1982

Carol Jean Shaw v. Harold Elijah Shaw : Brief of Defendant-Respondent

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

CAROL JEAN SHAW, now known as CAROL JEAN SHAW LORD, Plaintiff and Appellant,	)	
vs.	)	Case No. 18367
HAROLD ELIJAH SHAW, Defendant and Respondent.	)	

Appeal From an Order to Show Cause Re Modification of Divorce Decree and a Supplemental Order to Show Cause

Honorable Douglas L. Cornaby, District Judge

JEFF R. THORNE
35 First Security Bank Building
P. O. Box "F"
Brigham City, Utah 84302
Attorney for
Defendant-Respondent

LOWELL V. SUMMERHAYS
420 Continental Bank Building
Salt Lake City, Utah 84101
Attorney for
Plaintiff-Appellant

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BRIEF OF DEFENDANT-RESPONDENT

STATEMENT AND NATURE OF CASE

This is an appeal by the plaintiff from an Order on Order to Show Cause Re Modification of Divorce Decree and a Supplemental Order on Order to Show Cause and the denial of miscellaneous motions by plaintiff filed thereafter.

DISPOSITION IN LOWER COURT

The plaintiff filed an Affidavit and Motion For Order to Show Cause In Re Contempt, which matter was filed on September 22, 1980. A response to the Motion was filed by

the defendant, and through no fault of the defendant, the matter did not come on for hearing until December 18, 1981. Following the hearing, the court entered its Findings of Fact and Conclusions of Law and Order on Order to Show Cause on February 5, 1982. Thereafter, the court entered a Supplemental Order on Order to Show Cause, which Supplemental Order was signed April 16, 1982. Thereafter, certain motions were made by the plaintiff and a plaintiff in intervention which were denied by the District Court.

RELIEF SOUGHT ON APPEAL

The defendant-respondent requests that the orders of the District Court be affirmed, and that the appeal be dismissed and that the matter be remanded to the District Court for the imposition of attorney's fees on appeal.

STATEMENT OF FACTS

The respondent believes the Statement of Facts submitted by the appellant is inaccurate in that it appears to be her "version" of the facts. For that reason the respondent prefers to set out a different Statement of Facts.

The plaintiff and defendant were married on January 16, 1959. The plaintiff and defendant had six children born as issue of this marriage.

The plaintiff originally filed a summons and complaint for divorce in the District Court of Weber County, State of Utah, on January 13, 1978, (R.199-203). In the original divorce proceedings the plaintiff was represented by W. Brent West. The defendant was represented by Mann, Hadfield and Thorne. Over a period of some months, negotiations took place between the respective counsels, to arrive at an out of court settlement.

On September 28, 1980, a written stipulation was ultimately reached between the parties to determine the: possession and the equity in the family home, custody of minor children, child support, alimony, debts and obligations, division of personal property, filing of tax returns, health and accident coverage, and the awarding of tax exemptions on the minor children. (R.208-210).

The plaintiff then took a default divorce (R.207) and the "Findings of Fact and Conclusions of Law" and "Decree of Divorce" were signed on October 11, 1978, to become final one month from date of entry. (R.211-215 and 216-219).

On July 1, 1980, the plaintiff married her present husband, Robert L. Lord. (R.364, paragraph 5 of Findings of Fact).

Under date of July 31, 1980, Robert Lord sent a letter to Mr. Shaw telling him he must continue paying alimony or Mr. Lord would collect it through court action. (R.239).

Mr. Shaw had his attorney contact Mr. Lord and attempt to resolve the matter without court proceedings. Following telephone conversations a letter dated August 6, 1980 was sent to Mr. Lord outlining why Mr. Shaw understood alimony would terminate upon remarriage. (R.240).

After other telephone conversations failed to resolve the question of alimony, Mr. Lord threatened and ultimately did file on August 29, 1980 a tort action against Mr. Shaw seeking to recover $256,500.00 for "alleged" torts committed by Mr. Shaw against his former wife during the time they were married. (R.241-242). Mr. Shaw believed and alleged that the tort action was filed to attempt to coerce him into accepting Mr. Lord's demands that he pay alimony. (R.227-228 paragraph 5; R.249 paragraph 5;) (T.98-99 note: transcript references are to stamped page numbers, rather than typed page numbers).

The tort action was dismissed by the trial court on the defendant's motion for summary judgment. The plaintiff, Mrs. Lord, has filed an appeal on that case which is now awaiting decision by the Utah Supreme Court. (see Lord v. Shaw, case number 17993).

After failing to get Mr. Shaw to meet her demands, Mrs. Lord through her husband, Attorney Robert L. Lord, filed an "Affidavit and Motion for Order to Show Cause In Re Contempt". (R.221-224). In the original affidavit and motion filed on September 22, 1980 the plaintiff claimed the

defendant was delinquent for child support and alimony for the months of July and August, 1980. The defendant filed a response with attached exhibits on September 23, 1980. (R.225-241). As part of his "Response", the defendant alleged that only three children were living with the plaintiff, that the minor child, Neil, had come to live with the defendant, and the defendant requested the court to determine what, if any, child support was in arrears for the months in question.

The hearing was set for September 24, 1980, the plaintiff was not present but was represented by her counsel, Robert Lord. The defendant was present and represented by his counsel and was ready to proceed. The court declined to hear any evidence and determined to have the matter set for a one-half day hearing. (R.245).

The defendant filed an "Amended Response" (R.246-266). The plaintiff filed: a "Motion to Modify" (R.267-268), a "Motion for Change of Judge" (R.269-270) and a "Notice of Trial". Trial was set for December 2, 1980.

On December 1, 1980 the plaintiff filed an objection to the trial setting (R.295-297) and over the defendant's objections the matter was continued since Mr. Lord stated he needed to be a witness and desired to associate other counsel in the matter.

Following this continuance the defendant attempted to have the matter set through various telephone calls to the

court administrator's office. The defendant was finally advised that all of the district judges normally sitting in Weber County had disqualified themselves.

Mr. Lord formally withdrew as attorney of record on August 17, 1981. (R.312). The plaintiff then filed an additional Affidavit and Motion to Reform the Divorce Decree. (R.313-316).

The matter was finally set for hearing on December 18, 1981, before the Honorable Douglas R. Cornaby.

