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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. :

REPLY BRIEF OF DEFENDANT/APPELLANT

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

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CASES AND AUTHORITIES CITED

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STATEMENT OF FACTS

Appellant reiterates the facts herein by reference to the statement thereof contained in her initial brief; it appears from Respondent's recitation of the facts that he is in substantial agreement with Appellant's statement as well.

Appellant vigorously disputes, however, Respondent's statement that he had "acted as both father and mother" to the parties' children. (Respondent's Brief at 4). Respondent cites to nothing in the record in substantiation of such a claim, and indeed nowhere in the record does such substantiation exist. To the contrary, the record reflects that the District Court, at the time of the granting of the divorce, found Appellant to be a fit and proper person to be awarded visitation with the children

(R.9), and in fact did award her visitation rights. (R.11). Respondent has failed to refer to anything that would support Appellant failed to exercise her visitation or otherwise failed to maintain contact and a parental relationship with her children. It is noteworthy that the transfer of Robyn's custody from Respondent to Appellant originated with the child's request to do so (R.14); that is hardly indicative of Appellant's failure to continue in her role as mother to her children.

ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO GRANT THE MODIFICATION SOUGHT SO FAILS TO DO EQUITY THAT IT CONSTITUTES A CLEAR ABUSE OF DISCRETION, AND THE EVIDENCE PRESENTED CLEARLY PREPONDERATES AGAINST THE COURT'S FINDINGS, BY REASON OF WHICH REVERSAL IS APPROPRIATE.

There is no dispute concerning the appropriate standards, initially stated by Appellant and reiterated by Respondent, which apply to the consideration by a trial court of a request to modify a divorce decree and to the review by this Court of the trial court's determination of the issues. The trial court appropriately orders modification when, in relation to the decree's disposition of property, there exists a substantial and material change of circumstances warranting same. Foulger v. Foulger, 626 P.2d 412, 414 (Utah 1981). Upon review of the trial court's determination of a modification request,

this Court will accord considerable deference to the trial court's judgment and will not disturb it unless the evidence clearly preponderates against the findings, or the trial court abuses its discretion or misapplies principles of law. Openshaw v. Openshaw, 633 P.2d 177, 178 (Utah 1981). It must be remembered, however, that the issue of modification of a decree is governed by equitable considerations, Land v. Land, 605 P.2d 1246, 1250 (Utah 1980), and property settlements are not beyond the power of a court of equity to modify. Chandler v. West, 610 P.2d 1299, 1300 (Utah 1980).

Having clearly in mind the relevant standards, it remains to apply the facts and circumstances of the present case to them. Respondent makes much of the fact that Appellant voluntarily departed the marital relationship, as if that justifies eternally withholding from Appellant the dispensation of equity. It must be apparent, however, that this fact, far from justifying the trial court's action, is clearly irrelevant. The relevant factors are changes in circumstances "occurring since the entry of the decree and not contemplated in the decree itself." Lea v. Bowers, 658 P.2d 1213, 1215 (Utah 1983) [emphasis supplied]; the fact of the divorce itself or the basis for it have no bearing on the issue before this Court.

Since the divorce, numerous factors have arisen which [illegible] the substantial and material changes of circumstances

justifying the modification requested by Appellant. First and foremost, Appellant has obtained the custody of her daughter, Robyn, and is now providing for her care. Appellant would like to provide Robyn with a home more suitable to their family life than the apartment they now enjoy, yet cannot do so without receiving her portion of the equity in the parties' home. (Trans. 26, 27). While this alone might justify the relief requested, additional factors also exist. Appellant has remarried and moved to California, where the cost of living, particularly housing, far exceeds that in Utah. (Trans. 17, 27). Respondent, too, has remarried, to a woman employed full time and earning a substantial income. (Trans. 38, 41). Respondent's new wife now resides with Respondent in the home in which Appellant owns an interest. (Trans. 38).

