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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT STETTLER,

Plaintiff-Respondent,

vs. Case No. 19156

PATSY EDWARDS STETTLER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Appeal from an Order of the
Second Judicial District Court in and for Davis County,
Honorable J. Duffy Palmer presiding

Edward B. Havas of
HAVAS AND HAVAS
Harrison Place, Suite 216
3293 Harrison Boulevard
Ogden, Utah 84403

Counsel for Defendant-
Appellant

Rodney S. Page of
HESS, VAN WAGENEN, PAGE
& HESS
50 South 125 East
Clearfield, Utah 84015

Counsel for Plaintiff-
Respondent

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Clerk, Supreme Court, Utah

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[illegible] Harrison Boulevard
Ogden, Utah 84403

Counsel for Defendant-
Appellant

Rodney S. Page of
HESS, VAN WAGENEN, PAGE
& HESS
50 South 125 East
Clearfield, Utah 84015

Counsel for Plaintiff-
Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

[illegible] STETTLER,

Plaintiff-Respondent,

vs. Case No. 19156

PATSY EDWARDS STETTLER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

This is a post-divorce action commenced by Appellant seeking modification of the parties' decree of divorce.

DISPOSITION IN LOWER COURT

Appellant commenced this action pursuant to Order to Show Cause In Re Modification issued from the District Court on February 15, 1983. Appellant sought thereby: 1) modification of the terms stated in the decree upon which Appellant's equity in the prior family home would become payable, to include the condition of Respondent's remarriage and therefore require present payment thereof; 2) an award of child support from Respondent for the benefit of one of the minor children whose custody had been transferred from [illegible] to Appellant; and 3) contribution from Respondent

for expenses incurred by Appellant on behalf of that minor child prior to hearing on the [illegible]

The court, following hearing, [illegible] modification [illegible] of the decree with respect to the payment of equity in the home and also declined to order Respondent to contribute to expenses incurred on behalf of the minor child prior to hearing. The court awarded Appellant support for the child in her custody, however rather than ordering a specific monthly amount thereof, the court determined that the cost of supporting that child approximately equalled that of supporting the eldest child, who is in Respondent's custody. The court therefore ordered that one offset the other and neither party would be required to pay support to the other regarding those children.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the District Court's Order denying modification of the decree concerning the equity in the home and declining to require Respondent to contribute to the pre-hearing expenses of the minor child in Appellant's custody. Appellant requests that this Court remand this case with instructions to the District Court to modify the decree to provide for present payment to Appellant of her equity in the home and to order Respondent to pay to Appellant an amount, determinable by this Court [illegible] the record or by the District Court upon remand, as [illegible]

tution to the pre-hearing expenses incurred by Appellant on behalf of the minor child. Appellant also seeks to have this Court require the District Court on remand to specify the monthly dollar amount equivalent of its support award to Appellant.

STATEMENT OF FACTS

The parties herein were divorced by decree of the Second Judicial District Court in and for Davis County entered August 26, 1981. (R.11). The divorce was granted pursuant to stipulation entered into by the parties (R.3), the terms of which were incorporated into the decree. Said documents were prepared by counsel for Respondent. (R.1-6, 8-13). Appellant was neither represented by counsel nor did she receive the advice of counsel. (Trans.9,10).

In said decree, the following orders were made which are pertinent herein. Custody of the parties' three children was awarded to Respondent, subject to visitation by Appellant. (R.11). Appellant was ordered to pay to Respondent the sum of One Hundred Dollars ($100.00) per month per child, a total of Three Hundred Dollars ($300.00) per month, for child support. (R.12). Respondent was awarded the parties' home subject to a lien securing one-half (1/2) of the then equity in said property, which was awarded to Appellant. (R.12). Pursuant to the terms of the decree, the equity was to be paid to Appellant "upon sale of the

home or upon the youngest child reaching 1[illegible] years of [illegible] whichever occurs first." [illegible] payment would become due were [illegible] [illegible].

Subsequent to the divorce, Appellant has remarried, as has Respondent. (Trans.10,38). Appellant has in addition changed her residence to the State of California (Trans.8), where she now lives with her present spouse. Both parties are employed (Trans.11,18), as are their present spouses. (Trans.11,41).

