

1998

Gary V. Petersen v. Julie A. Petersen : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Clark W. Sessions; Clyde, Snow, Sessions & Swenson; Counsel for Appellee.

Michael K. Mohrman; Richard, Brandt, Miller & Nelson; Paul M. Belnap; Strong & Hanni; Counsel for Appellant.

Recommended Citation

Reply Brief, *Petersen v. Petersen*, No. 981652 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1833

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
K F U

50

.A10

DOCKET NO. 981652

IN THE UTAH COURT OF APPEALS

GARY V. PETERSEN,

Plaintiff/Appellant,

vs.

JULIE A. PETERSEN,

Defendant/Appellee.

Appellate No. 981652-CA

Second District Court
Civil No. 824983079 DA

Priority No. 15

REPLY BRIEF OF APPELLANT
GARY V. PETERSEN

APPEAL FROM AN ORDER OF AUGUST 10, 1998 DENYING
PLAINTIFF/APPELLANT'S PETITION TO MODIFY DECREE OF DIVORCE
DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
THE HONORABLE PAMELA G HEFFERNAN

COUNSEL FOR APPELLEE:

Clark W. Sessions
CLYDE, SNOW, SESSIONS & SWENSON
One Utah Center
201 South Main #1300
Salt Lake City, Utah 84111

COUNSEL FOR APPELLANT:

Michael K. Mohrman
RICHARDS, BRANDT, MILLER
& NELSON
Key Bank Tower 7th Floor
50 South Main Suite 700
Salt Lake City, Utah 84144

and

Paul M. Belnap, Esq
STRONG & HANNI
Sixth Floor Boston Building
Nine Exchange Place
Salt Lake City, Utah 84111

FILED
Utah Court of Appeals
AUG - 6 1999
Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

GARY V. PETERSEN,

Plaintiff/Appellant,

vs.

JULIE A. PETERSEN,

Defendant/Appellee.

Appellate No. 981652-CA

Second District Court
Civil No. 824983079 DA

Priority No. 15

**REPLY BRIEF OF APPELLANT
GARY V. PETERSEN**

APPEAL FROM AN ORDER OF AUGUST 10, 1998 DENYING
PLAINTIFF/APPELLANT'S PETITION TO MODIFY DECREE OF DIVORCE
DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
THE HONORABLE PAMELA G. HEFFERNAN

COUNSEL FOR APPELLEE:

Clark W. Sessions
CLYDE, SNOW, SESSIONS & SWENSON
One Utah Center
201 South Main #1300
Salt Lake City, Utah 84111

COUNSEL FOR APPELLANT:

Michael K. Mohrman
RICHARDS, BRANDT, MILLER
& NELSON
Key Bank Tower 7th Floor
50 South Main Suite 700
Salt Lake City, Utah 84144

and

Paul M. Belnap, Esq.
STRONG & HANNI
Sixth Floor Boston Building
Nine Exchange Place
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
ARGUMENT	4
CONCLUSION	8

TABLE OF AUTHORITIES

UTAH CASES

<u>Bridenbaugh v. Bridenbaugh</u> , 786 P.2d 241 (Utah Ct. App. 1990)	4,5,6,8
<u>Petersen v. Petersen</u> , 737 P.2d 237, 243 n.5 (Utah Ct. App. 1987)	6
<u>Williamson v. Williamson</u> , 1999 WL 439265 (Utah Ct. App. 1999)	7
<u>Fullmer v. Fullmer</u> , 761 P.2d 942, 951 (Utah Ct. App. 1988)	7

UTAH STATUTES AND RULES

Utah Code Ann. § 30-3-5(7)(g)(i)	4
Utah Code Ann. § 30-3-5(7)(a)	7

REPLY ARGUMENT

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT DEFENDANT/APPELLEE'S EMPLOYMENT AS A SCHOOL TEACHER SUBSEQUENT TO THE ENTRY OF THE DECREE OF DIVORCE DID NOT CONSTITUTE A SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCE SUFFICIENT TO MODIFY THE DECREE OF DIVORCE.