Respondent asserts that these factors fail to rise to the level necessary to justify a modification because Appellant "could" have "easily contemplated" them at the time of the divorce. (Respondent's Brief at 9). While it is true that an individual in the process of a divorce might foresee that in the future one or the other of the parties may remarry, that custody of children may change, or that other circumstances may be altered, that does not prevent those changes, once they occur, from being the basis for a modification of the decree. Were it so, virtually no modifications would be justified, since most modifications follow changes in circumstances which could [illegible]

been "contemplated" by the individual. But such is not the law; the changes in circumstances which justify modification are those which, in addition to being material and substantial, were "not contemplated in the decree itself." Lea v. Bowers, 658 P.2d at 1115 [emphasis supplied]. That is, such changes must be those not addressed within the decree (as by expressly recognizing the likelihood of an occurrence, providing for that which is to take place upon the occurrence of the contemplated event, or the like); this requirement ensures that the subsequent events truly are substantial and material changes in circumstances, and not those events already considered in arriving at the disposition contained within the decree at the outset.

The decree in the instant case did not contemplate the changes in circumstances which have occurred since its entry; it is entirely silent as to these changes. These changes therefore may be considered in determining whether modification is appropriate. Viewing the totality of these circumstances, it is clear that the evidence preponderates in favor of a conclusion contrary to that reached by the trial court, and in fact material and substantial changes of circumstances have occurred justifying modification of the parties' decree to require payment to Appellant of her interest in the parties' home upon the Respondent's remarriage. In addition, the trial court's failure to order such modification, with the result that Respondent and his new wife, who was possessed of the ability to pay to Appellant her interest

in the home, continue to reside therein without compensation to Appellant and prevents her from providing a similar home to the child in her custody, so fails to do equity to Appellant and the child as to constitute an abuse of the trial court's discretion. For either or both of these reasons, Appellant is entitled to the relief sought in this appeal.

II.

THE TRIAL COURT ABUSED ITS DISCRETION AND MISAPPLIED PRINCIPLES OF LAW IN FAILING TO ORDER RESPONDENT TO CONTRIBUTE TO COSTS REASONABLY AND NECESSARILY EXPENDED BY APPELLANT FOR ROBYN'S SUPPORT AND MAINTENANCE DURING THE PERIOD OF JUNE, 1982, THROUGH THE HEARING OF MARCH 11, 1983.

As noted by Respondent, this issue also is governed by equitable considerations and therefore the same standards of review apply as were discussed in the preceeding section. The trial court's decision is entitled to be upheld unless the evidence clearly preponderates to the contrary, or the trial court abuses its discretion or misapplies principles of law. Openshaw, 639 P.2d at 178. In the instant case, the trial court has both abused its discretion and misapplied the relevant principles of law.

As conceded by Respondent, both parents have the obligation to support their children. A concomitant to that principle is that neither parent should be required to bear the obli-

gation of support of a child alone, if the other parent is capable of providing contribution thereto. Nevertheless, the result of the trial court's ruling on this issue requires Appellant to have borne the entire obligation for Robyn's support during the period of June, 1982, through March 11, 1983, notwithstanding Respondent's obligation and ability to contribute thereto.

While Respondent contends that the Uniform Civil Liability for Support Act, Utah Code Ann. §§78-45-1 et seq., is inapplicable in this case, the plain language of that statute belies that assertion. The Act imposes a mutual obligation of support upon the parents. Utah Code Ann. §§78-45-3 and 78-45-4 (1977). The Act further defines an "obligor" as "any person owing a duty of support[,]" Utah Code Ann. §78-45-2(2) (1982), and an "obligee" as "any person to whom a duty of support is owed[,]" Utah Code Ann. §78-45-2(3) (1982), and provides that "[t]he obligee may enforce his right of support against the obligor... ." Utah Code Ann. §78-45-9(1) (1982). It grants to the District Courts continuing jurisdiction over all proceedings brought pursuant to the Act. Utah Code Ann. §§78-45-6 and 78-45-8 (1957) [emphasis supplied]. Nowhere in the Act are actions referring to Utah Code Ann. §30-3-5 (1979) excluded, nor vice versa; accordingly, the two statutes must be interpreted together as applicable in this case. This conclusion is reinforced by the requirements found within the Act at Utah Code Ann. §78-45-9(2)

(1982), applicable to any action to recover support "whether under this act or any other applicable statute." Id.

The Uniform Civil Liability for Support Act also allows, but does not make mandatory, the state department of social services to proceed on behalf of an obligee. Utah Code Ann. §78-45-9 (1982). However, the State's rights in this regard are solely derivative from the rights of the obligee. Roberts v. Roberts, 592 P.2d 597, 599 (Utah 1979); Mecham v. Mecham, 570 P.2d 123, 125 (Utah 1977). (Cf., The Public Support of Children Act, Utah Code Ann. §§78-45b-1 et seq., which is exclusively designed to apply to the situation where the State has provided support to a child and seeks reimbursement from the parent). Accordingly, it is clear that, Respondent's assertions to the contrary notwithstanding, this Act and the principles stated in those cases referred to in Appellant's earlier brief have direct application to the present case.