In June, 1982, the parties' daughter, Robyn, requested to and did commence residing with Appellant (Trans. 12). Pursuant to the parties' stipulation (R.14), an Order modifying the decree to provide for the permanent transfer of Robyn's custody to Appellant was entered on December 3, 1982. (R.16). From the time Robyn commenced residing with Appellant in June, 1982, until hearing herein, Respondent contributed no financial assistance to Appellant for Robyn's benefit. (R.32,33; Trans.12).

On February 15, 1983, Appellant's Affidavit and Petition for Order to Show Cause, dated February 4, 1983, was filed (R.19), seeking the following relief: for an award of child support from Respondent to her for the benefit of Robyn, alleging a reasonable amount thereof to be [illegible] Hundred Fifty Dollars ($150.00) per month (R.20); for [illegible] tribution from Respondent for reasonable and necessary [illegible]

[illegible] expended on Robyn's behalf since her coming to live with Appellant in June, 1982, (R.21) [Appellant phrased her request as one for credit against amounts owed to Respondent for child support which had fallen into arrears. Appellant stipulated at the hearing herein to the entry of judgment against her for said arrearages in the amount of $875.00; she does not appeal from that judgment]; and for the modification of the decree to provide for payment of Appellant's equity in the home upon Respondent's remarriage and therefore ordering said payment immediately. (R.22). The parties stipulated that the equity at the relevant time equalled $39,054.28, one-half of which was awarded to Appellant and secured by lien. (R.33; Trans.4). The Order to Show Cause issued on February 15, 1983, (R.23), following which hearing was held on March 11, 1983. (R.29).

Following the hearing of March 11, 1983, at which testimony was given and evidence introduced, the District Court made the following rulings pertinent to this appeal. The court determined that the cost of rearing Robyn in California offset that of rearing the oldest boy, and therefore ordered that Appellant not be required to pay Respondent support for the oldest boy, and Respondent not be required to pay Appellant support for Robyn. (R.29; [illegible]). No dollar amount equivalent of that support was [illegible] by the court. (Trans.55). The court declined to

enter judgment against Respondent for any of the expenses borne by Appellant on behalf of Robyn prior to the hearing (Trans.55). The court further declined to modify the decree regarding the equity in the home, finding no change of circumstances to warrant it and determining that issue to be <u>res judicata</u>. (R.29; Trans.56). Findings of Fact, Conclusions of Law and an Order on Order to Show Cause were issued accordingly. (R.31-36, inclusive).

Appellant filed her notice of appeal on April 21, 1983, from which this appeal stems. (R.38).

ISSUES PRESENTED

1. Whether or not the District Court erred in failing to modify the parties' decree to provide for payment by Respondent of Appellant's share in the equity of the home upon the condition of his remarriage, and thereby ordering immediate payment thereof to Appellant.

2. Whether or not the District Court erred in failing to award Appellant financial contribution from Respondent for the expenses of Robyn's support and maintenance reasonably and necessarily expended by Appellant during the period of June, 1982, through the date of hearing, March 11, 1983.

3. Whether or not the District Court erred in failing to specify the dollar amount equivalent of the sup-

port awarded to Appellant from Respondent for the benefit of Robyn.

ARGUMENT

I.

APPELLANT IS ENTITLED TO A MODIFICATION OF THE PARTIES' DECREE PROVIDING FOR PAYMENT TO HER OF HER EQUITY IN THE PARTIES' HOME UPON THE EVENT OF RESPONDENT'S REMARRIAGE, AND THEREBY TO AN ORDER REQUIRING IMMEDIATE PAYMENT THEREOF.

a.

The rule of res judicata does not preclude the relief sought by Appellant.

The District Court, in refusing to modify the decree pertaining to payment of the equity in the parties' home, stated that the issue was res judicata and that it could not change that. (R.29; Trans.56). While the doctrine of res judicata undeniably operates in divorce actions, McLane v. McLane, 570 P.2d 692, 694 (Utah 1977), it does not preclude the relief sought herein.