At the time the matter came for hearing, the defendant had certain issues which it wanted determined by the court, and the plaintiff had certain issues which she desired to be heard by the court. The court indicated that it desired to have all of the issues heard since many had arisen in the 16 months since the matter had originally been set for hearing. (T.54).

It appears from the record that the issues which the parties presented for hearing were:

(a) Whether alimony terminated upon marriage or whether it continued for a three-year period until September 1, 1981, in spite of plaintiff's marriage.

(b) What child support delinquencies, if any existed.

(c) What child support obligation Mr. Shaw owed on the minor child, Neil, from the time he went to live with Mr. Shaw until he reached majority.

(d) Whether any child support should have been ordered for the oldest son, Rick.

(e) Whether a change of circumstance existed, such that child support should be increased.

(f) Whether the divorce decree should be amended to grant Mrs. Lord the tax exemptions for Federal and State income tax purposes.

(g) How the court should award certain items of personal property in dispute.

(h) Whether attorney's fees should be awarded to either side.

(i) Whether the proceeds from the sale of the home should be awarded; and if so, how the proceeds should be divided between the parties.

(j) Whether sanctions should be applied against the plaintiff for failure to answer the defendant's discovery requests.

The plaintiff had three witnesses testify at the hearing: Carol Shaw Lord, the plaintiff; Robert Lord, her husband; and Brent West, her attorney at the time of the divorce. The plaintiff also introduced 6 exhibits. These exhibits were: a) her handwritten statement of her 1981 income, b) a letter from Mr. Thorne to Mr. West, c) earning statements from Jordan School District, d) earning statements from Tender Touch Nursery, f) expenses testified

to by Mr. Lord, and g) shelter expenses testified to by Mr. Lord. (R.360).

The defendant had four witnesses testify at the hearing: Mr. Shaw, the defendant; Richard Shaw, the parties' son; Edna Gorley, a neighbor; and Evelyn Thompson, the defendant's mother. The defendant also introduced six exhibits: 1) a series of six letters between respective counsel prior to the divorce stipulation; 2) Mr. Shaw's record of expenditures; 3) Mr. Shaw's monthly living expenses; 4) seven copies of checks; 5) Mr. Shaw's record of child support payments; and 6) Mr. Shaw's proposed division of savings from the sale of the family home with attached documents. (R.360).

The court examined the exhibits and the testimony and issued a ruling from the bench. (T.172-197). The court essentially resolved the issues in favor of the defendant's positions.

At the conclusion of the hearing on December 18, 1981, there was considerable discussion as to how certain credits and offsets should adjust the division of proceeds from the sale of the family home. The court went through those in great detail, and gave a decision as to how the various credits should be awarded. The court then requested that each party submit any affidavits they may have regarding payments made to fix up the home to have it ready for sale,

and directed that they be done within 10 days from the date of hearing. (T.180).

Following the submission of the affidavits, the court on January 4, 1982 by written ruling, (R.350) made his award of credits regarding the payments made by the plaintiff. The defendant was given a credit in the amount of $130.70 for his share of expenses, which amount was apparently not objected to by the plaintiff.

Mr. Shaw's counsel prepared the "Findings" and "Decree" and submitted them to the plaintiff for approval on December 31, 1981 (R.384). No response from the plaintiff was received. On January 12, 1982 and January 15, 1982, Mr. Shaw's counsel submitted some changes to the plaintiff (R.385,386) and again no response was made by the plaintiff. Finally on February 2, 1982, Mr. Shaw's counsel requested the court to review the "Findings" and "Decree" since no word had been received from the plaintiff. (R.387).

The court signed the Findings of Fact and Conclusions of Law on February 5, 1982, and also signed the Order on Order to Show Cause Re Modification of Divorce Decree (see R.361-375).

Under letter dated February 3, 1982 the plaintiff sent to Mr. Shaw's counsel revisions to the Findings which were totally different than the judge's decision. By letter dated February 8, 1982 the plaintiff was apprised that the

Findings and Order prepared by the defendant were signed by the judge on February 5, 1982. (R.398).

On March 3, 1982 the plaintiff filed a Motion and Order for Extension of Time to File an Appeal (R.376-377), which was actually filed in person by Robert Lord, who had previously withdrawn from the case. At the time Mr. Lord filed the Motion the court set a hearing on April 5, 1982 to resolve any questions including the allowance of claims for repair costs to the home to get it ready for sale. (R.456-457).

After the defendant received a copy of the Motion of Extension to File an Appeal, the defendant filed an objection to the motion for the reason that an extension of time would damage the defendant in that the defendant had over $16,000 equity from the sale of the home which had been tied up since September of 1980, and the defendant had still not received any money from his share of the proceeds. (R.381-388).

Mr. Stanger then withdrew as attorney of record (R.380) and Ronald C. Barker entered an appearance. (R.379). On March 23, 1982, the plaintiff then filed a Motion to Vacate Findings, Conclusions and Judgments (R.399-401) and filed her proposed Findings and Order. (R.402,406). The defendant filed his objection to the Motion to Vacate and his objection to the plaintiff's proposed Findings. (R.389-398).

The plaintiff then filed a Notice of Appeal on April 2, 1982 (R.419) and failed to notify either the court or opposing counsel that she would not appear on the previously set April 5, 1982 hearing.

On April 5, 1982 the defendant and his counsel appeared but neither the plaintiff, her husband, or her counsel attended. The Court had to telephone the plaintiff's attorney to see why they were not in court. The Court was told that since they had filed a notice of appeal the previous Friday, they did not intend on appearing at the hearing. (T.2).

The Court proceeded with the hearing and ruled that the "Findings" and "Order" submitted by the plaintiff did not reflect the Court's findings or decision. (R.458, T.2). The Court ruled that the failure of the plaintiff to appear waived any objection she may have to the Court receiving by affidavit the costs of repair to the home. The Court ruled that the proceeds from the sale of the home should be released to the defendant immediately except that $3,000 should be put in a trust account pending resolution of the appeal. (T.11-12; R.458; R.476). The Court also ordered the plaintiff to pay attorney fees (T.11; R.476) and the court further ruled:

> "The actions of the plaintiff and Robert Lord, her husband and former attorney of record, appear to be designed to harass and designed to try to financially break the defendant, and are not a good faith legal effort by the plaintiff." (R.478 paragraph 7)

(See also supplemental transcript of hearing held April 5, 1982, page 11).

