

1980

## Owen Ray Knuteson v. Jacqueline A. Knuteson : Respondent'S Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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OWEN RAY KNUTESON,

Plaintiff-Appellant,

vs.

Case No 16924

JACQUELINE A. KNUTESON,

Defendant-Respondent.

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RESPONDENT'S BRIEF

---

Appeal from the Order and Judgment  
of the Third Judicial District Court  
for Salt Lake County, State of Utah  
Honorable Christine M. Durham, Judge

---

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RESPONDENT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is respondent appeal that the lower court should not have interpreted the facts of this matter to constitute that respondent did reside with a person of the opposite sex as set forth in Section 30-3-5(3), Utah Code Annotated 1953, as amended.

DISPOSITION IN LOWER COURT

The Honorable Christine M. Durham, on December 19, 1979, after receiving testimony during the Order to Show Cause hearing ruled that even though the defendant did occupy the same residence with a person of the opposite sex for approximately two months, she did not reside with that person pursuant to Section 30-3-5(3), Utah Code Annotated 1953, as amended.

### RELIEF SOUGHT ON APPEAL

Respondent respectfully seeks affirmation of the trial judge's order that Section 30-3-5(3), Utah Code Annotated 1953, as amended, was not violated by respondent and that alimony payments not be terminated.

### STATEMENT OF FACTS

On August 13, 1979, the Honorable Christine M. Durham ruled, among other things, that the appellant was to pay alimony to the respondent for an indefinite period of time. On or about August 27, 1979, respondent and her children moved into a neighbor's house because all the utilities had been shut off at the respondent's house. Respondent had no income, and appellant did not substantially comply with the support order to allow funds to keep the utilities current.

Subsequently, on November 7, 1979, after respondent successfully obtained judgment against appellant for non-support payments in the amount of \$1442.33, and execution thereof, respondent paid her utilities indebtedness and moved back into her home with her children and all of their belongings.

Appellant argues that respondent's move to the neighbor's house for approximately two months and that subsequent sexual relations with that neighbor constitutes residing set forth in Section 30-3-5(3), Utah Code Annotated 1953, as amended:

"(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party 'establishing that the former spouse is residing with a person of the opposite sex, unless it

is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.'" (Emphasis mine.)

## ARGUMENT

### POINT I

#### RESPONDENT WAS NOT RESIDING WITH A PERSON OF THE OPPOSITE SEX FOR PURPOSES OF SECTION 30-3-5(3), UTAH CODE ANNOTATED 1953, AS AMENDED, AND ALIMONY SHOULD NOT BE TERMINATED

Although appellant fails to state the reasons for respondent's move from her residence for the space of approximately two months, the transcript of the hearing of plaintiff's Order to Show Cause indicates clearly the problems that respondent had. In determining the interpretation of "residing" it would be helpful to examine respondent's intent. The parties' son Ray testified that the utilities were shut off and that it was necessary to move out (Tr 13). He further testified that, "we left most of our furnishings at home" (Tr 17) and had no intent to abandon their home but would return to it when, "we had money to turn back on the electricity and the gas that had been turned off." (Tr 18).

Respondent's testimony concerning her intent to reside is uncontroverted and in agreement with that of her son. She stated that Dick (appellant) would not pay her any money. (Tr 30). She had no other source of income except the support payments from her former husband. When he refused to make regular payments, the utilities were disconnected, making her residence uninhabitable (Tr 17).

Although she and her children slept in the neighbor's house and although she participated in sexual contact with a person



of the opposite sex, she never intended to abandon the home awarded to her by the trial court or reside with the person of the opposite sex. Respondent spent much of the daytime hours at her own home without utilities. She spent time washing walls, cleaning cupboards, and doing yard work (Tr 28). It was clearly never appellant's intent to abandon her own home to reside permanently with her neighbor (Tr 28).

Consistent with respondent's not having the intent to reside with her neighbor, she did return to her own residence on November 7, 1979. According to the file, this was the same date she received funds from the execution against appellant. It was her testimony that upon receiving funds from the execution, respondent paid the utilities indebtedness and moved her family and possessions back into her own house on November 7, 1979 (Tr 29).

Respondent had no knowledge of the Order to Show Cause hearing to terminate alimony. Although the action was filed on November 5, 1979, she had no notice until November 17, 1979, when she was personally served. Therefore, consistent with her intention, on the day she finally received sufficient funds the utilities were paid and she moved back into her own house. There was never any intent to remain at the neighbor's home.

It is clear from the foregoing and from her testimony that respondent never intended to reside with a person of the opposite sex. Taking this position one step further, respondent did not in fact reside with a person of the opposite sex. A workable definition of "reside" is not provided for us, although California law has treated this matter to some degree.

California has been struggling with this issue for some time. Reviewing statutory and case law of California may be helpful. Prior to 1976 the Civil Code of California, Section 4801, used the term "living with" rather than "reside.":

"Upon petition of a spouse who has been ordered to pay support under Section 4801, the court shall revoke the order for support upon proof that the spouse to whom support has been ordered to be paid is living with a person of the opposite sex and holding himself or herself out as the spouse of the person for a total of 30 days or more, either consecutive or non-consecutive, although not married to the person. The court shall order the restitution of any support which has been paid since the date upon which the spouse to whom support has been ordered to be paid commenced holding himself or herself out as the spouse of the person."

The above formula of living with a person of the opposite sex for more than 30 days and holding himself or herself out to be the spouse of that person gave way to the current California statute that there is a presumption of decreased need and modification of support payments to the supported former spouse cohabiting with a person of the opposite sex. The court in In re Lieb (1978) 80 CA 3d 629 further treats this amendment in that, "If cohabitation is found to exist, the rebuttable presumption of decreased need for spousal support must be overcome by the supported spouse."

The respondent neither resided nor lived with a person of the opposite sex although she spent nights there and moved "the kids, beds, my stove and my refrigerator, and my freezer, and our dressers with our clothes in." (Tr 28). She at no time abandoned or attempted to abandon her home. She never held herself out to be the wife of the neighbor. There was certainly no decreased need in her receiving

support payments from her former spouse. The only benefit she received for two months was free lodging, she even paid for the groceries for her own family (Tr 22).

### CONCLUSION

Appellant leads us to believe that he was oppressed by being under a court order to pay support to his former wife, and that he was somehow wronged when respondent left her household for that of a neighbor. It is clear from the transcript and the record that appellant refused to comply with the court's support order. The record shows a judgment was obtained and a subsequent execution carried out at appellant's bank and credit union. Further, the day respondent received funds from the execution, she paid the utilities and moved back into her home.

Respondent, desperate for help and not in possession of funds, protected herself and her children by responding to the help of her neighbor for lodging until utilities were on in her own house. This desperate circumstance was caused directly by appellant due to his refusal to comply with a court support order. If appellant prevails it would signal others who pay support to former spouses to cut off all payments and force them into desperate times or some perceived statutory wrongdoing. The ultimate incentive would be great to have the payor former spouse to relieve himself of support obligations.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 1980.

H. DELBERT WELKER

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Attorney for Defendant-Respondent