Utah Code Ann. §30-3-5 (1979) provides that "[t]he court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary." (Emphasis supplied). Therefore, while the decree may be res judicata as to those circumstances existing at the time the

decree is entered, McLane, [illegible] P.2d at [illegible], the court is not precluded from reviewing [illegible] upon those matters listed [illegible] circumstances so require. Id. See also, Smith v. Smith, [illegible] P.2d 307, 309 (Utah 1977); 24 Am. Jur. 2d, Divorce and Separation, §423 (1966).

This proposition therefore merely restates in a slightly different manner the long standing rule of law in Utah that in seeking modification of a divorce decree, "the threshold requirement for relief is a showing of substantial change in the circumstances of the parties occurring since the entry of the decree and not contemplated in the decree itself." Lea v. Bowers, 658 P.2d 1213, 1215 (Utah 1983). As to the existence of such changed circumstances justifying the relief requested herein, see the following section.

b.

There has occurred a substantial change of the circumstances of the parties since the entry of the divorce decree justifying the modification sought by Appellant.

As indicated above, the trial court in a divorce action retains continuing jurisdiction to make such modification in the initial decree as are just and equitable, providing a change of circumstances exists justifying it. Foulger v. Foulger, 626 P.2d 412, 414 (Utah 1981). At the hearing herein, the District Court determined [illegible]

[illegible] the parties' stipulation with regard to [illegible] in the home and that there was not a change of [illegible] to warrant modification thereof. (R.33; Tran. [illegible]).

While the trial court's findings, judgment and decree are entitled to considerable deference, Christensen v. Christensen, 628 P.2d 1297, 1299 (Utah 1981), the modification of a divorce decree sounds in equity and it is therefore this Court's "duty and prerogative...to review both the facts and the law." Id. Indeed, not only is this Court not limited by the findings of fact made by the trial court, it may make findings of fact of its own. Boals v. Boals, _____ P.2d _____, Nos. 18172, 18187, slip op. at 22 (Utah, filed May 18, 1983). As was stated in Watson v Watson, 561 P.2d 1072, 1073 (Utah 1977), "[this Court] would be remiss in its responsibility and this assured right of appeal would be meaningless if it unquestioningly accepted all actions of the trial court and remained insensitive to pleas to rectify inequity or injustice." Appellant makes her plea herein.

The courts rightly require a substantial and material change of circumstances to warrant modification of the decree relative to the disposition of real property, particularly when the decree embodies the parties' prior agreement. Foulger, 626 P.2d at 414. However, "property

settlements are not sacrosanct and are not beyond the power of a court of equity to modify." [illegible] 1299, 1300 (Utah 195[illegible]). A review of the record herein reveals that substantial and material changes of circumstances have occurred which provide a compelling basis for modification of the decree.

Appellant has remarried and has moved to California with her new husband. More to the point, Respondent has remarried and his new wife is living in and deriving the benefit from the home in which Appellant owns an interest. Further, Appellant now has custody of the parties' daughter, Robyn, for whom she would like to provide a home. (Trans. 27). Appellant has testified that without recovering her equity in the parties' home, that would not be possible. (Trans.27).

Appellant was not represented by counsel in these divorce proceedings, nor were the documents which determined all of the issues therein independently reviewed by counsel on Appellant's behalf. Respondent, on the other hand, was represented by counsel throughout. (Trans.9,10). At the time of the divorce, Appellant did not contemplate the circumstances presently existing; based upon Respondent's representations to her, she contemplated that if Respondent remarried it would be to a woman with several children and, in light of his custody of the parties' three children, that

he would be unable to support such a new family if Appellant ... her equity in the home. (Trans.28). In actuality, Respondent has remarried a woman having only one child, and who is employed full time. (Trans.28). With Robyn's custody having been transferred to Appellant, Respondent now has custody of only two of the parties' children, one of whom was, at the date of the hearing, 17 years of age and employed. (Trans.26).