Following the hearing, "Special Findings of Fact and Conclusions of Law" (R.473-478) and "Supplemental Order on Order to Show Cause" (R.453-455) were signed by Judge Cornaby.

The plaintiff then filed an "Objection to the Entry of Order and Motion to Delay Entry of Order" (R.451). This was denied by the Court (R.456) who pointed out that the April 5, 1982 hearing was set and held at the specific request of the plaintiff who then chose not to appear.

Robert L. Lord on April 27, 1982 filed with the Court a motion entitled: "Motion to Intervene; Motion to Vacate Supplemental Order on Order to Show Cause; Motion to Vacate Special Findings of Fact and Conclusions of Law; Motion to Vacate Ruling; Motion to Modify the Aforesaid; and Request for Oral and Evidentiary Hearing" (R.485-487) and also filed affidavits in support of the motions.

On April 29, 1982 Mr. Barker withdrew as attorney of record for the plaintiff. (R.488).

On April 28, 1982, Lowell Summerhays filed as attorney for plaintiff a "Motion for New Trial, Motion to Vacate, Modify or Amend, and Request for Oral and Evidentiary Hearing" (R.469). Also on April 28, 1982, Robert L. Lord filed a "Motion for New Trial". On May 5, 1982, Judge Cornaby denied all motions filed. (R.472).

As part of the April 5, 1982 hearing, the court specifically ordered that the monies currently held in Mountain States Savings in the names of plaintiff and defendant be divided equally, with $3,000.00 to be held in trust to cover any issues pending appeal, and the defendant's amount was to be turned over to him immediately. The Court also ordered that this condition would apply to the extension of time in which to file the appeal. Since the court order, the plaintiff has absolutely refused to cooperate or allow the same to be done. (R.454).

ARGUMENT

POINT I

THE COURT ORDER REQUIRING DEFENDANT TO PAY ALIMONY TO PLAINTIFF WAS AUTOMATICALLY TERMINATED UPON PLAINTIFF'S MARRIAGE.

The general rule in the State of Utah is that alimony terminates upon the marriage of the former spouse. This general rule has been declared to be state policy by the 1979 Legislature.

UTAH CODE ANN. §30-3-5(2) (Supp.1981) sets out this basic policy:

> "(2) Unless a decree of divorce specifically provides otherwise, any order of the court that a party shall pay alimony to a former spouse shall automatically terminate upon the remarriage of that former spouse, unless that marriage is annulled and found to be void ab initio in which

> case alimony shall resume providing that the party paying alimony be made a party to the action of annulment and that party's rights are determined." (emphasis added)

Even prior to the announced legislative policy regarding terminating alimony upon remarriage, the Utah Supreme Court had clearly articulated the rule that alimony terminated upon marriage.

The Utah Supreme Court in the case of Austad v. Austad, 2 Utah 2d 49, 269 P.2d 284 (1954), clearly stated that in the state of Utah alimony terminates upon remarriage of the wife. In this regard the Utah Supreme Court made a rather lengthy discussion of a prior Utah Court case, which may have given some validity to the proposition that alimony would not terminate upon remarriage, and the Utah Supreme Court clearly overturned that prior decision. In this regard the Utah Supreme Court stated:

> "It appearing that the Myers rule has very little foundation in the decisions of the courts of our sister states, of our own state, or in reason, to induce us to adhere to it we conclude that notwithstanding what has been said in earlier cases, there is implicit in the divorce decree the provision that the alimony continues only so long as the wife remains unmarried. Accordingly the alimony awarded plaintiff terminated upon her remarriage...." id. 58.

The respondent appreciates that under the decision announced in the Austad case there may be some exceptional situations where alimony would not terminate upon remarriage.

> "In reaching this decision we are not to be understood as holding that the same result would

> eventuate where a sum of alimony was decreed in lien of dower, or in settlement of property rights acquired by the wife, or where the alimony is awarded in a lump sum payable in installments. And we further observe that under some exceptional circumstances this result might be so unconscionable or inequitable that the court, under its equitable powers would decree that the wife does not lose her right to alimony upon remarriage. In such instance the burden would be upon the wife to prove those facts." id. 58 (footnotes omitted)

In the instant case one is thus faced with determining whether the divorce decree "specifically provides otherwise" that alimony would not terminate upon remarriage or whether the alimony awarded Mrs. Lord was "in a lump sum payable in installments".

The divorce decree reads as follows:

> "5. The Defendant further agrees to pay to the Plaintiff the sum of $125.00 per month as and for alimony. This alimony is to run for a period of three years, beginning October 1, 1978. At the end of that time, the Plaintiff agrees to permanently waive any future alimony.
>
> 6. Both parties acknowledge that the Defendant's payment of the house payment is included as a part of the child support and alimony and is not in addition to those payments. The house payment will be made directly to the mortgage company on the first of each month. The balance will be paid directly to the plaintiff by the 20th of each month." (R.218).

There is nothing in the divorce decree or in the Findings of Fact to suggest alimony would not terminate upon her marriage.

Also the language of the Divorce Decree does not mean the alimony was a "lump sum payable in installments". Lump sum alimony judgments have traditionally been characterized

by a specific sum being stated, after which a provision is included which stipulates the manner in which the sum is to be paid. The essence of lump sum is this stating of a specific sum certain. The installment payment provision, if such was decreed, was merely a method of carrying the judgment into effect. Instructive in this regard is the language of the court in Morris v. Morris (Fla. App.1973) 272 So. 2d 203, wherein it reads:

> "...lump sum alimony may properly be payable in installments, but in the cases reviewed the amount awarded was for a specific sum to be paid in full."

Also see Cann v. Cann (Fla. App. 1976) 334 So.2d 325.

The alimony provision in the present case is dramatic in contrast. The court stated no specific lump sum. The alimony provision was structured as a continuing obligation on the part of respondent to pay his former wife, a sum certain, that being $125.00 per month, which obligation would only last three years at the longest or until she remarried.

The trial court clearly construed the alimony provision to terminate upon remarriage, and also found that the negotiations leading up to the stipulation provided it would terminate upon the plaintiff's marriage.

