

1981

Hope H. Openshaw v. Richard Creed Openshaw : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HOPE H. OPENSHAW,	:	
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	Case No. 17369
	:	
RICHARD CREED OPENSHAW,	:	
	:	
Defendant-Respondent.	:	
	:	

BRIEF OF RESPONDENT

AN APPEAL FROM AN ORDER GRANTING A
MODIFICATION OF A DECREE OF DIVORCE
FROM THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF
UTAH, THE HONORABLE KENNETH RIGTRUP,
JUDGE PRESIDING

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FILED

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Clk. Supreme Court, Utah

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Defendant-Respondent. :
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BRIEF OF RESPONDENT

I.

NATURE OF THE CASE

In this divorce modification action the Appellant petitioned the Court below to reduce arrearages in child support to Judgment, and to modify the Decree of Divorce to require increased child support, and to require the Respondent to pay for all medical expenses of the children. The Respondent filed a cross petition requesting that the Decree of Divorce be modified to re-establish the amount of child support and to allow the Respondent to claim the minor children as dependents for income tax purposes.

II.

DISPOSITION IN LOWER COURT

After a hearing, the lower court, the Honorable Kenneth

Rigtrup, Judge Presiding, denied the Appellant's petition for modification, and in part granted the Respondent's petition for modification, reducing the monthly amount of child support and allowing the Respondent to claim both children as dependents for tax purposes, and reduced certain arrearages in child support to Judgment.

The Appellant petitioned the Court for Relief from the Order granting the above modifications and to Re-open the hearing for additional evidence. The Court granted the Appellant's petition and took additional evidence. The Court then altered the modification to allow the Respondent to claim only one of the two minor children as a dependent for tax purposes.

The Appellant has appealed the Court's decision in granting the Respondent certain modifications in the Divorce Decree.

III.

RELIEF SOUGHT ON APPEAL

The Respondent seeks a ruling by this Court upholding and confirming the decision of the Court below.

IV.

STATEMENT OF THE CASE

A Decree of Divorce between the Appellant and the Respondent was entered March 4, 1977, in the Third Judicial District Court in and for Salt Lake County.

On February 29, 1980, the Appellant filed a Motion for an Order to Show Cause which was granted requiring the

Respondent to appear and show cause (a) why arrearages in child support should not be reduced to Judgment, (b) why the Respondent should not be ordered to pay all medical expenses incurred for both minor children, and (c) why attorney's fees and other relief should not be granted.

On March 5, 1980, the Respondent filed a Petition to Modify the Decree of Divorce to (a) set a specific and permanent amount of child support, (b) allow the Respondent to claim the two minor children as dependents for tax purposes, and (c) grant other relief.

On March 18, 1980, the Appellant filed a Petition for Modification seeking the same relief as sought in the initial Order to Show Cause plus requesting that the Court increase the Respondent's child support obligation from two hundred dollars (\$200.) per month per child to two hundred and fifty dollars (\$250.) per month per child.

The matter was partially heard on March 14, 1980, when the Court granted a Judgment for arrearages in support against the Respondent in the sum of twelve hundred dollars (\$1,200.) plus attorney's fees in the sum of one hundred dollars (\$100.).

The matter was heard with regard to the cross petitions for modification on March 28, 1980. Evidence was profered by both parties, financial statements from both parties were submitted, copies of the Appellant's check stubs were submitted, the Court reviewed the pleadings including Answers to Interrogatories, and the matter was argued by counsel to

the Court.

The Appellant sought to increase support to two hundred fifty dollars (\$250.) per month per child and to require Respondent to pay all medical bills for both children not covered by his insurance. The Petition for an increase to two hundred fifty dollars (\$250.) per month was withdrawn by Appellant's counsel at the hearing (T.R. p.131). The request that the Respondent should pay all medical bills was before the Court and denied; that denial is not at issue in this appeal. No evidence was presented as to the health of the minor children or the need for such a modification; no argument was made regarding the request; and, the Court made no finding regarding that situation. The request for that modification was abandoned by Appellant.