Mrs. Peterson erroneously argues that Dr. Petersen cannot rely upon the case of Bridenbaugh v. Bridenbaugh, 786 P.2d 241 (Utah Ct. App. 1990) because it was enacted prior to Utah Code Ann. § 30-3-5(7)(g)(i), which requires a threshold showing that the alleged substantial material change of circumstance be something that was not foreseeable at the time of the divorce. However, Bridenbaugh has not been overruled. Additionally, Mrs. Petersen ignores the explicit language of Bridenbaugh that “a party seeking modification of a prior alimony award bears the burden of establishing that a substantial change of circumstances has occurred which justifies modification.” Bridenbaugh, 786 P.2d at 242. Clearly, the analysis in Bridenbaugh is directly applicable when examining whether a substantial change in circumstances has occurred in the current case.

As stated in Dr. Petersen's original Brief, Bridenbaugh is especially persuasive because the facts are virtually identical to the case at hand. (Brief of Appellant Gary V. Petersen at p. 12). Both cases involve marriages of long duration in which the wife was not employed outside the home. In both cases, the husband was ordered to pay child support and alimony. (Cf. Bridenbaugh, 786 P.2d at 241 and R.16, R. 107, T.36, R. 213). Subsequent to the divorce, both wives earned post-graduate degrees and secured employment. (Cf. Bridenbaugh, 786 P.2d at 242 and T.52-53, R. 229-30 and R. 108). Approximately fifteen years after the decree was entered, both husbands filed a

Petition to Modify for the specific purpose of terminating alimony (Cf Bridenbaugh, 786 P 2d at 241 and R 15-18) At the time they filed their petitions to modify, the income of both husbands had increased eight-fold (Cf Bridenbaugh, 786 P 2d at 242 and R 107-108, Appellant's Addendum 6, ¶6, p 2) Additionally, Mrs Bridenbaugh's income increased from nothing to approximately \$22,000.00 while Mrs Petersen's income has increased from nothing to \$46,000 00 (Cf Bridenbaugh, 786 P 2d at 242 and R 108, T 82 R 259) In both cases, at the time the petition to modify was filed, the wives were only supporting themselves and were earning a significant percentage of what their husbands earned to support a large family while the parties were married (Cf Bridenbaugh, 786 P 2d at 242-3 and Appellant's Brief at 12) In Bridenbaugh, these facts were sufficient to demonstrate a substantial change in circumstances since the divorce Bridenbaugh, 786 P.2d at 243 Similarly, the facts are sufficient to demonstrate a substantial change in circumstances in the current case

In addition to the factors cited above, all six of the parties' children are now emancipated and none are living with Mrs Petersen She has refinanced the house to the point where her monthly obligation is now between \$400 and \$500 less than it was when the parties were married. She has deposited a remaining portion of her inheritance in savings, approximately \$23,000. She contributes substantially to her 401(k), in the amount of approximately \$7,500 per year. She has well over \$50,000 in that account She also participates in the Utah State Retirement System. She voluntarily purchases life insurance on the appellant's life at a monthly cost of \$285. She lives in a 5,000 square foot home, which has an equity in excess of a quarter of a million dollars. She has no monthly expenses except for those necessary to run her household and pay for her moderate

mortgage obligation. In sum, Mrs. Petersen's financial condition has significantly improved. Clearly, a substantial change of circumstances has occurred since the decree was entered.

The evidence before the court plainly illustrates that this material change in circumstances was not contemplated within the decree of divorce. The parties did not anticipate that Mrs. Petersen would be employed as a school teacher and earning in excess of \$46,000.00 per year. The Findings of Fact and Conclusions of Law state that "defendant's ability to secure a teaching position is speculative." (Appellee's Addendum 1 at ¶ 5 p. 4). Additionally, the express intention of Mrs. Petersen was to pursue an education in a field other than teaching. (Appellee's Addendum 1 at ¶ 5 p. 4). In fact, the Appellate Court found that Mrs. Petersen's gainful employment would constitute a substantial change in circumstances warranting a readjustment in the amount of alimony. Petersen v. Petersen, 737 P.2d 237, 243 n.5 (Utah Ct. App. 1987).