The court in announcing its decision from the bench stated:

> "THE COURT: In ruling on this matter the Court will take the matters item by item. The Court is going to deal first with the alimony question. I

> think [plaintiff's] counsel, of course, has objected to the Court going behind the decree, that the decree speaks for itself on its face, and the Court believes that the decree does speak for itself on its face; but my interpretation of what it says, obviously, is different than the way -- at least some of the way you are interpreting that matter. The court does not find this to be a lump sum alimony. The Court -- or in that kind of order the Court finds that was $125 per month alimony. It was contemplated that the plaintiff was going to stay single. While that may have been contemplated and then, as a matter of fact, worked out to be that way, this was just like any normal provision would have been put in a decree for alimony. I think that the provision terminates on marriage and the Court finds that the marriage did take place July 1st, 1980, and that terminated [alimony] at that time. If the Court goes behind the decree, and I believe that is the general -- that's the way the Utah law has it now, if the Court goes behind it and then begins to look at testimony offered today as to what the testimony between the parties are, I still come up with the same answer. The letters between counsel seem to be that that was an agreed thing, specifically, by the defendant, that it would terminate after three years or remarriage, and remarriage not having put into it. It's clear, too, from the plaintiff's testimony that she said that she intended it to run a full three years. The reason she intended it to run a full three years -- this comes from counsel and not from her -- is because she didn't anticipate marriage. She was in school and she was going to need it for that full period of time. At the time of remarriage the law has -- and has a presumption in that that responsibility ceases with the prior husband and falls to the present husband. And so, it's no longer on the defendant. (T.173-174).

The court decision that the intent was that alimony would terminate upon plaintiff's marriage is amply supported by the record.

Plaintiff's Exhibit 1 a series of six letters clearly shows the parties agreed alimony would terminate upon her marriage.

Mr. Thorne's letter to Mr. West, dated September 14, 1978 contains this provision:

> "Mr. Shaw would also pay $125.00 per month for alimony for three (3) years or until Mrs. Shaw remarries." (R.360).

Mr. West's letter of September 20, 1978 to Mr. Thorne states:

> "This letter is to advise you that we have accepted the terms set out in your letter dated September 14, 1978, in regards to child support and alimony." (R.360).

On cross-examination at trial Mr. West also admitted that the provisions in the September 14, 1978 and September 20, 1978 letters was the final agreement reached on alimony.

> "Q (By Mr. Thorne) Were there any other further negotiations that you recall that we had which would provide that alimony was not to terminate on remarriage?
> A. No. the Only negotiations I recall is our exchange of letters. I recall no specific phone call between yourself and I where we actually discussed that, other than what was in the written correspondence.
> MR. THORNE: That's all.
> MR. FITT: You may come down, sir. Thank you.
> THE COURT: You may step down and be excused." (T.94).

The appellant's position that the alimony was to have been paid for three years irrespective of her marriage is simply contrary to law and to the facts as found by the trial court.

This Court has often stated the rule, that on appeal considerable deference will be given to the trial court's

findings. In Christensen v. Christensen, Utah, 628 P.2d 1297, 1299 (1981) this Court stated:

> "[O]n review this Court will accord considerable deference to the judgment of the trial court due to its advantaged position and will not disturb the action of that court unless the evidence clearly preponderates to the contrary, or the trial court abuses its discretion or misapplies principles of law. Fletcher v. Fletcher, Utah, 615 P.2d 1218 (1980); Carter v. Carter Utah, 563 P.2d 177 (1977) Watson v. Watson, Utah, 561 P.2d 1072 (1977); Eastman v. Eastman, Utah, 558 P.2d 514 (1976); Harding v. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971)."

The record amply supports the trial court's decision that alimony would terminate upon plaintiff's marriage.

POINT II

PLAINTIFF IS NOT ENTITLED TO SUPPORT PAYMENTS FOR THE MINOR CHILD NEIL AS ACCRUED FROM THE TIME OF HIS VOLUNTARY REMOVAL FROM PLAINTIFF'S CUSTODY TO THE RESIDENCE OF DEFENDANT.

Although recognition is duly granted to the rule that the divorce decree fixes the support obligations between parties, and that they cannot modify or change their obligations by their conduct, it is also recognized that specific circumstances may make adjustments necessary.

In Stanton v. Stanton, 30 U.2d 315, 320, 517 P.2d 1010 (1974) this court stated:

> "However, in matters concerning the custody and support of children, because of their highly equitable nature, it is appropriate for the trial court to take into consideration the entire

> circumstances in making any order of enforcement of the decree, by contempt or otherwise, having in mind his equitable powers, to make any adjustment he may think fair and justified."

Courts have recognized that it may be unjust to require a father to pay child support payments to a former spouse when the child has come to live with his father. Recognizing the equities of such a situation the court in Nabors v. Nabors (Ala.Civ.App. 1978) 354 So 2d 277 declared:

> "When an order requires a divorced husband to make periodic payments for the support of children and he has supported the children while they lived with him, the wife cannot recover payments for support during that period, nor during the period third persons were supporting the children or the children were supporting themselves."

A case on nearly all fours with the instant dispute is found in Strum v. Strum, 317 NE 2d 59 (Ill.App.1974). There a sixteen year 11 month old girl left the custody of her mother to live with her father. One year later, the mother brought suit to recover the support accrued under the child support decree. The court ruled that the mother's conduct presented a situation where equitable estoppel should apply to prevent recovery. Specifically, the court said:

> "It seems abundantly clear that the plaintiff either consented to or acquiesced in Cynthia living with her father and he was supporting her. She became eighteen years of age August 11, 1972 and at the time of the hearing on the rule to show cause was past eighteen years of age. It was not until July of 1972 that any question of termination of payments for her support was raised. [she had left her mother's custody in July of 1971]. Under these circumstances, it is our opinion that this situation is appropriate for the doctrine of equitable estoppel and that as to

> Cynthia, the trial court properly dismissed the petition for a rule to show cause".

A close scrutiny of Strum reveals a surprising similarity of facts with those of the instant matter. In both cases a child, within approximately one year of gaining majority, decides to live with his non-custodial parent. That parent supports the child until it reaches its majority one year later. The custodial parent delays action to recover support for nearly one year or longer. Strum obtained this delay by not filing suit; Mrs. Shaw filed suit, two months after the departure, to recover alimony payments. The subject of Neil's support was not raised in that complaint, instead his support was raised in trial some 14 months after the filing of the alimony complaint.

