

2001

# Lavon Russell v. Raymond Russell : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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J. Reuben Clark Law School

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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LAVON RUSSELL,

Plaintiff and  
Respondent,

vs.

RAYMOND RUSSELL,

Defendant and  
Appellant.

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Case No. 14361

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BRIEF OF APPELLANT

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Appeal from the Judgment of the  
District Court of Weber County  
Honorable Calvin Gould, Judge

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FILED

FEB 24 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

---

LAVON RUSSELL,	/	
Plaintiff and	/	
Respondent,	/	
vs.	/	Case No. 14361
RAYMOND RUSSELL,	/	
Defendant and	/	
Appellant.	/	

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This is an action wherein the Respondent, who was the wife, brought an Order To Show Cause and Affidavit in Re Modification of Decree of Divorce. Upon the hearing held in the above entitled matter, testimony of the Respondent only was heard, with no evidence or testimony taken from the Appellant, with the Court granting a modification in the amount of alimony to be paid and doubling the amount of support per child per month.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment of the Lower Court in granting a Modification of Decree of Divorce by doubling

the amount to be paid as support by Appellant, all without testimony being taken of the Appellant at the time of the hearing, and having this Court decree that the Order of the Lower Court was a nullity and to set aside and vacate the Judgment of the Lower Court.

#### STATEMENT OF FACTS

The Appellant herein was the husband and the Respondent, the wife, and they were intermarried on November 17, 1948. (R-1)

A Decree of Divorce was granted to the wife September 20, 1968, wherein she was awarded custody of six children (R-19) and the payment in support for the children by the Appellant in the amount of \$40.00 each per month, for a total of \$240.00. The Court further ordered the Appellant to pay \$98.40 a month as a house payment on a home for a limited period of time, subject to a further review of the Court as to the final disposition of the home and the division of the equity in said home. The Court further ordered the Appellant to pay all of the obligations and indebtedness of the marriage as between the parties. (R-19) The further Order of the Court in the original Decree of Divorce, in allowing the Respondent the use of the home for herself and the minor children, ordered that the property was not to be encumbered or mortgaged. (R-19)

Prior to the action presently before the Court, a Stipulation was entered into by and between the parties on July 14,

1969, wherein the wife was awarded the title and equity to all of the real property and the Appellant was freed from continuing to make payments of \$98.40 per month, but a reaffirmation was made of his paying \$40.00 per child, for a total of \$240.00 as and for child support. (R-27)

On April 28, 1971, the Appellant brought a Petition before the Court for an Order To Show Cause why the wife should not be held in contempt of Court for failure to allow to the Appellant right of visitation with the children. (R-37)

The Court entered an Order setting aside specific visitation rights to the Appellant providing for a prolonged summer vacation period for the Appellant. (R-38)

#### ARGUMENT

##### POINT I

MODIFICATION OF SUPPORT AWARD IN A DIVORCE DECREE IS BURDEN OF THE MOVER.

The Petition of the Respondent in the Lower Court in seeking a modification of the support decree was initiated by the Respondent and placed upon said Respondent the burden, as a mover in the Lower Court action, of proving such changed conditions arising since the entry of the Decree as would require under the Rules of Equity and Justice a change in the Decree.

In Gardner v. Gardner, 177 P.2d 743, the Supreme Court

of Utah (1947), the Court held that where a divorce is granted to a party, together with custody of a minor child of the parties, and an award was made of support money for said child, the Plaintiff having filed a Petition for Modification of a Decree had the burden of proving the need and basis for such a modification of a Decree.

In the instant case before the Court, the Respondent was the mover for a Decree seeking modification of the support awarded previously in the Lower Court, alleging as a basis thereof, the increase in the cost of living and seeking to more than double her support from \$40.00 to \$100.00 a month.

(R-39)

The testimony of the Respondent only was presented to the Court and the Respondent rested after stating that Respondent was employed making \$114.00 per week (R-65), that two children were living at home, one being 11 years of age and the other 16 years of age (R-64), and further stating that the home which had been purchased in 1965 and which had a 10-year pay-off on the home terminating in 1975. (R-66) The home was granted to the Respondent, together with all of the equity. The Respondent testified the loan had been refinanced for modernization and improvement of the home by the Respondent and that she owed \$11,000.00 on said home as a result of said improvement loan (R-67).



No evidence nor any showing of any change of status of the Appellant nor was any evidence elicited from any witness before the Lower Court as to the earnings or economic position of the Appellant (R-69).

This Court held in the case of Jones v. Jones, 104 Ut. 275, 139 P.2d 222, that it was reversible error for the Lower Court to modify the alimony award in a Divorce Decree by increasing it from \$30.00 to \$50.00 per month when there was no pleading to support that modification.