The Court denied the Appellant's Petition for Modification and granted in part, the Respondent's Petition for Modification. The Court made Findings of Fact and Conclusions of Law based upon the evidence and hearing of March 28, 1980, and entered an Order modifying the Decree of Divorce as follows:

- 1) Child support was permanently set at one hundred seventy-five dollars (\$175.) per month for each of the two teenage children reduced from two hundred dollars (\$200.) per month per child; and
- 2) The Respondent was allowed to claim both of the children as dependents for income tax purposed beginning with the year 1980, whereas the Appellant had been allowed to claim both in prior years; and

3) Granting other relief which is not pertinent to this appeal.

On August 21, 1980, the Court, the Honorable Kenneth Rigtrup heard the Appellant's request to reconsider and re-open the hearing and in part granted the relief sought. The Order of March 28, 1980, amending the Decree was modified to allow the Respondent to claim only the oldest minor child as a dependent for income tax purposes; otherwise the Order of March 28, 1980, remained intact.

The Appellant has filed a timely Notice of Appeal of the lower court's rulings of March 28, 1980, and August 21, 1980.

V.

STATEMENT OF FACTS

The Appellant and Respondent were married in Evanston, Wyoming on June 24, 1961, and were divorced in Salt Lake County, Utah on March 4, 1977. (T.R. pp. 27-33).

At the time of the divorce the parties had two minor children, Larry age 11 and Thomas, age 8; custody of the two minor children was awarded to the Appellant. (T.R. pp.27-33.)

While the divorce was pending the Appellant, in a financial statement and affidavit of January 12, 1977, indicated to the Court that her monthly minimum household expenses were five hundred fifty dollars and sixty-seven cents (\$550.67) per month for her support and the support of the two minor children. (T.R. pp.12-14). There is no findings or other evidence in the Court record or the stipulations of the parties as to the household expenses of the Appellant as of the time

of the divorce; however the stipulation settling the case was filed and dated February 18, 1977, only a month after the Appellant submitted her affidavit of expenses on January 12, 1977. (T.R. pp.23-25-).

At the time of the divorce the Appellant, Mrs. Openshaw, was unemployed; she could not work because of the physical condition of the minor child Thomas. (T.R. pp.12-13; see also the Affidavit of Mrs. Openshaw, T.R. p.40).

At the time of the divorce the Respondent, Mr. Openshaw was employed by ZCMI earning take home net pay in the sum of four hundred and seventy-five dollars (\$475.) per month. (T.R. p. 28).

The Respondent was ordered to pay monthly child support in the original decree in the amount of one hundred dollars (\$100.) per month per child based upon his net monthly income of four hundred and seventy-five dollars (\$475.). The child support was ordered to be automatically increased by fifty per cent (50%) of any additional take home pay of the Respondent, up to a maximum of two hundred dollars (\$200.) per month per child. (T.R. p.28 & p. 35).

The Respondent was ordered in the original Decree to maintain health and accident for the benefit of the minor children and to pay for the costs of prescription drugs for the treatment of the asthma and blood disease of the minor child Thomas. (T.R. pp. 32-33).

Within four months after the entry of the Decree the Appellant secured employment and was earning approximately five hundred and forty-four dollars (\$544.) per month with

a raise of five per cent (5%) effective July 4, 1977, to a total of five hundred and seventy-one dollars and twenty cents (\$571.20) per month. (T.R. p.40).

In October, 1979, the Respondent was earning more than eight hundred dollars (\$800.) per month and pursuant to the original Decree was then obligated to pay two hundred dollars (\$200.) per month per child as child support. (T.R. p.79).

The Appellant filed an Order to Show Cause (T.R. p.52) and a Petition for Modification (T.R. p. 65) seeking to:

- a) Increase child support to two hundred and fifty dollars (\$250.) per month per child; and,
- b) Reduce arrearages in child support to Judgment; and,
- c) Require the Respondent to pay all medical expenses of both children; and,
- d) Be awarded attorney's fees and other relief.