The equities of the instant case are sufficient to remove it from application of the general rule. First, the appellant's suit of September 1980 was to recover alimony. Subsequently, appellant obtained a series of continuances of the matter for fourteen months. The respondent was blameless in this causing of delay. The presence of the suit prevented the respondent from obtaining a timely modification of the custody which would have formally relieved him of the obligation to make Neil's child support payments. Appellant's behavior resulted in defendant-respondent's supporting Neil for a full year without the benefit of legal sanction.

Appellant's cited case law is deficient in the present case. The situations involved there consisted of instances where the supporting parent assumed support for short periods of time; e.g. weekends, weeks, and at most three months. Here, Mr. Shaw has supported his son for more than a full year, a considerably longer period of time. Justifiably, the expenses of a weekend and such short periods of time should not be subtracted from the support obligation. The inclusion of such would cause a disruption in budgeting. In the instant case, a full year of support does not present these issues. Instead, an allowance of the petition would result in a windfall allowance to appellant, in reality an unjust enrichment.

The trial court clearly perceived that under the facts of the present case no child support arrearage should be given to Mrs. Lord, since she accepted Neil's decision to live with his father and Mr. Shaw paid all of Neil's expenses.

> "I am going to talk about child support next. The provisions in the decree are clear as to child support. That it will be $75 per child per month under certain circumstances. One circumstance, of course, is that up to the time they become 18 years of age and the other, if they are in school. I think generally inherent in this is, of course, the plaintiff in this case [is] also supporting him. On about August 1st of 1980 the plaintiff ceased to support the one child, Neil, and has asked for child support because there was no [change made in the] decree.
>
> Now, of course, these matters were initially filed shortly thereafter in this court. I won't look up the exact date, but my memory tells me that it was

somewhere in September of 1980 that this action began, roughly 15 months before we get into court for trial and for a final hearing on it. And I suppose if the matter had been heard back 15 months ago or someplace close to that, that the decree could have been amended if the Court decided it was appropriate. The court is going to think it proper that the defendant should not be required to pay support for the child while he is actually supporting the child, and though the decree provides for a specific amount of child support, the Court should amend that decree order -- directing it to be effective as of August 1st, 1980. Of course, in this area this is an equitable doctrine to try to take the burden off or put a burden on the proper parties. The plaintiff has an obligation to support just as the defendant does. I am not trying to lift it off of one shoulder and place it on the other. (T.174-175) (see also R.365 paragraph 10).

POINT III

PLAINTIFF HAS NOT SHOWN A SUBSTANTIAL CHANGE OF CIRCUMSTANCES; THEREFORE CHILD SUPPORT SHOULD NOT BE INCREASED.

Appellant's position contends that the trial court abused its discretion by failing to find a sufficient change of circumstances to permit a modification of child support payments.

The standard to determine whether child support should be increased is whether there has been a substantial change of circumstances from the situation existing at the time of the divorce. see King v. King, 29 Utah 2d 436, 511 P.2d 155 (1973).

On appeal the standard used is that the decision of the trial court on a petition for an increase in child support will not be disturbed unless it appears that the evidence so

preponderates against the trial court's findings that inequity or injustice would result. see Owen v. Owen, Utah, 579 P.2d 911, (1978).

As the court noted in Owen decision:

> "...due to the advantaged position and the responsibilities of the trial court in such matters, we will accord some verity to his actions; and we will not disturb his findings nor the determination made thereon unless it appears that the evidence preponderates against them so that an inequity or injustice has resulted." 579 P.2d at 913.

The Owen case is insightful for many of the contentions raised by appellant. There the plaintiff argued for increased support on the basis of inflation, the changing needs of growing children and the feeling that plaintiff deserved a better class of living environment. Similar attention was also given to the increased salary of the defendant husband.

The Owen case also gave other guidelines to use in determining proper support payments. First, both the mother and the father are responsible for the support of children; second, the issue for the court to adjudicate was the needs of the children and not necessarily the manner and standard of living desired by the plaintiff; third, while an increase in the father's income is important, it is only to be considered along with the other facts and circumstances concerning the needs of the children and the ability of the parents to pay for them; fourth, the past payment record of

father can be used to judge the equities as between the parties and the welfare of the children.

At trial the court found that at the time of the divorce Mrs. Lord was making $150.00 per month, she now makes over $500.00 per month; the court found that while the plaintiff's housing costs have gone up, they have voluntarily increased so plaintiff and her husband could live in a more expensive home. The court also found that while the defendant's gross income increased, his take home income only slightly increased, and while the defendant may not have a legal obligation to do so, he is solely supporting the three older children. (R.364-367).

In stating his oral decision the court made these comments:

"The changed circumstances, of course, really came with the marriage, the remarriage of plaintiff Lord in 1980, July 1. In September of that year they purchased a new home. While necessity may have required that, they get a larger house for the children that would be more expensive than in the apartment that Mr. Lord was currently renting. There is nothing that required them, of course, to buy an $80,000 home..." (T.176).

"All of this that I am saying persuades the Court, however, that though the plaintiff's expenses have gone up considerably, they voluntarily gone up, and I suppose that if perhaps -- a poor example, but I suppose if a person had a hundred thousand dollar income per year, they could show where the amount expended per child well might grow proportionately, and if it were $50,000 income, it would be some proration less. If it were 25, it would be some proration less, but it would always grow as the income grows, because people just normally, not always, but normally, spend more

both on themselves and children as this takes place. They perhaps -- well, I won't go into more detail. All of this persuades me that there has not been shown before the Court today a change of circumstances such as would justify the Court in changing the original award of $75 per month per child. Cost of living, obviously, has made the cost of -- without all these other things -- has made the cost to the plaintiff go up. The defendant has, obviously, had an income increase, gross income increase of almost $4,000. He has testified that the net increase is very slightly above what it was initially at the time of the divorce. He has three children in his home to support, but has no legal obligation to support them under our law, and yet, I recognize parents do take that responsibility upon themselves to support to some degree, if not a major portion of the support, for adult children when they are living in the home. Just as I would if they were in my home. And it's complimentary to the parents, but it's not a fact that the Court can take into account so far as changed circumstances go. But, even all of those things being considered and discounting the three children in the home, I don't think that there has been a showing that the defendant's circumstances have changed enough that would justify the change of the order above the $75 a month per child." (T-177-179).

