

1967

## Wanda Carter v. Ercil v. Carter : Reply Brief

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**In the Supreme Court of the  
State of Utah**

UNIVERSITY OF

WANDA CARTER,  
Plaintiff and Respondent,

vs.

ERCIL V. CARTER,  
Defendant and Appellant.

MAY 1954  
CASE NO. 4000

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**REPLY BRIEF**

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Appeal from Order of the Fourth Judicial  
Utah County, State of Utah  
The Honorable Allen B. Sorenson,

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Clk. Sorenson

# In the Supreme Court of the State of Utah

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WANDA CARTER,  
Plaintiff and Respondent,

vs.

ERCIL V. CARTER,  
Defendant and Appellant.

CASE  
NO. 10751

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## REPLY BRIEF

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In the respondent's brief, respondent has referred to Findings of Fact, Conclusions of Law and an Order Modifying Decree which were not sent to the Supreme Court with the Appellant's Designation of Record on Appeal. Since the respondent has chosen to raise these matters by his brief, we have deemed it important to send these documents to the Supreme Court.

The fact of the matter is that at the time of the Amended Decree, the defendant was brought into Court on an order to show cause and the show cause order was related to the support of a child that had been born to the parties, subsequent to the divorce. This fact is referred to in the Statement of Facts in the appellant's Brief.

At that time the undersigned, counsel for the defendant, did not have available to him a copy of the original Findings of Fact and Conclusions of Law and Decree, however, it was agreed by the respective parties that the original decree of divorce could remain in effect and that additional provision would be added providing for the support of the child, Cory C. Carter, and also providing for reasonable rights of visitation with the child by the defendant, his father. No court record was made of the stipulation.

Counsel for the plaintiff took considerable liberty with the Findings of Fact, Conclusions of Law and Order Modifying the Decree. At that time, counsel for the plaintiff, who was a lawyer other than the present counsel for the plaintiff, stated in the order modifying the decree as follows: "That the defendant is hereby ordered to vacate the residence and property of the parties which has heretofore been awarded to the plaintiff and located at 1891 West 600 South Street in Provo, Utah, and that the plaintiff herein shall have the peaceful use and possession of the said residence, together with the household furniture, furnishings and supplies located in the house, except for the personal tools and effects of the defendant herein."

At the argument of these matters to Judge Tuckett and to Judge Sorensen, I was very clear in stating to both Judges that the insertion of this language in the modified decree was done by counsel without knowledge to me of the exact terms and conditions of the original decree. I assumed that counsel was accurate in stating that the property had heretofore been awarded to the plaintiff and I was probably negligent in not checking the original decree

to make sure that the language contained therein was compatible with the language in the order modifying the decree.

Regardless of the reasons for the insertion of the language above stated, it is the position of the appellant that the insertion of said language did not alter the conditions of the original decree, for the following reasons:

1. The plaintiff, in her affidavit for order to show cause, respecting the modification of the decree, requested only that the decree be modified as follows: "That the alimony and support money for the plaintiff and one minor child be increased from \$60.00 per month to \$200.00 per month, a restraining order against the defendant from harming and molesting the plaintiff in any manner in her residence, and awarding to the plaintiff the 1956 Chevrolet automobile." This was the only pleading upon which the order modifying decree was entered and at that time the decree was entered merely to provide for support of the minor child born after the divorce. Counsel for the plaintiff, in making findings and an order in excess of his pleading, did not, by doing so, modify the original decree.

2. The language of the modification does not state in effect that the property is now transferred to the plaintiff, but rather states "which has heretofore been awarded to the plaintiff," which statement is categorically contrary to fact and categorically contrary to the original decree.

The appellant respectfully states that the plaintiff cannot, by this language, modify the terms of the original decree wherein it was the intent of both parties merely to provide for support of the minor child. Your appellant further believes that the language inserted was inserted

by counsel for the plaintiff erroneously and not with intent to change the provisions of the original decree. The undersigned believes that such language was inserted upon the mistaken belief by then counsel for the plaintiff that the original decree had, in fact, awarded the property to the plaintiff.

As the matter now stands, we are faced with a dilemma that has not been corrected by the arguments and litigation had in the Court below. The question is, what does the Decree mean and what is an equitable solution to the property question.

Respectfully,

JACKSON B. HOWARD