The Respondent filed a Petition for Modification (T.R. pp. 55-57) seeking to stabilize and set permanent child support and to allow the Respondent to claim the two children as dependents for tax purposes and for other relief.

Arrearages in child support were reduced to Judgment on March 14, 1980. (T.R. p.79).

The cross-petitions for modification were heard by the Court on March 28, 1980. The following evidence was before the Court on March 28, 1980.

The Appellant was employed and had gross monthly earnings of nine hundred ninety-eight dollars and forty cents (\$998.40) and net monthly earnings of seven hundred sixty-nine dollars

and two cents (\$769.02). (T.R. p. 64-financial statement; p. 78-financial statement; pp. 74-75-check stubs; p. 69-Answers to Interrogatories; pp.126-127-transcript of testimony; p. 88-Findings of Fact).

The Appellant had monthly household expenses for herself and the two children of the parties in the amount of eight hundred ninety-six dollars and thirty-five cents (\$896.35) per month. The amount represented the average monthly expenditures of the Appellant to maintain herself and the two children. (T.R. p. 64-financial statement; p. 78-financial statement; p. 126-transcript of testimony; p. 88-Findings of Fact). The Appellant had recently voluntarily increased her monthly home mortgage payments from two hundred twelve dollars (\$212.) to three hundred forty-three dollars and forty-five cents (\$343.45) per month. (T.R. p. 84).

The Respondent was employed and had gross monthly earnings of one thousand six hundred thirty-five dollars and forty three cents (\$1,635.43) and net monthly earnings of one thousand two hundred nine dollars and forty-six cents (\$1,209.46). (T.R. p. 73-financial statement; p. 126-transcript of testimony; p. 88-Findings of Fact).

The Respondent had monthly expenses for the operation of his household in the sum of one thousand one hundred forty-two dollars and seventy-three cents (\$1,142.73). That included support for his current spouse and his step-daughter, Jsanu. (T.R. p. 73-financial statement; p. 126-transcripts of

testimony; p. 88-Findings of Fact).

The Respondent had re-married after his divorce from the Appellant; the re-marriage was before July, 1979. The Respondent's current spouse, Shirley Openshaw has a minor daughter, Jsanu. The Respondent's current spouse was unemployed because of her physical condition. The minor child, Jsanu was not receiving any child support or maintenance from her natural father. The Respondent was fully supporting the minor step-daughter, Jsanu. (T.R. p. 67; p. 73; pp. 129-130; pp. 87-88).

During the period September 1979, through and including February 1980, the Respondent was falling behind in his monthly child support payments to the Appellant in the average amount of one hundred and seventy-four dollars (\$174.) per month. (T.R. p. 73). His actual obligation then being a total of four hundred dollars (\$400.) per month.

The two minor children of the parties, Thomas and Larry were now teenagers, age 12 and 15 respectively. (T.R. p. 27; p. 87). The Court found that the two teenage boys were old enough that they could find odd jobs to earn their own spending money and minor expenses. (T.R. p. 89).

The Appellant in support of her motion to re-open the hearing and take more evidence submitted an un-controverted Affidavit (T.R. pp.93-96) and stated that as a result of not being able to claim both minor children on her income tax withholding that her monthly net income was reduced by forty-eight dollars and twelve cents (\$48.12).

After the foregoing evidence was submitted to the Court, the Court modified the Order and allowed the Appellant to claim the youngest child, age 12, as a dependent for tax purposes, (T.R. p. 107); the Respondent was allowed to claim the older child.

VI.

ARGUMENT

POINT I

THE APPELLANT HAS NOT ESTABLISHED FACTS
OR GROUNDS SUFFICIENT FOR THIS COURT TO
OVER-RULE THE FINDINGS OF THE COURT BELOW

This action was heard below as an equitable matter upon cross petitions for modification of a Divorce Decree entered three years before. The appeal from a Divorce Decree or from the modification of a Divorce Decree is an equitable matter. King vs. King, 25 Utah 2d 163, 478 P.2d 492 (1970). An equitable appeal to the Utah Supreme Court is reviewed by the Court de novo. Utah Const. Art. VIII, § 9; Foreman vs. Foreman, 111 Utah 72, 176 P.2d 144 (1947).