The plaintiff in her brief attempts to show her income at the time of the divorce was significantly more than the trial court found. But counsel admits on page 5 of his brief that such evidence was not introduced at trial.

It is clear that the trial court's findings and decision are not only supported but are mandated by the actual evidence introduced at trial.

POINT IV

THE TRIAL COURT'S DIVISION OF PROCEEDS FROM THE SALE OF THE HOME SHOULD BE AFFIRMED.

The original divorce decree provided for the division of proceeds from the sale of the home. The decree provided:

> "The Plaintiff will be awarded the permanent and exclusive occupancy of the parties' home located at 2728 North 600 East, North Ogden, Utah. Title to the house will remain in the joint name (sic) of the parties until such time as they divide the equity. The Defendant will continue to make a monthly house payment of $250.00 for a period of three years. At the end of that time, the parties agree to divide the equity in the home equally. Payment of the Defendant's equity will be made upon the occurance of any one of the following events:
>
> a. The voluntary sale of the home by the Plaintiff.
> b. The remarriage of the Plaintiff.
> c. The youngest child having reached the age of 18.
>
> No interest will accumulate on the Defendant's equity. During the period of three years in which the Defendant makes the house payment, he will be able to claim any and all tax deductions as long as he is current on the payments." (R.217).

The plaintiff married Robert L. Lord on July 1, 1980. Technically the defendant was entitled to his one-half of the equity at that time. However, realizing that the plaintiff desired to move to Salt Lake City, the parties placed the home for sale. An earnest money agreement was entered into with the parties, as sellers, and a Mr. & Mrs. Price, as buyers. (Def. Ex 6 p.2).

The home was sold and the parties received over $34,000.00 as their equity. The plaintiff and her husband refused to disburse Mr. Shaw's money to him and threatened not to complete the sale. (T.100-101). During this same time the tort action and this action were filed and in order to save the house sale, Mr. Shaw accepted their demand to place the entire proceeds in a trust account until this legal matter was heard. (He obviously did not know the legal proceedings could be prolonged such that it would be years until he received his share of the money.)

The trial court started with the premise that the proceeds from the sale of the home should be divided equally between the parties; and explicitly ruled that the costs of repair were to be submitted by affidavit within ten days, (T.180).

The court then gave each party certain credits before the division. At the time of trial all parties finally agreed to the rent and repair credits. (T.192).

The court's decision as reflected in the "Findings of Fact" was that Mrs. Lord should receive credits of a) $60.00 for back child support, b) $166.48 for adjustment of rent and child support for September 1980; c) $225.00 for October 1980; and d) $564.00 which was deducted from the repair costs of the driveway; the plaintiff was also allowed $503.93 for her share of the home repairs. Mrs. Lord's total credits were $1,519.41. (R.367-368).

Mr. Shaw was given credits of a) $550.00 to equalize savings withdrawals made on April 17, 1981; b) $125.00 for rent received by Mrs. Lord in August 1980; and c) $130.70 for his costs of repair to the home. Mr. Shaw's total credits were $805.70.

The difference in the credits each received was $713.71. The court thus ruled Mrs. Lord was to first receive $713.71 and the balance in the account was to be divided equally.

The court specifically ruled that all repair costs were to be submitted within 10 days of the trial. (T.180). The plaintiff in her brief argues that the court failed to consider her supplemental affidavit claiming expenses of $2,589.61. The record clearly shows, however, that the supplemental affidavit was not filed until January 14, 1982, (R.358) nearly a month after the hearing and ten days after the Judge had ruled on the repair costs. (R.350).

It is also submitted that even if it was error to determine repair costs by affidavit rather than through shown witnesses or other evidentiary means, that such an error was waived by the plaintiff at the original hearing when it was agreed by both parties to submit such costs by affidavit. (T.180).

The plaintiff further waived any claimed errors made by the court by failing to appear at the April 5, 1982 hearing.

The April 5, 1982 hearing was set at the specific request of the plaintiff by her husband who personally appeared before the trial court. (R.456). One of the very purposes for holding the hearing on that date was to resolve any questions as to what costs were allowable. (T.4-5). The plaintiff cannot fail to appear at a hearing and then argue that she be allowed another hearing on remand to determine the very issues which she chose not to pursue prior to her appeal.

POINT V

THE INSTANT APPEAL SHOULD BE DISMISSED AS PREMATURE; AND ALL FINDINGS AND ORDERS ENTERED AFTER THE NOTICE OF APPEAL WERE FILED SHOULD STAND.

The Utah Rules of Civil Procedure allow for an appeal to be taken under the provisions of Rule 72. Therein it states:

> "(a) An appeal may be taken to the Supreme Court from all final orders and judgments; in accordance with these rules...."

Conformance to the rule demands that the judgment appealed be final. The Utah court was required to interpret this finality requirement in Peterson v. Ohio Copper Co, Utah, 266 P.1050 (1928). There the appellant had filed a notice of appeal one day after motioning for a new trial.

The motion had not been acted upon by the court. In refusing to hear the appeal the court said:

> "The constitution of this state (Art.8 Sec. 9) as interpreted by this court, permits of (sic) an appeal to this court from a judgment of the district court only in cases where the judgment of the district court is final. The question therefore is, when does the judgment of a district court for purposes of an appeal become final in a case where there is a motion for a new trial reasonably made after the entry of the judgment or decree?
>
> The uniform holding of this court in such cases has been that the judgment becomes final when the motion for a new trial is overruled. Consequently, the effect of a motion for a new trial, when seasonably made, is to suspend the judgment or decree for purposes of appeal until the motion has been disposed of." 266 P. at 1050.

Similar logic is found in the case of First National Bank v. Nielson, 60 Utah 227, 208 P.522. (1922). There the court said:

> "This court, in an unbroken line of decisions, has held that, where a motion for a new trial has been seasonably filed, the motion suspends the finality of the judgment,...and that while the motion is pending and undetermined an appeal is premature. 208 P at 523. (emphasis added)

Support is found for this position in Bowman v. Ogden City, 33 Utah 196, 93 P 561 (1908); and Watson v. Mayberry, 15 Utah 265, 49 P 479 (1897).