This state of facts amply shows that material circumstances have substantially changed and compellingly argues for the modification prayed for by Appellant. Nor would such a modification inflict undue hardship upon Respondent. As earlier noted, Respondent is employed and earns an annual income in excess of $20,100.00. (See Defendant-Appellant's Exhibit 5; Trans.39). He further receives $70.00 per month from an interest in a family business. (Trans.44). Respondent's spouse is also employed, earning nearly $17,000.00 per annum. (Trans.41). In these circumstances, it would be reasonable for the modification to be ordered.

The District Court noted in making its ruling that the stipulation and decree were unusual in failing to provide for payment of the equity upon the conditions of Respondent's remarriage or cohabitation, terms which usually are included. (Trans.56). The Court further expressed the

reasonableness and equity of Appellant's request when it stated: "I am going to urge Mr. Stettler to see if he could get it. I think in fairness to this woman, lady she ought to have her equity out of the house... ." (Trans.56).

This situation is analagous to that of an award of alimony. While the existence of Appellant's interest in the home is not in the nature of direct support to Respondent, it does act as a subsidy to the housing expense of Respondent and his spouse-- Respondent is permitted to utilize the home, including Appellant's portion thereof, without payment to Appellant therefor and without Appellant's interest therein appreciating, accruing interest or in any other way becoming more valuable. In other words, it is the equivalent of Respondent being permitted to utilize Appellant's funds for a substantial period of time, interest free. Utah Code Ann. §30-3-5 (1979) provides that an award of alimony terminates upon the recipient's remarriage. The same result should apply in the instant case; Appellant should not be required to subsidize housing for Respondent's present spouse.

The evidence adduced herein clearly preponderates toward the conclusion that a material and substantial change has occurred in the circumstances of the parties, which justifies the modification sought by Appellant. The judgment of the trial court has so failed to do equity that it

manifests a clear abuse of discretion, and it falls to this court to take appropriate corrective action in the interests of justice. Watson v. Watson, 561 P.2d 1072, 1074 (Utah 1977). This Court is therefore respectfully urged to reverse the court below, and instead order that the parties' decree be modified as prayed for by Appellant and that an order issue requiring immediate payment to Appellant of her equity interest in the home.

II.

APPELLANT IS ENTITLED TO FINANCIAL CONTRIBUTION FROM RESPONDENT FOR EXPENDITURES MADE BY HER FOR THE SUPPORT AND MAINTENANCE OF THE PARTIES' DAUGHTER, ROBYN, DURING THE PERIOD OF JUNE, 1982, THROUGH HEARING ON MARCH 11, 1983.

Utah Code Ann. §78-45-3 (1977) provides that every man shall support his child, just as every woman is required to support her child. Utah Code Ann. §78-45-4 (1977). A parent cannot escape that responsibility, State Division of Family Services v. Clark, 554 P.2d 1310 (Utah 1976), nor indeed should he or she attempt to do so.

Utah Code Ann. §78-45-7 (1977) provides as follows:

> Determination of amount of support. --
> . . . .
> (3) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:
> (a) The amount of public assistance received by the obligee, if any;

> (b) The funds that have been reasonably and necessarily expended in support of spouse and children.

The very language [illegible] sub-section [illegible] two important factors. First, it indicates that a court order is not a prerequisite to the existence of the obligation for support and the accumulation of arrearages thereunder, for these provisions are operative <u>only if</u> no prior court order exists. (<u>Cf.</u>, subsection (2) of that statute addressing the determination of the amount of <u>prospective</u> support when no prior court order exists). Second, it makes mandatory, by the term "<u>shall</u> determine and assess" the calculation and levy of arrearages, in an amount based upon public assistance received and funds <u>reasonably and necessarily expended</u> for support. (Emphasis supplied.)

This was recognized by this Court in <u>Roberts v. Roberts</u>, 592 P.2d 597, 599 (Utah 1979), where it was stated: "[t]his amendment [§78-45-7(3)] indicates an intent by the Legislature that the State be allowed to recover all sums expended by the State on behalf of an obligee spouse and children prior to court order." Inasmuch as under the Uniform Civil Liability for Support Act, Utah Code Ann. §§78-45-1, <u>et seq.</u>, the duty of the obligor is to the obligee and the State's rights are solely derivative therefrom, <u>Mecham v. Mecham</u>, 570 P.2d 123, 125 (Utah 1977), this legis-

lative intent must apply as much to the obligee as it does to the State.

