

1995

# Joyce H. Garrick v. Richard P. Garrick : Reply Brief

Utah Court of Appeals

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Frederick N. Green; Green & Berry; Attorneys for Plaintiff/Appellee.

Nolan J. Olsen; Olsen & Olsen; Attorneys for Defendant/Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 950112-CA

IN THE UTAH STATE COURT OF APPEALS

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JOYCE H. GARRICK,	:	
	:	
Plaintiff/Appellee,	:	
vs.	:	
	:	Appeal No. 950112-CA
RICHARD P. GARRICK	:	
	:	Priority No. 15
Defendant/Appellant.	:	

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REPLY BRIEF OF APPELLANT  
AND CROSS-APPELLEE

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APPEAL FROM AN ORDER IN THE THIRD JUDICIAL  
DISTRICT COURT, IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE GUY R. BURNINGHAM PRESIDING

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NOLAN J. OLSEN (2464)  
OLSEN & OLSEN, L.L.C.  
Attorneys for Defendant/Appellant  
8138 South State Street  
Midvale, Utah 84047

Frederick N. Green  
GREEN & BERRY  
Attorneys for Plaintiff/Appellee  
622 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

**FILED**

**OCT 13 1995**

**COURT OF APPEALS**

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Attorneys for Defendant/Appellant  
8138 South State Street  
Midvale, Utah 84047

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GREEN & BERRY  
Attorneys for Plaintiff/Appellee  
622 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

ARGUMENT . . . . . 1

POINT I  
DEFENDANT’S RETIREMENT WAS NOT ANTICIPATED  
AT THE TIME OF THE ENTRY OF THE DECREE IN THIS MATTER  
AND THEREFORE MODIFICATION WAS LEGALLY WARRANTED. 1

POINT II  
THE EVIDENCE AT TRIAL DEMONSTRATED THAT  
DEFENDANT’S RETIREMENT AFFECTED HIS ABILITY TO EARN  
AND THEREFORE PROPERLY SUPPORTED MODIFICATION  
OF THE ALIMONY AWARD. . . . . 2

POINT III  
INASMUCH AS THE DEFENDANT DID NOT HAVE THE  
ABILITY TO PAY THE COURT ORDERED ALIMONY,  
THE DISTRICT COURT IMPROPERLY FOUND HIM IN  
CONTEMPT. . . . . 4

POINT IV  
DEFENDANT PROPERLY MARSHALED ALL THE  
EVIDENCE IN SUPPORT OF THOSE CHALLENGED FINDINGS AND  
DEMONSTRATED THAT SUCH WERE CLEARLY ERRONEOUS,  
ACCORDINGLY SUCH FINDINGS SHOULD BE SET ASIDE. . 5

POINT V  
THE REAL PROPERTY LOCATED AT 1130 NORTH 1200 EAST  
LEHI WAS NEVER AWARDED IN THE DIVORCE ACTION  
AND THIS COURT’S FINDING WITH REGARD TO SUCH  
PROPERTY SHOULD BE SET ASIDE AND THE DETERMINATION  
BE REMANDED TO THE DISTRICT COURT. . . . . 5

CONCLUSION . . . . . 6

CERTIFICATE OF MAILING . . . . . 8

TABLE OF AUTHORITIES

STATUTES

	<u>Page</u>
Kunzler v. O'Dell, 855 P.2d 270, 277 (Utah App. 1993) . . .	4
Proctor v. Proctor, 773 P.2d 1389 (Utah App. 1989) . . . .	3
West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah App. 1991) . . . . .	1

ARGUMENT

POINT I

**DEFENDANT'S RETIREMENT WAS NOT ANTICIPATED  
AT THE TIME OF THE ENTRY OF THE DECREE IN THIS MATTER  
AND THEREFORE MODIFICATION WAS LEGALLY WARRANTED.**

In Point I of her cross-appeal, Plaintiff initially argues that Defendant's threat of retirement was known at the time of the divorce trial and does not constitute an unanticipated event which is required for modification. In so arguing, Plaintiff claims that she does not contest any findings of fact; rather, contests the conclusions drawn from those findings of fact. Such argument is wholly without merit.

