, 1978.

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CERTIFICATE OF SERVICE

SERVED the foregoing Reply Brief of Appellant by delivering two copies thereof, personally, to Robert Felton, Attorney for Respondent, Twelve Exchange Place, Salt Lake City, Utah 84111, this 10<sup>th</sup> day of March, 1978.

Bruce J. Nelson