

1979

# Sheila Penrose Larsen Land v. William Dennis Land : Brief of Plaintiff Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

Sheila Penrose Larsen Land, )  
Plaintiff and Respondent, )  
v. )  
William Dennis Land, )  
Defendant and Appellant. )

No. 162

**BRIEF OF PLAINTIFF RESPONDENT**

Appeal from Judgment of the Third District  
Court of Salt Lake County, Honorable  
Christine M. Durham, Judge

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FILE

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William Dennis Land, )  
Defendant and Appellant. )  
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PLAINTIFF-RESPONDENT BRIEF

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STATEMENT OF THE KIND OF CASE

This is an action based upon an Order modifying a Decree of Divorce previously entered between Plaintiff and Defendant.

DISPOSITION IN LOWER COURT

Defendant's Order to Show Cause for Modification was denied. Plaintiff's Order to Show Cause was granted in hearing tried before the court.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks an Order affirming the decision of the lower court and denying Defendant-Appellant's Appeal.

## STATEMENT OF FACTS

The Decree of Divorce granted between the parties was based upon stipulation. The Decree provides in pertinent part the following:

"2. The Plaintiff is awarded the care, custody and control of the three minor children of the parties, and shall be awarded the sum of One Hundred Dollars (\$100.00) per month per child in child support for a total of Three Hundred Dollars (\$300.00) per month. This child support shall be increased to One Hundred Thirty Three Dollars (\$1.33.00) per month per child upon Defendant's payment in full of the second mortgage on the home of the parties." ( R-23)

"7. The Defendant is awarded the business known as the Eat'n House located in Salt Lake City, Utah and shall have full ownership of all assets and full responsibility for all debts arising therefrom. ( R-24)

"6. The Defendant shall assume and pay all debts and obligations incurred by the parties up to and including the 29th day of October, 1974 and shall defend and hold the Plaintiff harmless for the payment of the same except those specifically mentioned herein including the obligation under the first mortgage on the home of the parties." (R-24)

"8. Plaintiff is awarded the home and real property of the parties located at 5171 South 2870 East, Salt Lake City, Utah subject to an interest of Defendant who is awarded a 50 percent interest in the present equity in the home which value shall be fixed not later than January 1, 1975. Defendant's interest in the home shall be an obligation against the property only upon Plaintiff's sale of the home or upon the youngest surviving child of the parties reaching the age of majority or becoming emancipated, whichever occurs first. Payment of Defendant's interest shall be made at the time of receipt of funds on any sale of the property or within two years following the date of majority or emancipation of the youngest surviving child of the parties. Defendant's 50 percent interest shall bear interest at 3 percent per annum from January 1, 1975 until paid. (R-24)

"9. The Plaintiff shall assume as her sole obligation the first mortgage on the home and shall make the required payments on that mortgage. The Defendant shall assume as his sole obligation the second mortgage on the home and shall make the required payments on this mortgage until paid in full. (R-24)

The Findings of Fact and Conclusions of Law and the Decree of Divorce specifically incorporated the terms of the Stipulation signed by the parties and indicated that the terms of the Decree of Divorce should be construed in accordance with said Stipulation. (R-21,25) The provisions in the Decree were essentially the same as those in the Stipulation.

Defendant-Appellant received as his sole property all of the business assets acquired by the parties during the marriage, to wit: the "Eat'n House". Defendant was also required to be solely responsible for all of the debts and obligations incurred as a direct result of the operation of that business. Defendant indicated he was cognizant and aware of those provisions. (R-81) Numerous judgments and liens incurred by the operation of subject business and having been duly recorded, attached to the real property of the parties prior to the entry of the Divorce Decree. The amount of these liens was approximately \$27,000.00. (R-77) Defendant was to pay all business indebtedness as well as the second mortgage on the residence. When Defendant had paid off the second mortgage, his child support obligations were to be increased from

One Hundred Dollars (\$100.00) per month per child to One Hundred and Thirty Three Dollars (\$133.00) per month per child. (R-23)

There is a disputed issue of fact as to whether the amount of these liens or encumbrances has been reduced substantially at the present time or whether the total liens attaching to the property, as a result of the operation of the business, is approximately the same. Plaintiff testified that in 1976 there were still \$27,000.00 worth of recorded liens. (R-94) Defendant-Appellant testified that he has paid off personal liens and liens against the house in the amount of approximately \$9,000.00, and that some of these were liens against the property. (R-82) Defendant insisted that he had received satisfactions of judgment on some of the judgments. (R-82)