The trial court recognized that Mrs. Petersen would likely need to seek employment "in order to assist in providing *partial* support for herself and the parties' minor children." (Appellee's Addendum 1 at ¶ 9 p. 6)(emphasis added). But there is no indication that the parties anticipated that Mrs. Petersen would become self-sufficient. Mrs. Petersen argues that the trial court erred in calculating that she would only be able to earn 1/4 to 1/5 the amount of Dr. Petersen. (Appellee's Brief at p. 6). However, this argument is misleading. First, at the time the court made this estimate, they found that Dr. Petersen could earn approximately \$100,000.00 per year. (Appellee's Addendum 1 at ¶ 5 p. 4) In other words, the court concluded that Mrs. Petersen could earn between \$20,000.00 and \$25,000.00 per year. Much to the parties' surprise, Mrs. Petersen now earns nearly twice that amount. Additionally, this argument disregards the following,

[T]he purpose of alimony is to allow the recipient spouse a standard of living as close as possible to that experienced during the marriage, not to provide subsequent improvements to keep pace with those of the payor spouse.

Bridenbaugh, 786 P.2d at 243(emphasis added). In other words, the disparity in the parties' income is not a reason to continue Dr. Petersen's alimony obligation. The trial court erred when it determined that Mrs. Petersen's employment as a school teacher subsequent to the entry of the decree of divorce did not constitute a substantial and material change in circumstance sufficient to modify the decree of divorce, as amended.

Mrs. Petersen argues that even if her employment were not foreseeable, a reduction in alimony is not warranted. However, this argument is without merit. The trial court must consider the following factors when modifying an alimony award:

(1) the financial condition and needs of the recipient spouse; (2) the recipient's earning capacity or ability to produce income; (3) the ability of the payor or spouse to provide support; and (4) the length of the marriage.

Williamson v. Williamson, 1999 WL 439265 (Utah Ct. App. 1999)(citing Utah Code Ann. § 30-3-5(7)(a) (1988)). In order to reduce or terminate alimony, the trial court must be persuaded that "[the receiving spouse] will be able to support herself at a standard of living to which she was accustomed during the parties' marriage." Fullmer v. Fullmer, 761 P.2d 942, 951 (Utah Ct. App. 1988).

Mrs. Petersen, at present, makes between 46 and 47 percent of the total family income earned by Dr. Petersen to support a family of eight at the time the parties were divorced. However, she can utilize that entire income of approximately \$46,000 to \$47,000 per year for her own support. By her own admission, she paid off all of her bills in 1995. She has savings of not less than \$23,000 in

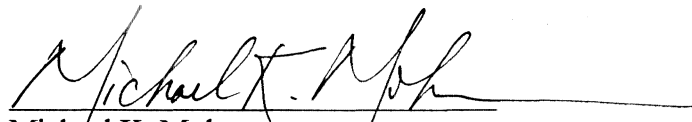
various CD's. She has in excess of \$50,000 in a 401(k) retirement account. She has no obligation for the support of any person other than herself. She owns a home with substantial equity. It is obvious that she is capable of providing for herself a standard of living that is better than the standard of living that she enjoyed at the time that the parties were divorced. Mrs. Petersen's argument that "1983 dollars are not the same as 1999 dollars" was not controlling in Bridenbaugh and is similarly irrelevant the current case. (Appellee's Brief at p. 8; Bridenbaugh, 786 P.2d at 241). Quite simply, Mrs. Petersen has the ability to support herself at the standard of living to which she was accustomed during the parties' marriage and modification of the decree is warranted.

CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's determination that there is no material change of circumstances sufficient to warrant termination of alimony and remand to the trial court with instructions to enter an order consistent with its ruling.

RESPECTFULLY SUBMITTED this 6 day of August, 1999.

RICHARDS, BRANDT, MILLER
& NELSON

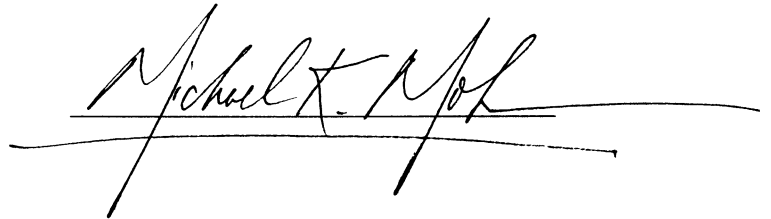

Michael K. Mohrman
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 6 day of August, 1999, to the following:

Clark W. Sessions
CLYDE, SNOW, SESSIONS & SWENSON
One Utah Center
201 South Main, 13th Floor
Salt Lake City, Utah 84111

Paul M. Belnap
STRONG & HANNI
Sixth Floor, Boston Building
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Michael X. Moh", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'M' and a distinct 'X'.

13112-001
263331