

1981

## Marilyn Stone v. Gordon Barth Stone : Brief of Defendant-Appellant

Utah Supreme Court

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### Recommended Citation

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MARILYN STONE,

Plaintiff and  
Respondent,

vs.

GORDON BARTH STONE,

Defendant and  
Appellant.

Case No. 17613

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BRIEF OF DEFENDANT-APPELLANT

---

Appeal from a Judgment by the  
Third Judicial District Court of  
Salt Lake County, State of Utah

---

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**FILED**

JUL - 6 1981

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BRIEF OF DEFENDANT-APPELLANT

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NATURE OF THE CASE

This is an action based on the divorced husband's Petition for Modification of an original Divorce Decree by the reduction of alimony required to be paid by said appellant-defendant husband to plaintiff-respondent wife.

DISPOSITION IN THE LOWER COURT

The lower Court, the Honorable Dean Conder presiding, refused to reduce the amount of alimony required to be paid pursuant to the original Decree, and the defendant-appellant husband appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the judgment of the trial Court reversed, and to have this Court make an Order substantially reducing the amount of alimony to be paid by defendant-appellant husband to plaintiff-respondent wife.

### STATEMENT OF FACTS

Respondent-wife and appellant-husband were married in February of 1953, and as issue of said marriage had six children; said marriage ending in divorce in January of 1976. That the original Decree of divorce provided for, among other things, the payment of alimony, child support and distribution of property between the parties. Said original Decree was based upon a Stipulation entered into by and between the parties, in both respondent and appellant were represented by counsel. Respondent being represented by her brother and the brother-in-law of the appellant herein, and the appellant being represented by the said Byron L. Stubbs. The parties were married for approximately 23 years prior to their divorce.

In November of 1980, appellant-husband, by and through his attorney, petitioned the lower Court to grant some relief to said appellant in the payment of alimony, and said appellant based his Petition for Reduction of Alimony on the following reasons:

1. That the respondent's salary had increased since the date of said divorce over and above that which she was receiving at the time of the divorce in excess of 80 percent.

2. That at the time of the divorce there were 5 children living at home, and as of the date of the Petition only one minor child is living at home.

3. The value of the real property has increased substantially from the date of the divorce Decree, and the need

for such a large family home for the respondent to live in had ceased to exist.

4. The appellant-husband has now remarried.

5. The automatic increase in alimony of 35 percent of each raise received by the appellant-husband herein takes away said appellant-husband's incentive to excell in his work and discourages said respondent-wife from improving her financial condition.

Following a hearing without the opportunity to offer any oral testimony, the Honorable Dean Conder dismissed appellant-husband's Order to Show Cause and specifically found in his Memorandum Decision that an 85 percent increase in salary was an insufficient increase to justify a reduction in appellant-husband's obligation to pay alimony, and apparently the lower Court ignored any and all other facts before it at the time as indicated by the Memorandum Decision.

#### LAW AND ARGUMENT

IS AN INCREASE IN INCOME SINCE THE DATE OF  
THE ORIGINAL DECREE WHICH IS IN EXCESS OF  
80 PERCENT OF THAT AMOUNT EARNED BY RESPONDENT-  
WIFE AS OF THE DATE OF SAID ORIGINAL DECREE  
A SUFFICIENT INCREASE TO JUSTIFY A REDUCTION  
IN THE AMOUNT OF ALIMONY REQUIRED TO BE PAID  
BY APPELLANT-HUSBAND PURSUANT TO THE ORIGINAL DECREE

Respondent's 1979 tax return showed a total income of \$13,881.98. Respondent's 1975 tax return shows a total income of \$7,537.12. The total increase in income of respondent-Plaintiff in four years was \$6,344.86. This total amounted to an increase in income of 84.18 percent over a four-year



sought relief from the payment of alimony was the fact that since the date of the Decree, five of the six children born as issue of the marriage and living with the plaintiff at the time of the original divorce Decree had since moved from the home of the parties where plaintiff-respondent resides. As a result thereof, the said plaintiff-respondent has much more free time in which she can earn a living than she did when all of children were living at home, her liabilities to furnish support and care for said children has certainly decreased, and her cost-of-living overall has obviously by reason of the fact that five children have moved out of the home gone down.

The value of the real estate awarded to the plaintiff-respondent herein as of the date of the original Decree has increased substantially and the need for such a large home for plaintiff and one child to reside in is presently nonexistent. The value increase placed on the home granted plaintiff-respondent in the original Decree as indicated by the defendant-appellant on page 11, line 33, of said defendant-appellant's answer to plaintiff's Interrogatories wherein said appellant states at line 33, ". . . June, 1976, pursuant to the divorce Decree of March, 1976, plus a Quit-Claim Deed to Marilyn Stone. I received nothing therefor, and the fair market value as to the said property as of December 2, 1980, would be approximately \$100,000.00, said value being approximately \$60,000.00 as of the date of the divorce Decree." Thus, the increase in the equity of the home has been approximately \$40,000.00 since the

date of the divorce Decree. Also, as indicated at line 27, page 11, of defendant-appellant's Answers to respondent-plaintiff's Interrogatories, the size of said home is 1,400 sq. ft. with a full basement on approximately one acre of ground with two bedrooms finished in the basement prior to respondent-appellant's leaving said home.