Defendant in August of 1978 filed his Motion to Reduce Child Support Obligations from \$133.00 per month per child to \$100.00 per month per child (R-28), a total attempted reduction of \$99.00 per month because of three children being born as issue of the marriage. Plaintiff then filed her Motion Requesting that Child Support Remain the Same, but requesting that Defendant be required to pay one-half (1/2) of any medical and dental insurance coverage on the children (R-34), an issue not provided for in the Decree. Plaintiff also asked that Defendant be required to Quit Claim any interest he had in subject premises to Plaintiff due to the fact that

at the time specified in the Decree there was no equity in the home. (R-34) Plaintiff's Affidavit filed at that time indicated that the appraised value of the residence, at the time of the Decree, was approximately \$52,000.00. That the mortgages at the time were approximately \$25,000.00, and the other liens and encumbrances were in the amount of \$27,000.00, thus leaving no equity in which Defendant could share. (R-37)

After the Court heard evidence on the matter the Court took the matter under advisement and then entered its minute entry dated November 16, 1978. (R-41) That Order was then supplemented by Findings of Facts, Conclusions of Law and a Formal Order Modifying the Decree of Divorce. (R-41-50) That Order provided that an appraisal of the residence be made as of January 1, 1975, to determine the value of the residence at that time. The Order also provided that equity at that time was to be determined by taking the value as of that date and subtracting all liens, mortgages and encumbrances. Plaintiff was then to pay to Defendant 50 percent of that equity in return for Defendant executing a Quit Claim Deed. (R-50) Defendant's Motion to reduce child support was denied, and Plaintiff's Motion requesting Defendant to pay one-half (1/2) of any medical and dental insurance for the minor children was granted. (R-49, 50)

## ARGUMENT

### POINT ONE

THE COURT WAS CORRECT IN RULING THAT EQUITY IN THE HOME SHOULD BE DETERMINED BY SUBTRACTING FROM THE MARKET VALUE ALL LIENS, JUDGMENTS, MORTGAGES OR ENCUMBRANCES AS OF THE DATE OF THE DECREE

A. PLAINTIFF SUBMITS THAT THE PLAIN CLEAR AND COMMON MEANING OF EQUITY IS IN AGREEMENT WITH THE HOLDING OF THE COURT.

Defendant argues that equity should be determined by only subtracting from the market value the mortgages on the home and not taking into consideration the other liens or encumbrances. (p.4,5 of Defendant's Brief) Plaintiff submits that it is common usage in the area of real property and customary that "equity" in a house and real property can only be seen to be the amount in excess of all obligations, liens or encumbrances on the property. Financial and lending institutions, as well as title companies, adopt this definition as their basic premise in the transfer, borrowing or trading of real property. This definition is in such common usage that any citation of authorities appears unnecessary. Funk and Wagnall's Standard Comprehensive Interntaional Dictionary, on page 429 of the Bicentennial Edition states: "Equity - 4. Value in excess of mortgage or other liens."

Defendant appears to supplement his argument by arguing that because Defendant was required to pay off the

liens, these should not be taken into account in the determination of equity. Plaintiff submits that it is undisputed that all of the liens, other than the mortgages, were incurred through the operation of the business the "Eat'n House"; and that Plaintiff relinquished any claim to any of the assets of that business. Plaintiff was required to pay off as her sole personal obligation the large first mortgage on the home; and Defendant received a reduction of child support payments during the time he was paying off the relatively small second mortgage. (R-81) The parties agreed that this was a fair, reasonable and equitable arrangement and that stipulation was adopted by the Court at the time of the Decree.

The Court in its ruling adequately enforced the terms of the Decree. The amount, if any, Defendant has actually paid in regard to satisfying these judgments is immaterial to the determination of the amount of equity in the home at the time of the Decree.

B. OTHER COURTS HAVE RULED THAT THE DEFINITION OF EQUITY ADOPTED BY THE DISTRICT COURT IS CORRECT AND THAT DEFINITION SHOULD BE UPHELD.

It has been uniformly held that Equity is determined to be the amount in excess of all liens or encumbrances. The Supreme Court of Florida in Pierson v. Ball, 189 So679, 138 Fla. 104, (1939), stated:

" 'Equity' or 'equity of redemption,' in legal parlance, refers to a mortgagor's right to redeem

after forfeiture for nonpayment of mortgage but before sale by sheriff, but in common acceptation has reference to value of property in excess of incumbrances that amount to a lien."