This Court held in the Gardner v. Gardner case, *supra*, that the fact that an alimony award was involved in the Jones case while a support money award was involved in the Gardiner case, did not make the Jones' decision inapplicable to the case being heard.

This Court further held, that to secure a modification of a support money or an alimony award in a Decree of Divorce, the moving party must allege and prove changed conditions arising since the entry of Decree which require, under Rules of Equity and Justice, a change in the Decree. This Court further cited the following cases in support thereof: Barraclough v. Barraclough, 100 Ut. 196, 111 P.2d 792, and Hampton v. Hampton, 86 Ut. 570, 47 P.2d 419.

In Allen v. Allen, 25 Ut.2d 87, 475 P.2d 1021, the Supreme

Court of Utah (1970), the Court held that the burden of showing a substantial change of circumstances is upon the moving party.

## POINT II

### RESPONDENT FAILED TO SHOW ANY CHANGE OF CIRCUMSTANCES REQUIRING INTERVENTION OF A COURT OF EQUITY.

At the hearing for modification, the only testimony elicited by the Court was from the moving party, which was the wife and Respondent herein, was her testimony to the affect, that she had two children living at home, one of 11 and one of 16 years of age (R-64); she was employed making \$114.00 per week (R-65); four of the six children set forth in the original Decree of Divorce and whose custody was granted to the Respondent (R-19), that only two remained, and no representation was made to the Court that the Respondent provided any support or maintenance to the four children no longer living at home. The record further shows from the testimony of the Respondent, that the home which would have been paid off by 1975 was mortgaged by her for the purpose of expending \$11,000.00 in improvements on the home, which evidenced a state of stability of economic circumstances of the Respondent so encumbering the home to improve it. It has further been stated to the Court, that the home was awarded to the Respondent on July 14, 1969, as her sole property. (R-27)

Osmus v. Osmus, 189 P.2d 233, Supreme Court of Utah

(1948), which stated that:

It is a principle now firmly established in this jurisdiction, that to entitle either party to modification of a decree of alimony or support money, that such party plead and prove the change of circumstances such as to require in fairness and equity a change in the terms of decree.

This Court then held that the evidence in the Osmus case, supra, that there was neither a pleading nor proof of the change of circumstances that the Court could not make an Order modifying the Decree under such circumstances.

In Sorenson v. Sorenson, 20 Ut.2d 360, 438 P.2d 180, this Court held, that first the burden of showing changed circumstances is upon the party seeking modification of an award in a Divorce Decree, and further stated that the fact that the wife owns property which has increased substantially in value or ability to produce income after the entry of a Decree for alimony, that such is an important consideration, as is also the fact that the children previously being supported have become emancipated and have become employed and self-supporting.

The evidence in the instant case as given by the Respondent evidences that the home has been substantially improved, that full title is in the Respondent, and further, that four of the six children no longer reside at home, and there was no testimony as to any change of circumstances in that of the

Appellant as would justify a Court of equity to double support money of the children remaining in the household of the Respondent. There was also no evidence as to what the earnings of the Respondent were, if any, at the time of granting of the Decree, and she has testified that she has earnings presently of \$114.00 per week. (R-65)

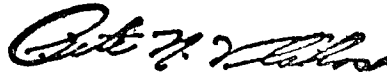
In Wilson v. Wilson, 5 Ut.2d 79, 296 P.2d 977 (1956), this Court explained, that in the making of an award of alimony, that the Trial Court should endeavor to provide a just and equitable adjustment of the parties' economic resources to enable the parties to reconstruct their lives on a happy and useful basis; and it has further held that there must be a substantial change in the material circumstances of either or both of the parties since the Decree was entered. Sorenson v. Sorenson, supra. The instant matter before this Court was based solely upon the testimony of the Respondent-spouse without seeking to introduce any testimony as to the status of the Appellant. The Court did enter an order doubling the original child support, which was originally awarded based upon the equitable position of the parties, as of the time of the Decree of Divorce.

#### CONCLUSION

It is submitted to this Honorable Court, that based purely upon the testimony of the Respondent (wife) and without

any testimony whatsoever as to the economic situation or position of the Appellant (husband), that an award by a Court of equity of double the amount of support determined in the original Decree of Divorce for each of the two remaining children of the spouse is contrary to the basic tenents of law as has been previously established by this Court as within the power of Court of equity to so act without full and complete knowledge of the circumstances of both of the parties.

Respectfully submitted,

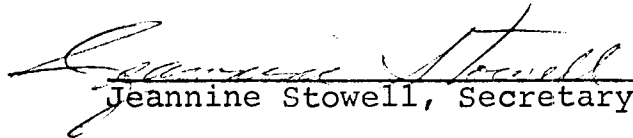


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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, George B. Handy, Esq., 521 Eccles Building, Ogden, Utah 84401, on this 24 day of February, 1976.

  
Jeannine Stowell, Secretary