A de novo review on appeal by the Utah Supreme Court is not a new trial but an appellate proceeding based upon the district court's record. Foreman vs. Foreman, *ibid.* In such a review this Court is not bound by the Findings of Fact of the lower court; this Court makes an independent study of the record, weighs the evidence and exercises its own independent judgment. Harding vs. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971).

In such an equitable review, the Findings of Fact of the Court below are presumed by the Supreme Court to be valid and correct due to the trial judge's advantageous position, having heard and seen the evidence first hand. Harding vs. Harding, ibid.

The burden is on the Appellant to show that the Findings of Fact of the Court below are in error. Harding vs. Harding, ibid.

The Supreme Court in this case and in all similar cases must review all of the evidence presented in the light most favorable to the lower court's findings. Ross vs. Ross, 592 P.2d 600, 602 (1979-Utah); Carter vs. Carter, 584 P.2d 904, 906 (Utah 1978); Watson vs. Watson, 561 P.2d 1072, 1074 (Utah-1977); Baker vs. Baker, 551 P.2d 1263, 1265 (1976); Harding vs. Harding, 26 Utah 2d 277, 279, 488 P.2d 308, 310 (1971); Stone vs. Stone, 19 Utah 2d 378, 380, 431 P.2d 802, 803 (1967).

Viewing the evidence presented in the Court below as set forth in the Statement of Facts and established by the record on appeal in this case, this Court cannot rule that the lower court's findings were in error.

This Court should not disturb the findings of the Court below simply because this Court might have viewed the matter different. This Court may disturb the findings of the Court below only if this Court can find that:

- a) the evidence clearly preponderates against the trial court's findings; or,

b) there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or,

c) there has plainly been such an abuse of discretion that an injustice has resulted.

Ross vs. Ross, *ibid.*; Carter vs. Carter, *ibid.*; Watson vs. Watson, *ibid.*; Baker vs. Baker, *ibid.*; Harding vs. Harding, *ibid.*; Stone vs. Stone, *ibid.*

The Appellant has not made a prima facie showing in her brief that any of the circumstances exist as set forth above, which would allow this Court to disturb the findings of the Court below. The Appellant has not met her burden in this appeal.

POINT II

THE EVIDENCE PRESENTED TO THE COURT BELOW CLEARLY SUPPORTS THE FINDINGS

The evidence submitted to the Court below clearly supports the findings of the Court and justifies the ruling of the Court.

The evidence presented in the record at the time of the hearing as to the income and expenses of the parties is as follows:

INCOME OF PARTIES AT THE TIME OF THE DIVORCE March 4, 1977

Appellant, Mrs. Openshaw	NONE
(T.R. pp.12-13; p.40)	Unemployed
Respondent, Mr. Openshaw	\$475. net per month
(T.R. p. 28)	

MINIMUM MONTHLY EXPENSES OF APPELLANT, MRS. OPENSHAW

January, 1977

Appellant, Mrs. Openshaw \$550.67

(T.R. pp.12-14)

Respondent, Mr. Openshaw no findings

INCOME OF THE PARTIES AT JULY 5, 1977

Appellant, Mrs. Openshaw \$571.20 net per month

(T.R. p.40)

Respondent, Mr. Openshaw No finding

INCOME OF THE PARTIES ON MARCH 28, 1980

Appellant, Mrs. Openshaw \$769.02 net per month
plus child support from
Respondent

(T.R. p. 64; pp.74-75)

Respondent, Mr. Openshaw \$1,209.46 net per month

AVERAGE MONTHLY EXPENSES OF PARTIES ON MARCH 28, 1980

Appellant, Mrs. Openshaw \$896.35

(T.R. p. 64; p. 126)
for self and two children
of the parties

Respondent, Mr. Openshaw \$1,142.73

(T.R. p. 73; p. 126)
for self, current spouse
and step-daughter

includes partial child
support from Respondent to
Appellant-Average \$226.51

CHILD SUPPORT OBLIGATION OF RESPONDENT

DIVORCE March 4, 1977 \$200. total per month plus
insurance and prescription
drugs

(T.R. p.32)

MODIFICATION HEARING March 28, 1980

(T.R. pp. 79-80) \$400. total per month
plus insurance and
prescription drugs

Examining the past and current incomes, expenses and
situations of the parties as set out above, this Court cannot

say that the findings and ruling of the Court below, were not justified and supported by the evidence.