The Iowa Supreme Court in Des Moines Joint Stock Land Bank of Des Moines v. Allen, 261 N. W. 912, 220 Iowa, 448, (1935), stated:

"Term 'equity' means the remaining interest belonging to one who has pledged or mortgaged his property, or the surplus of value which may remain after the property has been disposed of for the satisfaction of liens. An 'equity' is defined as the amount or value of a property above the total liens or charges."

The Supreme Court of California adopted this definition in Comstock v. Fiorella, 67 Cal. Rptr. 104, 107, 260 C.A. 2d 262 (1968) by stating:

" 'Equity' is the amount or value of a property above the liens and charges."

There appears to be little doubt the definition adopted by the District Court is in accordance with the definition adopted by other courts and should be affirmed.

C. THE DIVORCE DECREE BASED UPON THE STIPULATION OF THE PARTIES MAKES IT CLEAR THAT ANY INCREASED VALUE IN THE RESIDENCE IN QUESTION IS TO GO TO THE PLAINTIFF.

Plaintiff agrees with Defendant that the Court has the power to apply equity in all divorce situations. The question of what is equitable in this situation would necessarily need to look to the totality of the fact situation. Defendant received all assets of the business and consequently it would be in conformance with equity

that he should pay all obligations associated with those assets. This was stipulated to and approved by the Court. Plaintiff was required to pay off the large first mortgage and was to receive only One Dollar (\$1.00) per year as alimony. Defendant's obligation in regard to the house was to pay the small second mortgage, during which time he received a reduction in child support. All liens were business liens and it appears that equity would dictate his paying off said liens.

Defendant argues that awarding the Defendant a 50 percent interest in the real property would be a meaningless gesture if the District Courts definition were to be upheld. (p. 6 of Defendant's Brief) Plaintiff submits that the Defendant was not granted 50 percent interest in the real property, but only a "50 percent interest in the present equity". (R-24) It is obvious that an appraisal would have to be done to make that determination. The District Court in the most recent hearing has ordered that appraisal.

It is clear that Defendant is attempting to gain a 50 percent interest in the increased value of the residence. If, in fact, there was no equity at the time of the Decree, then his interest could not attach. To allow Defendant 50 percent interest in any increased value would not only be inequitable but would go against the provision of the stipulation which reads in pertinent part:

"6. . . . . Any increase in equity in the home and real property after the fixing of the interests described herein shall accrue to the benefit of the Plaintiff and Defendant shall have no rights over any such increase." (R-17)

The Decree of Divorce does not contain the above cited language, but as Plaintiff has indicated in the statement of facts, the Findings of Facts, Conclusions of Law and the Decree of Divorce indicate the intention to incorporate this Stipulation and to construe the Decree according to its provisions.

Plaintiff submits that the Court correctly ruled on this issue and its Order should be affirmed.

#### POINT TWO

#### DEFENDANT FAILED TO SHOW A MATERIAL CHANGE IN CIRCUMSTANCES THAT WOULD JUSTIFY A REDUCTION OF CHILD SUPPORT OBLIGATIONS

The Court correctly ruled that Defendant's Motion to Reduce Child Support should be denied. This Court has set the standard to be applied in attempts to modify the provisions of the Divorce Decree. It is necessary that the moving party show both:

- (1) A material and permanent change in circumstances since the entry of the Divorce; and
- (2) That because of that change the original Decree is no longer equitable or just.

In the case of Buzzo v. Buzzo, 45 U. 625, 148 P. 362, explained in 2 U. (2d) 49, 269 P.2d 284(1915) this Court

held:

"Upon application of either party, court may change, modify, or revise a decree respecting maintenance, whenever it is satisfactorily made to appear that the circumstances and conditions of the parties, or any of them, have change so that amount originally allowed is no longer just or equitable."

In Carson v. Carson 87 U. 1, 47 P.2d 894 (1935) this court stated:

Party to a divorce proceeding is not entitled to a modification of a decree of divorce in absence of showing that there has been material and permanent change of conditions since entry of the decree."