The Peterson court, in dismissing an argument on the procedural interrelationship of motion for new trial and notice of appeal noted:

> "If it should be contended that the taking of the appeal was in effect a waiver or abandonment of the motion for a new trial it is

> doubtful if such contention would be sound. Waiver must be intentional. 40 Cyc. 264. The same is true of abandonment. 1 Cyc. 5. Appellant had no intention either to waive or abandon his motion for a new trial because he assigns the overruling of the motion as error. id at 1052

The Utah position of classifying an appeal as premature if taken while a motion for new trial is undisposed of is consonant with the holdings of many other jurisdictions. In 4A CJS Appeal and Error §461 pg. 155 the annotator lists support as including decisions from Alabama, Colorado, Georgia, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, New Jersey, Ohio, Oklahoma and Pennsylvania.

The Utah Rules of Civil Procedure, Rule 73(a) presently provides for a suspension of the time period allowed for filing of notice of appeal, upon the submission of timely motions under rules 50(b), 52(b) and 59. Rule 50(b) allows for a granting or denying a motion for judgment notwithstanding the verdict. Rule 52(b) entails motions to amend or make additional findings of fact whether or not an alteration of the judgment would be required if the motion is granted. Rule 59 allows the alteration or amendment, or the making of new findings and conclusions and also allows a motion for a new trial.

In light of the past decisions providing that a judgment is not final pending a Motion for New Trial, it seems apparent that prematurity should also attach to any

appeal taken while motions under Rules 50(b), 52(b) and 59 are undisposed of. The suspension of the appeal time period by Rule 73(a) indicates that the judgment remains indefinite, and that continued litigation in the district court is a reality. Rule 73(a) should be viewed as an adoption of Peterson and an extension of that case's doctrine to the question of prematurity as applicable to the motions available under Rules 50(b), 52(b) and 59.

It is also clear that the hearing set for April 5, 1981 was set at the time the extension of time for filing appeal was filed (R.456). For these reasons it is submitted that the appeal was filed prematurely.

It is the respondent's position that this court in its discretion may dismiss any appeal that is filed prematurely. In Wood v. Turner, 18 Utah 2d 229, 231, 419 P.2d 634 1966 this court stated:

> "The premature filing of the notice of appeal such as was done in this case should not be regarded as a defect which will ipso facto entirely deprive the appellate court of jurisdiction. It is an irregularity which would be grounds for dismissal of the appeal within the discretion of the court. Such remedy would undoubtedly be well advised in the cases where the judgment had not become definite, or had not become final, or where remedies before the trial court had not been exhausted."

There really isn't any dispute that the remedies before the trial court had not been exhausted since the court and the defendant were prepared and appeared for the April 5, 1981 hearing to get a final judgment on the motion and

request filed by the plaintiff. For these reasons it is submitted there was a premature filing of an appeal and the appeal should be dismissed.

Another ground for the dismissal of this appeal is the refusal of the appellant to comply with the condition imposed for the extension of time to file the appeal.

When Mr. Lord appeared before the trial court on March 3, 1982 and filed the plaintiff's "Motion and Order For Extension of Time to File Notice of Appeal" he represented and the motion stated, "Defendant will suffer no prejudice if the time is extended, and it would be in the interest of justice to grant the additional time." (R.377).

Mr. Shaw strongly disagreed that the extension would not prejudice him.

The granting of an extension under Rule 73(a) to file an appeal is a discretionary function of the trial court, and inherent with that discretion is the right to impose any conditions deemed to be in the interest of justice, including imposing a condition nunc pro tunc. see Neuringer v. Wortman, Mont., 607 P.2d 543 (1980); Grover v. Hawthorne, Oregon, 121 P.804 (1912).

After the defendant appeared on the April 5, 1981 hearing the trial court ruled as follows:

> "That the extension of time granted to plaintiff in which to file a notice of appeal is conditioned upon the defendant being entitled to his share of the proceeds from the sale of the home. In this regard it is determined that $3,000.00 shall be placed in a special trust account with

> Mountainwest Savings and Loan which cannot be withdrawn except upon joint signature of plaintiff and defendant, or upon further order of the Court, and the defendant is entitled to his one-half of the principal and accrued interest to date he withdraws his share, and the plaintiff is entitled to her one-half. The account number is number 04-001637-14 which had a total of $34,629.13 as of April 5, 1982." (R.454).

There was no doubt in the trial court's mind that this condition was fair and that the $3,000 would more than cover any adjustments to the division of proceeds, should this court reverse any part of the trial court's ruling. (T.10).

The plaintiff has refused to comply with this requirement and the appeal should be dismissed since the imposition of the release of funds was made a condition to extending the time for appeal.

POINT VI

THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR THE AWARD OF ATTORNEY FEES ON APPEAL.

At the April 5, 1982 hearing the trial court made several findings regarding the conduct of this action by the plaintiff and her former counsel. Among these findings are the following:

> "3. The court thereafter was contacted by Robert Lord, husband of the plaintiff, who had formerly been an attorney of record, and who appears to really be the moving attorney in the matter. Mr. Lord presented a Motion and Order for Extension of Time to File an Appeal which was granted on March 3, 1982, copies of which are in the court file. Mr. Lord also requested a hearing date for plaintiff's motion.

4. Thereafter the plaintiff filed a Motion to Vacate the Findings of Fact and Conclusions of Law and Order and Judgment, and the defendant filed a response to the plaintiff's motion. The plaintiff further filed her proposed Findings and Conclusions with the court.

5. The Court finds that the Findings of Fact and Conclusions of Law previously signed by this Court on February 5, 1982 do, in fact, represent the Findings of the Court and the decision of the Court, even though they were prepared by defendant's counsel at the court's request.

6. The Court specifically finds that the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff do not reflect the Findings of this Court, and in particular that paragraphs 10, 12, 13, 14, 15, 19, 22, 23, 24, 25, and 28 do not represent Findings made by the Court.

7. One of the purposes for holding the hearing on April 5, 1982 was to resolve any objections as to the court allowing evidence of costs to repair the home for sale, being submitted by affidavit. The court was prepared to allow testimony regarding the affidavits to see if the court's ruling was appropriate. The court finds the plaintiff has not chosen to pursue that matter by virtue of failing to appear and the objections of plaintiff are denied and deemed to be waived.