This is not to say that Appellant is entitled to, or claims here, full reimbursement for such expenditures; she is not so entitled and does not so claim. Appellant is not in the position, as is the State, of a third party who provides support and becomes thereby subrogated to the child's right and entitled to complete reimbursement. Clark, 554 P.2d at 1311. Appellant recognizes her equal obligation to support her child and seeks only contribution from Respondent of his fair share of that obligation.

Applying the terms of this statute to the present case, the basis for calculating the arrearages is at least the amount of funds reasonably and necessarily expended on Robyn's behalf. The District Court found that from the time Robyn began living with Appellant in June, 1982, through the date of hearing, March 11, 1983, Appellant incurred reasonable and necessary expenditures for Robyn's support and maintenance, (R.32), in an amount exceeding Fifteen Hundred Dollars ($1,500.00). (R.33). Appellant testified that the amount thereof was around Fifteen to Sixteen Hundred Dollars. (Trans.25). (See also, Defendant-Appellant's Exhibits numbers 2, 3, and 4; Trans.12-15,20-25). No public assistance was rendered on behalf of Robyn during this period.

The trial court also found that Respondent made no financial contribution to Appellant for Robyn's support during that period. (R.[illegible]). [illegible] as much. (Trans.42). It is undisputed, therefore, that Appellant bore the entire financial burden of support for Robyn during the period in question. That Appellant should receive contribution from Respondent for same is, or should be, apparent.

The court in denying Appellant's request for such contribution reasoned that Respondent should not be required to make such payment "because he was supporting and sustaining the young man." (Trans.55). This is a <u>non sequitur</u> and, it is submitted, constitutes clear error. Respondent was, for a time, solely providing support for the young man referred to by the Court. After Respondent sought, and Appellant stipulated to, the entry of judgment against Appellant for her share of that obligation as determined by prior court order, Respondent no longer could be considered as having borne that load alone; by the entry of that judgment Appellant shouldered her portion. Appellant requests nothing more in return regarding Robyn, yet is denied that relief. In other words, while Appellant is called upon to contribute to the support of Respondent's charge, she is denied contribution to Robyn's support for the very reason that Respondent was providing for their son

during that period, notwithstanding the fact that Appellant has now contributed thereto as well. Clearly, such a result is inequitable and cannot be allowed to stand.

By the clear, unambiguous language of §78-45-7(3), Appellant is entitled to contribution from Respondent for a portion of the reasonable and necessarily expended costs of supporting Robyn during the period in question. The trial court erred in failing to award same. This Court is therefore urged to reverse the lower court's ruling and enter judgment in Appellant's favor for a reasonable amount which Appellant asserts can be determined from the record herein, or at least to reverse said ruling and remand to the court below with instructions to enter such a judgment in an amount to be determined by that court.

III.

THE DISTRICT COURT SHOULD HAVE SPECIFIED THE DOLLAR AMOUNT EQUIVALENT OF THE SUPPORT AWARD GRANTED TO APPELLANT.

Appellant does not dispute the propriety of an award to her of child support for the benefit of Robyn; indeed that was one of the primary purposes for her commencing this action. It is further not necessarily the case that Appellant disagrees with the amount, or equivalent, awarded to her; she simply cannot determine what that amount

Appellant was, prior to hearing herein, obligated to pay One Hundred Dollars ($100.00) per month per child as support. (R.12). Appellant sought from Respondent the sum of One Hundred Fifty Dollars ($150.00) per month for Robyn's support, which she believed would provide an equivalent level of support to that she provided for the children in Respondent's custody, considering Robyn's residence in California. (R.20; Trans.17). The court found that the expense of rearing the oldest boy roughly equalled that of rearing Robyn, all things considered, and therefore determined that one offset the other. (R.32; Trans.55). The court failed, however, to state the dollar amount equivalent of the support obligation each party owed to the other for these respective children, which are being offset against each other. (Trans.55).