It is obvious that the respondent-plaintiff does not need such an elaborate, if not extra-large, place to reside in all by herself and that to do so places a substantial burden upon both her and the defendant-appellant herein to support the same.

In Sorensen v. Sorensen, 20 Utah 2d 360, 438 P. 2d 12 the Court stated as follows:

"The fact that the wife owns property which has increased substantially in value or ability to produce income after the entry of the Decree for alimony is an important consideration as is the fact that a child whom the wife has been supporting has married and has become employed and self-supporting."

One other factor that should have been considered by the lower Court, but was somewhat ignored by the same, was the fact that two of the young boys were supported (voluntarily) on a Mission for the L.D.S. Church subsequent to the time that they left the home of the plaintiff-respondent herein. Both, however, have since returned and neither party has any further obligation therefor at the present time.

Note that on page 30, at line 20, of the deposition taken by the attorney for the respondent-plaintiff herein of Mr. Stone that he indicates that five children were living at home at the time of the original Decree in 1976, and on page 31 of said deposition Mr. Stone indicates how the child support for the children was computed by the original Decree.

DEFENDANT-APPELLANT HAS REMARRIED SINCE THE  
DATE OF THE ORIGINAL DECREE AND HAS THE ADDED  
OBLIGATION TO SUPPORT HIS NEW SPOUSE AS WELL  
AS FURNISH PARTIAL SUPPORT TO TWO STEP-CHILDREN

The defendant-appellant has since the date of the original Decree taken on the additional responsibility of a new wife as well as partial responsibility for the support and maintenance of two of said new wife's children. Said defendant-appellant is aware of the fact that this is a self-inflicted disability which he has placed upon himself. However, said facts must be taken into consideration by the Court in order for said Court to make a proper and fair determination of the said respondent-appellant's total ability to pay the alimony required of him by the original Decree. In any event, the Court's attention is directed to the defendant-appellant's Affidavit filed with the lower Court and being before you at the present time, said Affidavit being dated the 12th day of January, 1981, and given in support of his position for reduction of alimony to the lower Court. Said Affidavit showing a comparison between his present expenses and the expenses which he had in 1976,

wherein it is shown that in 1976 he had a total expense for the operation of his household affairs of \$1,259.00, and in 1979 said amount had increased to \$1,999.00, an increase of \$740.00 or an increase of 58.77 percent. If we look further at said same Affidavit of the said defendant-appellant herein we find that his salary increased over the same period of time only 34.86 percent.

TO GIVE THE PLAINTIFF-RESPONDENT 35 PERCENT  
OF EACH INCREASE IN SALARY WHICH DEFENDANT-  
APPELLANT RECEIVES IS AGAINST PUBLIC POLICY  
AND COUNTER-PRODUCTIVE

The original Decree grants to the plaintiff-respondent an amount equal to 35 percent of the gross amount of each raise received by the appellant-defendant from his employer on the job. Such a provision discourages the defendant-appellant's incentive to do a good job for his employer inasmuch as his salary increases are substantially eaten up by the increase in alimony and the taxes required to be paid to the Federal and State Governments. Such a provision is contrary to most alimony decrees wherein the amount of alimony awarded in the original Decree generally precedes in a declining manner and is granted to the plaintiff only in an effort to help throughout the difficult period of reestablishing herself. Said period in the instant case is obviously past and there is no longer a need for alimony as such, let alone an automatic increase in alimony, without showing any justification or reason therefor.

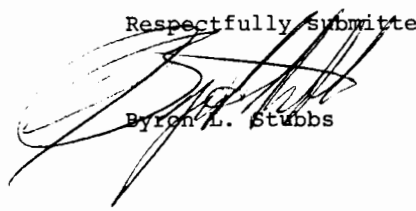
It is true that the defendant-appellant had the advice and counsel of his present attorney, Byron L. Stubbs, but it

is also true, as indicated by said defendant-appellant's Affidavit filed with the lower Court and before you in this matter, that said defendant-appellant refused to take the advice of said counsel. I refer you to the defendant-appellant's Affidavit dated January 12, 1981, and refer you specifically to page 4 thereof, paragraph 5, wherein said defendant-appellant indicates at line 14, "He did sign said agreement because his wife was being represented by her brother - lawyer, who had also been for a period of 22 years a trusted brother-in-law and counselor to the affiant herein."

CONCLUSION

Based upon the foregoing brief and the files and records herein, the defendant-appellant is entitled to a substantial reduction in alimony based upon the numerous changes in circumstances which have occurred since the date of the original Decree, and the said lower Court erred when it failed to grant relief as requested by said defendant-appellant.

Respectfully submitted,



Byron L. Stubbs