It has consistently been held by this Court that this standard is to be applied in modification proceedings. Defendant in the case before the Court failed to meet either one of the requirements that would allow a modification . His Motion was based upon the fact that the rental on his business had increased from \$924.00 per month to \$1,516.00 per month. (R-29) Defendant estimated that his business had increased 10 to 15 percent (R-69). Defendant admitted that child support payments and other personal expenses were paid out of his business checking account (R.71). Defendant admitted that he closes his business for a two week period in the summer. (R-73)

Defendant listed numerous items on his Affidavit as expenses. One of those payments was \$195.00 to Rocky Mountain State Bank for a truck.(R-30) At the hearing Defendant admitted that this was, in fact,an 18 foot motor home not used as a business vehicle, but as a pleasure vehicle. (R-76) Defendant listed a monthly payment of \$100.00 to

his mother-in-law. (R-30) This obligation was incurred in 1972 (R-74), but it was stipulated at the time of the hearing that only four (4) or five (5) payments have been made at the present. (R-103) Defendant can hardly allege that he has made monthly payments in this matter.

Defendant admitted that his economic situation had improved subsequent to the entry of the Decree due to the fact that he had paid off numerous debts and obligations. (R-104)

Plaintiff submits that by Defendant's own testimony he failed to show a material change in circumstance which would have justified a modification. Plaintiff's Affidavit revealed that she has monthly obligations of \$1,021.42; and has a gross monthly income of \$825.00 per month and a net income of \$600.00. (R-36) Plaintiff's Affidavit further shows that this calculation does not take into consideration many other items and expenses for the children and does not include any recreational amounts. (R-37)

Plaintiff submits that Defendant's attempt to modify the Decree is based mainly on rising inflation and costs and the record clearly shows that both parties have suffered from this problem. Not only has Defendant failed to show a permanent material change, but he has also failed to show that a change is necessitated under the just and equitable standard.

In Divorce Modification cases this Court has ruled in the case of Anderson v. Anderson, 104 U. 138 P.2d 252 (1943) that

"The Supreme Court will modify the trial court's decree only when there is abuse of its discretion and the award is not legally sound."

Both parties were allowed to present evidence of their current financial situation; the District Court was fully advised and the ruling of that Court was based on sound legal reasoning.

Plaintiff submits that the District Court's ruling should be affirmed.

### POINT THREE

THE COURT CORRECTLY RULED THAT DEFENDANT SHOULD PAY 50 PERCENT OF THE COSTS OF MEDICAL AND DENTAL INSURANCE FOR THE CHILDREN.

The Decree of Divorce made no mention of the insurance coverage for the minor children. Plaintiff testified that two of the minor children are in need of braces on their teeth at an expense of approximately \$1300.00 per child.

(R-89) She testified that the children are in need of psychotherapy and that she cannot afford these treatments.

(R 89-90)

It is apparent that the children should have insurance coverage. It is also apparent from the record that they are not covered by either parent at the present time. The need for therapy session and extensive dental treatment shows a material change of circumstances that would justify a modification and protection for the children is just and equitable. Plaintiff is merely asking that Defendant pay one-half (1/2) of this insurance cost. Plaintiff's Affidavit

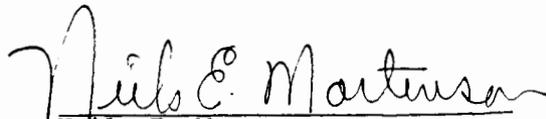
indicates that at this point in time such coverage will cost \$52.00 per month; so Defendant's obligation would only increase a total of \$26.00 monthly. (R-43)

Under the standards set forth by this Court in Plaintiff's Point Two, as well as the facts of this case, the decision of the District Court should be affirmed.

#### CONCLUSION

The District Court properly considered all factors and the Order was based upon standards set forth by this Court. The Order of the District Court should be affirmed in all aspects, in order to conform to sound legal principals as well as justice and equity.

RESPECTFULLY SUBMITTED,

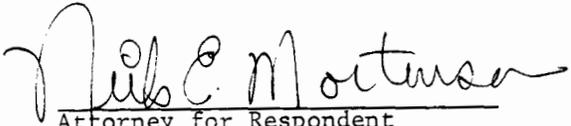


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CERTIFICATE OF SERVICE

This is to certify that on the 14<sup>th</sup> day of June, 1979, the undersigned served upon Appellant's counsel, Paul N. Cotro-Manes, 430 Judge Building, Salt Lake City, Utah 84111, two copies of the foregoing Brief of Plaintiff-Respondent by depositing the same in the United States Mails, postage pre-paid.

  
Attorney for Respondent