Respondent contends that the expenditure by Appellant of Fifteen Hundred to Sixteen Hundred Dollars ($1,500 to $1,600) during the relevant time period was not for necessities and was greatly excessive. However, the record shows just the opposite. The trial court expressly found that Appellant incurred reasonable and necessary expenditures for Robyn's support during the relevant period in excess of Fifteen Hundred Dollars ($1,500) to which Respondent contributed nothing. (R. 32, 33) [Emphasis supplied]. The following testimony by Respondent illustrates

that matter than considering those expenses to which he referred in his brief as excessive (Respondent's Brief at 12), Respondent actually considered them quite reasonable:

> Q. [by Mr. Havas] Yes, over a year's time, have you spent $400.00?
> A. [by Respondent] Yes, I have.
> Q. Do you think it's unusual or unreasonable that over a nine month period of time that over $400.00 will be spent for a child?
> A. No, I don't think it would be unreasonable. I think it would be hard if you don't have it.
> Q. It would be hard if you didn't have it, but it's not unreasonable. That's not an excessive amount for a child in the mid teens.
> A. I don't think it would be excessive, no, it would depend on the time and what needs were there.

(Trans. 48). The needs which existed for this child were explained by Appellant:

> Q. [by Mr. Havas] Will you tell the Court briefly why in essentially a nine month period $425.00 would be expended for clothing on this child?
> A. [by Appellant] When Robin (sic) came down to live, well, came to visit at first, she was overweight, ahh, very unhappy young girl. And so as she stayed on with us during the summer she lost 20 pounds and because of that and because she wanted to stay and live with us, school clothes had to be bought and so normal expenditures of a young girl that wanted to go to school and look like the rest of the kids in California, and because of the weight loss.
> Q. Okay. What was the extent of her wardrobe when she came to visit you initially?
> A. She had two pairs of levi's, I think three blouses, two dresses, and a jacket and two pairs of shoes.
> Q. Fairly minimal.
> A. Yes, for a three week visit.

(Trans. 23). This testimony by both Respondent and Appellant clearly illustrates the reasonableness and necessity of the expenditures for clothing referred to. In addition, nowhere in the record does Respondent challenge the propriety of any of the other expenses included within the sum found by the trial court to have been expended, to which Appellant testified in some detail. Clearly these sums were, as the trial court expressly found, both necessarily and reasonably expended.

That this is so is easily illustrated in yet another way. During the relevant period of time, Appellant was obligated to pay to Respondent One Hundred Dollars ($100.00) per month per child, for the support of the children in Respondent's custody. During the nearly ten month period from June, 1982, through March, 1983, therefore, Appellant's contribution to each child in Respondent's custody was One Thousand Dollars ($1,000.00). At the hearing herein, Respondent's counsel took pains to establish that Appellant's payments did not fully cover the cost of the children's expenses, implying that those payments did not even equal the expense to Respondent for these children:

> Q. [by Mr. Page] I see, then I will ask it again. Is it your opinion that it costs Mr. Stettler more than $100.00 a month per child to take care of the children in his custody?
> A. [by Appellant] Yes, it would.
> Q. And so essentially you each contribute significantly more than $100.00 to take care of the children that you have in your custody; isn't that true?
> A. That's true.

(Trans. 58). If Respondent considers Appellant's $1,000.00 contribution per child less than half of his actual cost of raising that child, he can hardly be heard to complain that $1,000.00 is excessive when spent by Appellant for the support of Robyn during the same period, without contribution at all from Respondent.

Having determined that the expenses incurred by Appellant in Robyn's behalf were both reasonable and necessary, and that both parents have an equal obligation to support their children, it is clear that since Appellant bore the entire obligation with regard to Robyn with no assistance from Respondent, Respondent should be required to reimburse Appellant for a portion of those expenses. Utah Code Ann. §78-45-7(3) (1977) provides that "[w]hen no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to: ...(b) [t]he funds that have been reasonably and necessarily expended in support of spouse and children." This statute, allowing for the assessment of arrearages without prior court order, controls in the instant case.