In the case at bar, the court explicitly found "[t]he findings and conclusions [in the divorce decree] are silent as to the anticipated retirement and, therefore, for purposes of the Decree, the Court deems that the Defendant's retirement was not anticipated." Finding of Fact No. 13 (R. 884). Accordingly, for purposes of this appeal, the Plaintiff is directly challenging the court's finding that the Defendant's retirement was not anticipated. However, in order to successfully attack the court's finding, "[t]he challenging party must marshal all relevant evidence presented at trial which tends to support the findings and demonstrate why the findings are clearly erroneous." West Valley City v. Majestic

Inv. Co., 818 P.2d 1311 (Utah App. 1991) (citing Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989)).

Here, the Defendant does not even challenge the relevant finding of the court let alone marshal all the evidence at the proceeding to demonstrate that such finding is clearly erroneous. Accordingly, such finding should be affirmed and any legal conclusions drawn therefrom also affirmed.

#### POINT II

**THE EVIDENCE AT TRIAL DEMONSTRATED THAT  
DEFENDANT'S RETIREMENT AFFECTED HIS ABILITY TO EARN  
AND THEREFORE PROPERLY SUPPORTED MODIFICATION  
OF THE ALIMONY AWARD.**

As part of her cross appeal, Plaintiff also argues that Defendant's sale of his business and retirement does not affect his ability to earn income. Plaintiff claims that there is an "absence on the record of any reliable testimony which would suggest the Defendant had an objective or rational reason to sell the business and retire." Brief of Appellee at 16.

Contrary to Plaintiff's contention, there was good evidence at the modification trial to support the Defendant's retirement. Specifically, the Defendant testified that he retired for health reasons. Further, Defendant testified that he retired because he was becoming irritable all the time, that he was worried all the time, and that he did not sleep well. R. 1056-1058.

Moreover, the cases cited by Plaintiff involving voluntary retirement are not dispositive to the case at bar. Specifically, Proctor v. Proctor, 773 P.2d 1389 (Utah App. 1989), the only case cited by Plaintiff from this jurisdiction, involves the obligor's duty to pay child support for children. Further, such case does not address the facts of this case; particularly those involving Defendant's poor health which certainly contributed to his decision to retire. Finally, and perhaps most importantly, this case does not involve a person who irresponsibly voluntarily elected to retire prior to an appropriate retirement age simply to deny his wife support.<sup>1</sup> The evidence at trial certainly suggested that Defendant is sixty-five years of age and was no longer able to run the day to day operations of the business. Finally, the evidence also showed that, unlike those cases cited by the Plaintiff, the Defendant continues to have some limited income; however, such income is hardly sufficient to satisfy his needs.<sup>2</sup>

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<sup>1</sup> Were this court to determine that the Plaintiff voluntarily retired at the age of sixty-five and had the continuing ability to earn his historic income, such would send a message that a person had the indeterminate obligation to work and support his ex-spouse to his death or complete incapacity.

<sup>2</sup> One point also raised at trial is that the Plaintiff, at her age, has the same ability to earn and support herself as the Defendant herein. Accordingly, such should be considered in any support determination.



POINT III

INASMUCH AS THE DEFENDANT DID NOT HAVE THE  
ABILITY TO PAY THE COURT ORDERED ALIMONY,  
THE DISTRICT COURT IMPROPERLY FOUND HIM IN CONTEMPT.

Plaintiff also argues in her cross-appeal that Defendant was properly held in contempt for failure to pay the court ordered alimony award during the pendency of this action. The court found:

20. The Defendant has in the past and does now have the ability to pay alimony to the Plaintiff in the amount of \$1,000.00 per month. To the extent he has failed to pay any amount since this Petition, he is found to be in contempt of this Court.

The Utah Supreme Court has "unequivocally required that all courts make explicit findings on each of the following substantive elements of contempt: 'the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.'" Kunzler v. O'Dell, 855 P.2d 270, 277 (Utah App. 1993) (Bench, J. dissenting in part) (quoting Von Hake v. Thomas, 759 P.2d 1162, 1172 (Utah 1988)).