Based upon the evidence as set forth above, the Court:

- a) Reduced child support for the two teenage boys from two hundred dollars (\$200.) per month each to one hundred seventy-five dollars (\$175.) per month each; and,
- b) Allowed the Respondent to claim one of the boys, the oldest as a dependent for income tax purposes.

There was a substantial change in circumstances of the parties and modification of the Decree was in order. Based upon the evidence presented the Court below made two minor changes; child support was reduced by a total of 12.5% and Respondent received a tax deduction for the oldest boy that will benefit the Respondent for three years until the child reaches 18.

Based upon the evidence in the record the actions of the Court below were not an abuse of discretion. The evidence and findings of the Court below as to the improved situations of both parties supports the action of the Court in a minor reduction of support and the awarding of the tax dependency claim for a period of three years. Such a minor change in the Decree cannot be said to be an injustice in light of the changed circumstances of the parties.

POINT III

THE COURT BELOW PROPERLY UNDERSTOOD AND APPLIED THE LAW IN THIS CASE

The amount of a child support award can be increased or decreased if there has been a substantial change in the

circumstances of the parties involved. Kessimakis vs. Kessimakis, 580 P.2d 1090 (Utah 1978); Russell vs. Russell, 551 P.2d 231 (Utah 1976); Gardner vs. Gardner, 111 Utah 286, 177 P.2d 743 (1947); Buzzo vs. Buzzo, 45 Utah 625, 148 P. 362 (1915). The District Court has continuing jurisdiction after it has rendered a divorce decree to modify or issue new orders with respect to child support. Dehm vs. Dehm, 545 P.2d 525, 527 (Utah 1976); Utah Code Annotated §30-3-5 (1953 as amended). The person seeking the modification of the decree has the burden of showing a significant change in material circumstances so as to justify court action in modifying the original award. Auerbach vs. Auerbach, 571 P.2d 1349, 1350 (Utah 1977); Sorensen vs. Sorensen, 18 Utah 2d 102, 417 P.2d 118 (1966).

The Court below received evidence showing a substantial change in material circumstances of the parties. The health of the minor child Thomas had improved such that the Appellant could work. The Appellant who had been earning nothing at the time of the divorce now had a substantial income. The Respondent's employment which had been in flux had now stabilized. The Respondent had remarried and was now legally obligated to support his step-daughter. The Respondent was now employed at Kennecott Copper Corporation and had group health and accident insurance through Kennecott Copper for the benefit and protection of his two teenage children. The Appellant had voluntarily increased her house payments from two hundred twelve dollars (\$212.) to three hundred forty-three

dollars and forty-five cents (\$343.45) per month.

The evidence presented to the Court clearly established a substantial change in material circumstances of the parties. The Court was then justified under the law in modifying the child support amount and allowing the Respondent to claim one child as a dependent for tax purposes. The support reduction of 12.5% and allowing tax dependency for three years is a minor alteration in light of the substantial change in the parties circumstances.

The Appellant emphasizes in her brief that the re-marriage of the Respondent is not grounds for modification of the Decree; that is the law in Utah. There were many other changes in circumstances as set forth above and a change in Utah law which justify the modification. If the only factor presented to the Court had been the Respondent's re-marriage, the Court should not have granted a reduction in child support; however, there were many other major changes which justified modification.

POINT IV

UTAH LAW CREATED AN ADDITIONAL SUPPORT OBLIGATION FOR THE RESPONDENT JUSTIFYING A MODIFICATION OF THE DECREE

Utah Code Annotated § 78-45-3 (1953 as amended) creates a statutory obligation for a man to support his wife when she is in need. Despite that statutory obligation, the Utah Courts have clearly stated that the re-marriage of a man with a support obligation from a previous marriage, is not in and of itself grounds to reduce the support obligation. Heltman vs.