Respondent would have this Court believe that this statute does not apply, since an order existed requiring Appellant to pay support to Respondent for Robyn. Once Robyn began living with Appellant, Appellant provided for her support entirely; it is fatuous to believe that Appellant continued under an obligation to pay Respondent for Robyn's support as well.

Indeed, at that time Respondent became obligated to contribute to Robyn's support, notwithstanding the lack of a formal court order stating such. Utah Code Ann. §§78-45-1 et seq. (1977). In the court order in existence with relation to Respondent's obligation, the provisions of §78-45-7(3) operate to determine the amount of arrearages to be assessed against Respondent for Robyn's support.

As noted, the amount of arrearages in such a case is to be determined by looking to, among other things, the amount reasonably and necessarily expended for support. The lower court having found that reasonable and necessary expenses in excess of $1,500.00 had been expended, without contribution from Respondent, it clearly misapplied the principles of law found within the Uniform Civil Liability for Support Act, supra, by failing to order such contribution. Such misapplication of law is grounds for reversal. Openshaw, 639 P.2d at 178.

An additional ground for reversal is abuse of the trial court's discretion. Id. A judgment which fails to do equity may constitute an abuse of discretion. Watson v. Watson, 561 P.2d 1072, 1074 (Utah 1977). In the present case, the lower court's judgment denying Appellant contribution from Respondent for Robyn's support during the relevant period has the effect of requiring Appellant to be solely responsible for Robyn's support at the same time that she is accepting her portion of the responsibility for the support of the children in Respondent's custody.

respondent, on the other hand, completely escapes any obligation for Robyn during that time. Such disparate treatment of the parties, and of the children to whom the support is owed, is patently unfair. Such a judgment so fails to do equity as to constitute an abuse of discretion which this Court, in the interests of justice, must correct. Id.

Because of both the court's failure to correctly apply the relevant principles of law and its abuse of discretion in rendering this decision, it is appropriate that this Court reverse the trial court's ruling and require Respondent to contribute to the expenses incurred by Appellant for Robyn's support during the relevant period.

III.

THE TRIAL COURT ERRED IN FAILING TO SPECIFY THE DOLLAR AMOUNT EQUIVALENT OF THE SUPPORT AWARD GRANTED FOR THE BENEFIT OF ROBYN.

As more fully stated in Appellant's earlier brief, the trial court awarded child support from Respondent to Appellant, for Robyn's benefit, but neglected to state an amount thereof. Rather than specifying the amount of such support, the court merely stated that it would offset that which Appellant would be required to pay Respondent for the parties' eldest child. The actual dollar value of such support was further confused by the court's reduction of the amount of Appellant's support obligation for the youngest of the parties' children. Appellant requested

on appeal to have the [illegible] award [illegible] adequacy both [illegible] and also to [illegible] establish the amount due the parties' child [illegible] 18, an event less than one year distant.

Respondent has failed in any respect to [illegible] address this issue. Accordingly, he must be deemed to have conceded the propriety of Appellant's point as relates to this issue, and this Court should rule accordingly.

CONCLUSION

The evidence clearly preponderates against the trial court's finding that no changed circumstance existed to justify modification of the decree as requested by Appellant, and the court's failure to grant that modification so failed to do equity as to manifest a clear abuse of the court's discretion. The trial court further erred by failing to require Respondent to contribute to the expenses incurred by Appellant for Betsy's support, arriving at that result by the misapplication of the appropriate principles of law. This ruling, too, so failed to achieve equity as to constitute an abuse of discretion. Finally, the court below erred in failing to specify the dollar amount of the prospective support award Appellant was to receive, which issue Respondent has failed to [illegible].

[illegible], the lower court's ruling should be reversed [illegible] relief sought by Appellant-Grantor, for which Appellant [illegible] prays.

RESPECTFULLY SUBMITTED this 27th day of October, 1983.

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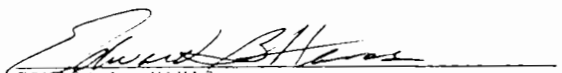
CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing Reply Brief of Defendant-Appellant to Rodney S. Page, Attorney for Plaintiff-Respondent, [illegible] South 125 East, Clearfield, Utah 84015, postage prepaid this 27th day of October, 1983.



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