8. The Court finds that the hearing set for April 5th was set at the request of the plaintiff and that the plaintiff failed to advise either the court or the defendant or defendant's counsel that plaintiff would not appear at said hearing.

9. The Court finds that the plaintiff's Motion to Vacate the Findings and Conclusions is not in order and should therefore be denied.

10. The Court finds that the plaintiff is entitled to an award of attorney's fees for appearing on this hearing, and in preparing special Findings and Conclusions and Orders in the sum of $390.00 and judgment may enter against the plaintiff for said amount.

11. The Court finds that the plaintiff's affidavit for additional costs in repairing the

home is not in order and that the decision as reflected in the original Findings and Order signed by the Court reflects the amount of money the plaintiff is entitled to.

12. The Court finds that the proceeds from the sale of the home are presently in a joint account requiring joint signature of plaintiff and defendant at Mountainwest Savings and Loan at the Branch Office located at 114 North Washington Boulevard, Ogden, Utah, and that the account number is 04-001637-14 and that there exists as of April 5, 1982 the sum of $34,629.13.

13. The Court finds that even if an appeal is taken, the only amounts in dispute would be less than $3,000.00 from the savings account.

14. The Court therefore finds that from the amount held by Mountainwest Savings & Loan there should be $3,000.00 placed in a trust account which cannot be released except upon joint signatures of the parties or upon order of this Court, and after the $3,000.00 is placed in the special trust account, that the defendant shall be entitled to one-half of the balance from the account. The plaintiff is entitled to the other half if she desires to withdraw the funds.

15. The Court finds that Mountainwest Savings & Loan should disburse to the defendant his share of the money free and clear of any claim of the plaintiff.

16. The Court further finds that disbursement of the money to the defendant is a condition to the order of extension of time in which to file the notice of appeal, granted on March 3, 1982.

17. The Court finds that at the original hearing of this matter on December 18, 1981 there was testimony presented that the plaintiff's husband and former attorney of record, Robert Lord, made allegations that Mr. Lord would do everything he could to financially break the defendant. The Court finds that that's probably what Mr. Lord's attitude in the matter is, based upon the history of what has taken place in this court case since this District Judge has been involved." (R.475-477).

The Supplemental Order also contained the following order:

> "7. The actions of the plaintiff and Robert Lord, her husband and former attorney of record since this District Judge has been assigned this case, appear to be a deliberate effort to try to break the defendant financially and to use their legal position to punish the defendant, and have not been made in good faith."

The actions of the plaintiff and her husband, who filed a petition in intervention, on appeal also seem revealing as to how they have tried to obstruct, delay, and run up legal costs of the defendant. In fact, this court in a previous motion assessed damages of $100.00 for appellant's failure to timely file her brief.

Courts have stated that attorney fees are appropriate damages on appeal where the appellant has used dilatory tactics, where an appeal lacks merit, or where an appeal is made in bad faith. see Varnum v. Grady, Nev, 528 P.2d 1027 (1974); Matter of Suesz Estate, Kansas, 613 P.2d 947 (1980); Hock v. Lienco Cedar Products, Mont, 634 P.2d 1174 (1981).

> "Where there was no probable cause for appeal by defendant from order refusing to set aside default judgment, and it appeared that appeal was part of long continued and calculated scheme by defendant to prevent enforcement of valid obligation for which defendant had no proper defense, award of...damages for delay resulting from appeal was warranted." Stirling v. Dari-Delite, Inc., Oregon, 494 P.2d 252 motion denied, 498 P.2d 753 (1972).
>
> "Since disposition made by District Judge was faultless on the basis of prevailing law and there was no room for dispute, no reasonable cause existed for appeal; accordingly, the Supreme Court would impose a penalty, in addition to attorney

fees, without proof of pecuniary loss or other damage. Reno Livestock Corp. v. Sun Oil Co., Wyoming, 638 P.2d 147 (1981)

It is respectfully suggested that this case presents a situation where the matter should be remanded to the trial court for an award of attorney fees for services rendered on appeal.

CONCLUSION

This record on appeal presents a rather bizarre episode of legal maneuverings in behalf of the plaintiff. While the legal proceedings have been prolonged and time consuming, they have also been costly to the defendant-respondent in that he has been denied the use of money he is legitimately entitled to from the proceeds of the sale of the family home, and he has been required to expend extensive money to defend himself in court against his former wife.

It is submitted that the record on appeal amply supports the legal positions taken by the defendant.

1. The terms of the divorce decree providing that the defendant paid alimony to the plaintiff automatically terminated upon the plaintiff's marriage.

2. The plaintiff is not entitled to any child support payments for the minor child, Neil, which may have accrued from the time Neil voluntarily left his mother's home to reside with his father.

3. The plaintiff has not shown a substantial change of circumstances sufficient to increase the child support obligations paid by the defendant, and there has been no abuse of discretion by the trial court in refusing to increase child support. Also, there is no evidence presented on appeal to show that the trial court abused this discretion in failing to change the divorce decree as it relates to tax exemptions on the minor children for Federal and State income tax purposes.

4. The trial court's division of proceeds from the sale of the home should be affirmed. The plaintiff should first be awarded the sum of $713.71 less the attorney fees awarded at the April 5, 1981 hearing of $390.00 less any awards of attorney's fees and costs allowed by this court on appeal.

5. This appeal should be dismissed as having been filed prematurely, and all Findings and Orders entered after the notice of appeal were filed should stand, including the award of attorney's fees entered in the April 5, 1981 hearing.

6. Because of the plaintiff's frivilous appeal, dilatory action in processing the appeal, and evidence that the appeal was filed in bad faith, this matter should be referred back to trial court for the award of attorney's fees to the defendant for his fees paid in defending himself on appeal.

Respectfully submitted this 22 day of December, 1982.

MANN, HADFIELD & THORNE

By _____
Jeff R. Thorne
Attorney for Respondent
P. O. Box "F"
Brigham City, Utah 84302

MAILING CERTIFICATE

I hereby certify that I mailed ~~a~~ two true and correct copy~~y~~ies of the foregoing Brief of Respondent, postage prepaid, to Lowell V. Summerhays, 420 Continental Bank Building, Salt Lake City, Utah 84101 this 22 day of December, 1982.

_____
Peggy Jackson, Secretary