Heltman, 29 Utah 2d 444, 511 P.2d 720; Harris vs. Harris, 14 Utah 2d 96, 377 P.2d 1007 (1963).

This Court said in Wright vs. Wright:

While this Court is sympathetic to the financial demands and burdens imposed on second-family situations, nevertheless, the undertaking to support stepchildren does not relieve the parent of his obligation to support his own natural children. Wright vs. Wright, 586 P.2d 443, 445 (Utah 1978)

The law in Utah as decided prior to 1979, was clear neither the re-marriage nor the undertaking of support for stepchildren was justification for reduction of child support. Prior to 1979, there was no statutory obligation for a step-parent to support a step-child.

The Respondent in the case at bar was divorced in 1977, and re-married prior to July, 1979. His new wife has a minor daughter. When he re-married the Respondent had no duty to support his step-daughter. On July 1, 1979, Utah Code Annotated, § 78-45-4.1 (1953 as amended), became effective and the Respondent was obligated by law to support his step-daughter; that section provides:

A step-parent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child.

The Respondent re-married and gained a step-daughter at a time when he was under no legal obligation to support the stepdaughter. After his re-marriage, the Utah Legislature created a new statutory obligation forcing the Respondent to support his step-daughter. The Respondent had no control over this new obligation created after he had re-married.

The Respondent did not voluntarily increase his financial burden. The obligation to support his step-daughter was thrust upon the Respondent by a legislature, a burden involuntarily forced upon him.

At the time of the hearing the Respondent was fully supporting his step-daughter as required by law. (T.R. p. 73).

Had the Respondent re-married after July 1, 1979, knowing that he would be legally obligated to support his new step-daughter, then such a voluntarily created new obligation should not be considered by the Court.

The involuntarily created obligation of the Respondent to support a step-daughter is much different from a voluntarily created financial burden such as re-marriage. The Court was justified in considering and allowing the newly created support obligation for the Respondent's step-daughter to be a factor in the reduction of the child support obligation.

POINT V.

THIS CASE WAS FULLY AND PROPERTY HEARD BY THE COURT BELOW

The Appellant in her Brief and in her Motions for Amendment of Modified Decree, To Open the Judgment for An Additional Formal Hearing and for Entry of an Amendment to the Modification of Decree, and Relief from the Court's Modified Decree (T.R. pp. 85-86) alleges that the hearing in the Court below was not a full hearing and was "informal"

such that the Court's ruling was not proper. The Court below granted both parties a fully opportunity to be heard and in fact granted the Appellant's request, re-opened the proceeding, received additional evidence, and granted an amendment to the Modification of the Decree. (See Appellant's Affidavit, T.R. pp. 93-99; and Order Granting Amendment, T. R. p. 107).

The Appellant's brief states that the hearing on both of the cross-petitions for modification was "limited by the Honorable Judge Rigtrup to an informal conference with the Attorneys, followed by a reported argument of Counsel, with the parties present. No sworn testimony was taken." (Appellant's Brief, Statement of Facts, page 2). The Appellant's Motions for Reconsideration by the Court (T.R. pp. 93-99) request a "formal hearing" by the Court, and states that additional material facts were "not clearly divulged to the Honorable Court, (and) were not properly allowed to be presented by formal testimony."

There is a transcript of a portion of the hearing on the cross-petitions for modification. (T.R. pp.125-123). That transcript reflects the argument of counsel, but is also reflects in part the evidence recieved by the Court by stipulation and by profer of counsel during the "informal conference" of counsel with the Court.

Prior to the reported hearing, counsel had discussed the case with the Court, had submitted financial statements of the parties and explained the positions of each side to

the Court. The financial statements of each of the parties are a matter of record. (T.R. p. 64; p. 73). The Court refers to those in the transcript and ask each of the parties if they are correct. (T.R. pp. 126-127). Those financial statements had been profered to the Court by respective counsel along with other information as to what each of the parties would testify if sworn. Those financial statements and information were accepted by the Court without objection or dispute from either counsel; those facts were proved as provided by Rule 3 of the Utah Rules of Evidence. The check stubs indicating the wages and income of the Appellant were similarly admitted into evidence. (T.R. pp. 74-75; pp. 126-127).