Here, not only are the findings lacking as to the required elements of contempt, but the evidence at trial did not support the finding that the Defendant had the continued ability to pay \$1,000.00 per month alimony. First, the court made no finding that the Defendant intentionally refused to pay the

court ordered support payment. Further, and most importantly, the uncontradicted evidence at trial is that Defendant's total monthly income from Social Security and the sale of Dick's Glass was \$2,680.19 and that Defendant had monthly living expenses in the amount of \$2,400.00. Based on such evidence alone, there was insufficient support for the court's finding that Defendant had in the past and the continued ability to pay alimony in the amount of \$1,000.00 per month. Consequently, such contempt finding is clearly erroneous and should be set aside.

**POINT IV**

**DEFENDANT PROPERLY MARSHALED ALL THE EVIDENCE IN SUPPORT OF THOSE CHALLENGED FINDINGS AND DEMONSTRATED THAT SUCH WERE CLEARLY ERRONEOUS, ACCORDINGLY SUCH FINDINGS SHOULD BE SET ASIDE.**

In responding to Defendant's claims on appeal, Plaintiff perfunctorily argues that Defendant failed to marshal the evidence in support of the findings and demonstrate that such evidence was insufficient to support the findings. However, Defendant submits that he did indeed marshal the evidence to show that those findings challenged on appeal were without sufficient evidentiary basis and refers this court to Defendant's/Appellant's brief for such argument.

#### POINT V

**THE REAL PROPERTY LOCATED AT 1130 NORTH 1200 EAST  
LEHI WAS NEVER AWARDED IN THE DIVORCE ACTION  
AND THIS COURT'S FINDING WITH REGARD TO SUCH  
PROPERTY SHOULD BE SET ASIDE AND THE DETERMINATION  
BE REMANDED TO THE DISTRICT COURT.**

Finally, Plaintiff argues that Judge Christensen awarded the Plaintiff the parcel of land located at 1130 North 1200 East at the time of the divorce. However, such claim is legally baseless. In fact, a review of the findings of fact, conclusions of law and decree in the initial divorce proceedings conclusively demonstrate that the court utterly failed to consider the subject parcel.

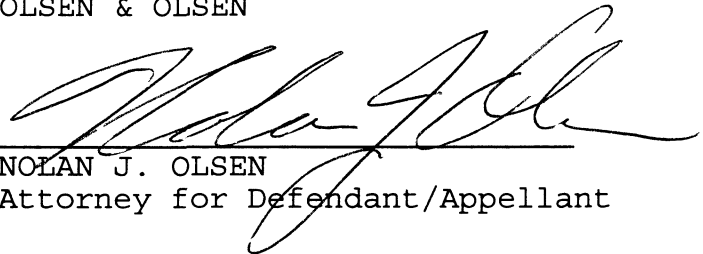
Further, as set forth in Defendant's opening brief, there was no evidence in the modification proceedings to support that court's finding that such property should be awarded to the Plaintiff. Defendant's/Appellant's brief at 29-34. Accordingly, such finding should be set aside and this issue remanded to the district court for proper determination.

#### CONCLUSION

Based on the foregoing, this court should reverse the district court's award of alimony and attorney fees and costs to the Plaintiff. Furthermore, this court should remand the issue of the property located at 1130 North 1200 East, Lehi, Utah with appropriate instructions to the district court.

DATED this 11 day of October, 1995.

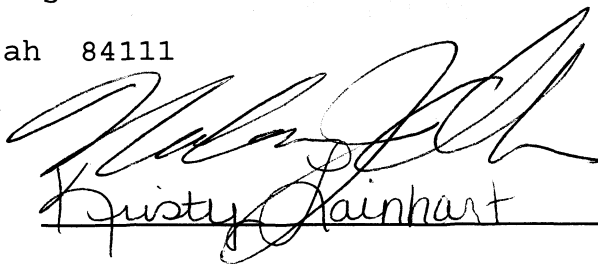
OLSEN & OLSEN

  
\_\_\_\_\_  
NOLAN J. OLSEN  
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 11<sup>th</sup> day of October, 1995, I mailed a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, postage prepaid thereon to:

Frederick N. Green, Esq.  
GREEN & BERRY  
Attorney for Plaintiff/Appellee  
622 Newhouse Building  
10 Exchange Place  
Salt Lake City, Utah 84111



Kristy Hainhart