Where modification is granted, the District Court should make findings regarding same. These "materially assist[] the parties in determining whether there may be a basis for appeal, and if an appeal is taken, significantly assists this Court in its review." Christensen v. Christensen, 628 P.2d 1297, 1301 (Utah 1981). It is advisable to set forth such findings in detail. Boals v. Boals, _____ P.2d _____, Nos. 18172, 18187, slip op. at 22 (Utah, filed May 18, 1983).

Inasmuch as Appellant cannot ascertain the equivalent of the support awarded her, she cannot determine whether such award comports with what is reasonable and therefore whether or not to consider the advisability of appeal. Perhaps more pertinent, the lack of specificity of the award's equivalent dollar value renders Appellant without guidance as to when, or if, a change in circumstances renders it reasonable to seek modification of the support award, and if sought, in what respect or to what extent such a modification may be reasonable to seek.

Finally, the support obligation for Robyn offset that for the oldest child of the parties, Carl. At the time of hearing herein, Carl had just turned 17 years of age. (Trans.26). Accordingly, in the near future Carl will become an adult of 18 years of age, upon which event Appellant's obligation to pay to Respondent child support on his behalf will cease. Robyn, on the other hand, is or soon will be 15 years of age. (Trans.23). The obligation upon Respondent to pay toward Robyn's support will continue after that regarding Carl has ended. Yet without a determination of the dollar amount equivalent of the present support level, it is unclear what amount that ongoing obligation for Robyn will be. That issue may be disputed and will in any event require clarification at some time. Inasmuch as Appellant resides in California, the expense associated with

her being required to travel to Utah for such a determination would be substantial; even more so when there is added in the costs associated with [illegible] work, the disruption of her life's routine, and the trauma of additional litigation proceedings should that become necessary.

These concerns can be rectified, and anticipated difficulties avoided, by the simple expedient of setting forth presently the dollar equivalent of the support obligations for these children which are being deemed to offset each other. It is submitted that the trial court erred in failing to do so, and this Court is respectfully urged to remand the matter for such a determination.

CONCLUSION

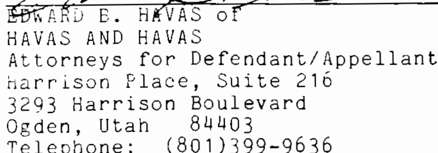
The District Court erred in determining that there had occurred no substantial change of circumstances justifying modification of the parties' decree pertaining to payment of the equity in the home. The judgment of the trial court was so inequitable to Appellant in the circumstances as to constitute an abuse of discretion warranting reversal by this Court. This Court should order that the parties' decree be modified to provide that Appellant's equity in the home become payable upon the condition of Respondent's remarriage, and thereupon further order that same be immediately due and payable to Appellant.

The court below further erred in failing to award Appellant contribution from Respondent for the reasonable and necessarily expended funds provided by Appellant for Robyn's support during the period of June, 1982, through March 11, 1983. The lower court's improper application of the relevant law justifies this Court's reversal thereof, and this Court should enter judgment in Appellant's favor for such contribution in a reasonable amount determinable from the record. In the alternative, this Court should remand the matter to the trial court with instructions to ascertain a reasonable amount of such contribution from Respondent and to enter judgment in favor of Appellant accordingly.

The trial court also erred in failing to state the dollar equivalent of the prospective support award for the benefit of Robyn, and this Court should remand this matter for such a determination and the entry of an appropriate finding.

WHEREFORE, Appellant respectfully prays for such relief, as well as for an award of her costs incurred in taking this appeal.

RESPECTFULLY SUBMITTED this 23rd day of June, 1983.



EDWARD B. HAVAS of
HAVAS AND HAVAS
Attorneys for Defendant/Appellant
Harrison Place, Suite 216
3293 Harrison Boulevard
Ogden, Utah 84403
Telephone: (801)399-9636

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing Brief of Defendant-Appellant to Rodney S. Page, Attorney for Plaintiff-Respondent, 40 South 125 East, Clearfield, Utah 84015, postage prepaid this 23rd day of June, 1983.

MICHELLE E. HEWARD, Secretary