The Court requested counsel to profer into the record any additional information or evidence. The transcript states in part:

THE COURT: All right. Do you want to profer into the record the situation concerning what the respective circumstances were at the date of the last order in this matter concerning child support and monthly alimony?

MR. MIDGLEY: Yes, Your Honor.

(T.R. p. 127)

THE COURT: Are there any other circumstances that ought to be on the record, other than the two exhibits which contain the itemized expenses, as well as the income?

MR. BARNARD: Yes, Your Honor, I think so.

(T.R. p. 128)

Both counsel were allowed ample opportunity to profer

information and evidence and to argue their respective cases to the Court on the record.

The fact that an informal non-recorded conference had been held did not in anyway preclude the presentation of evidence by profer to the Court below on March 28, 1980.

Tha Appellant requested the Court to reconsider its ruling of March 28, 1980. In support of that request the Appellant submitted an Affidavit (T.R. pp. 93-99). The Affidavit was accepted by the Court and was considered on August 21, 1980. The Affidavit recited that allowing the Respondent to claim both children as dependents caused a net decrease in the Appellant's take-home pay in the amount of forty-eight dollars and twelve cents (\$48.12) per month. (T.R. p. 84). That evidence was considered when the Court amended the modification and allowed the Respondent to claim only one of the minor children as a tax dependent. (T.R. p. 107).

The Court granted both sides full opportunity to be heard both on and off the record on March 28, 1980, and to profer any information or evidence regarding the case. There was no objection by either parties' counsel to that procedure at that hearing. After the hearing, Appellant's counsel objected to the "informal" nature of the hearing and requested to be allowed to submit additional evidence, he was allowed to do so through the Appellant's Affidavit.

The extensive Findings of Fact and Conclusions of Law adopted and entered by the Court (T.R. pp. 87-90) were not

"made out of whole cloth". Those Findings were based upon the evidence profered and received by the Court without objection.

The interest of judicial economy require that evidence be presented as expeditiously as possible. In this case it was done by stipulation and profer and without objection. When the Appellant raised questions as to the evidence that she was allowed to present, the Court accepted and considered an additional Affidavit with more evidence. The parties received a full opportunity to be heard twice in the Court below.

VII.

CONCLUSION

The Court below fully considered the evidence and arguments of both parties in the case. The evidence presented established a substantial change in material circumstances of the parties and justified the modification of the Decree of Divorce. The modification granted (a) a 12.5% reduction in child support and (b) allowing a tax dependency benefit for three years, was minimal. There was not sufficient grounds for this Court to disturb the Findings of the Court below the evidence in the record clearly supports the lower Court's Findings; the Court below understood and properly applied the law; and there has not been a substantial nor prejudicial error nor has there been an abuse of discretion by the Court below resulting in any injustice.

The decision and ruling of the Court below should be affirmed and the Respondent should be granted his costs on this appeal.

Respectfully submitted,

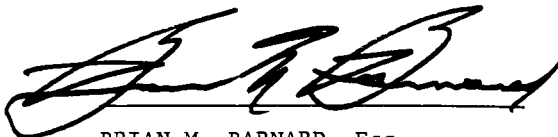
A handwritten signature in black ink, appearing to read "Brian M. Barnard", written in a cursive style.

BRIAN M. BARNARD, Esq.
Attorney for Defendant-Respondent

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Respondent to L. E. Midgley, Esq., Attorney for Plaintiff-Appellant, at 320 South 300 East, Salt Lake City, Utah 84111, postage prepaid in the United States Postal Service this 6~~2~~ day of March, 1981.

A handwritten signature in black ink, appearing to read "Brian M. Barnard", written over a horizontal line.

BRIAN M. BARNARD, Esq.
Attorney for Defendant-Respondent