

1995

Lowell Gerber v. Mary Jo Gerber : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO.

950613-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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LOWELL GERBER,	:	
	:	Case No. 950613-CA
Plaintiff/Appellant,	:	
	:	
v.	:	Priority No. 15
	:	
MARY JO GERBER,	:	
	:	District Court Case No.
Defendant/Appellee,	:	924905415

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APPELLANT'S REPLY BRIEF

AN APPEAL FROM FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER MODIFYING DECREE OF DIVORCE ENTERED BY
THE HONORABLE DOUGLAS L. CORNABY, ON JUNE 16, 1995
AND AN ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL
AND OBJECTIONS TO PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW SIGNED AND ENTERED
ON AUGUST 15, 1995, BY THE HONORABLE SANDRA N. PUELER

Third District Court - Salt Lake City, UT

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Pursuant to Rule 24c of the Utah Rules of Appellate Procedure,
the Plaintiff/Appellant, Lowell Gerber, submits the following Reply
Brief in response to the Brief of Respondent/Appellee, Mary Jo
Gerber.

STATEMENT OF THE CASE

This is a divorce case, as was stated in Appellants initial Statement of the Case. It involves errors made by the trial court in reviewing and modifying Appellant's alimony obligation to Respondent.

STATEMENT OF FACTS

No additional facts need be set forth in connection with this Reply Brief, other than to mention that the child support which Dr. Gerber originally agreed to pay was in excess of that provided for under the Utah Uniform Child Support Guidelines (R-158). Appellant relies on the Statement of Facts set forth in his principal brief on pages 4 through 15.

With regard to the relief being requested by Dr. Gerber, Mrs. Gerber continuously attempts to characterize it as Dr. Gerber's attempt to terminate his alimony obligation entirely. Perhaps that was done in order to engender some sympathy from this Court for Mrs. Gerber. Regardless of her motive, it is important for this Court to understand that Dr. Gerber's position on the alimony issue is simple and consistent with Utah law on alimony awards - If Mrs. Gerber is capable of earning \$4,000 per month as a dental hygienist then Dr. Gerber ought not to have to pay her \$4,000 per month in alimony. If she can only make \$3,000 per month, working part time as a dental hygienist, then Dr Gerber's alimony obligation should be reduced by the amount of income she is able to produce for herself. This is what Dr. Gerber's position was when this matter was tried and is also what his position is now.

ARGUMENT

POINT I

DR. GERBER HAS FULFILLED ALL REQUIREMENTS
NECESSARY TO DEMONSTRATE THAT THE TRIAL COURT
ERRED IN THE WAY IT DEALT WITH THE ALIMONY
ISSUE

Mrs. Gerber argues in Point I of her brief that Dr. Gerber has failed to meet the marshalling of the evidence requirement which this Court has stated is necessary in order to challenge Findings of Fact on appeal in divorce actions. [(Peterson v. Peterson, 818 P.2d 1305, 1308 (utah App. 1591))]

That is simply not true. Dr. Gerber, throughout his brief has meticulously referred this Court to all portions of the record (the court file, the testimony and the exhibits), to support his claims of error and demonstrate that the trial court arbitrarily ignored undisputed evidence which should have been considered in connection with Dr. Gerber's request to reduce his alimony obligation.

On the other hand, Mrs. Gerber's brief is seriously lacking in references to the record other than reference to the court file. Her only reference to testimony and exhibits can be found on page 18 of her brief in support of her claim that there was ample evidence to support each of the trial court's findings. Her argument related to Dr. Gerber's failure to Marshall the evidence is but an attempt to distract this Court from the real issues raised by this appeal.

The parties original settlement agreement, as reflected in paragraph 3 of the Decree, provided as follows:

Defendant is awarded alimony from plaintiff in the sum of \$4,000 a month commencing with the month of July 1993, based upon the current financial circumstances of the parties as shown in their Financial Declarations and under circumstances where defendant is currently unable to work based upon her present physical disability.

There shall be an automatic review of this alimony award in one year from the date of the entry of the Decree of Divorce, or earlier if circumstances warrant, based upon the anticipation that defendant will use her best efforts to seek and obtain employment at the highest economic level and will, further, use her best efforts to rehabilitate herself from her disability to held her achieve her best employment opportunities.

The issue is reserved as to whether defendant's employment should be full or part-time barked upon the needs of the children. At the time of the review, each party shall have the right to express his or her respective position on this issue, as plaintiff's position is that defendant should seek and obtain full time employment and defendant's position is that she should seek and obtain part time employment due to the children's needs.

Plaintiff shall have the right to request defendant to obtain a physical examination by a hand expert currently, with a further examination six months from the entry of the Decree of Divorce and a second further examination one year from the entry of the Decree of Divorce to assist the Court in determining defendant's ability to obtain employment.

At the time of the review by the Court, if there has been a substantial change in financial circumstances or ability, then the Court may make adjustments in the alimony award based upon those changes. (R-76) (Emphasis added)

This paragraph contains two factors which were to be considered when the alimony award was reviewed. The first was a requirement on the part of Mrs. Gerber to use her best efforts to seek and obtain employment at the highest economical level and use

her best efforts to rehabilitate herself from her disability to help her achieve her best employment opportunities: (R-76; Emphasis added)

The second factor was whether or not she should work full or part time based upon the needs of the children.

The trial court erred in focusing all of its attention only on the second factor and totally overlooking Mrs. Gerber's legal obligation to maximize her earning potential.

Dr. Gerber does not take issue with the Court's finding that Mrs. Gerber should work only part time (32 hours per week), but he does take issue with the fact that the trial court ignored the following undisputed evidence:

1) Mrs. Gerber could earn \$3,000 to \$4,000 per month as a dental hygienist, depending on whether she worked full or part time (40 versus 32 hours per week). (R-272-374)

2) Work was available for Mrs. Gerber as a dental hygienist. (R- 274)

3) Mrs. Gerber had applied for only one job since the Decree (R-375)

4) Mrs. Gerber applied to recertify as a dental hygienist only after Dr. Gerber filed his Petition to Modify. (R-370)

5) Mrs. Gerber missed passing the test by only two points, (R-412) and was at best reluctant to take it again. (R-412)

6) Mrs. Gerber said she would not have the relatively minor, out patient recommended surgery to correct the problems with her hand. (R-263)

7) Mrs. Gerber, in her own opinion, was no longer disabled.
(R-403)

8) Mrs. Gerber was working 4 full days per week as a substitute teacher. (R-413)

9) Mrs. Gerber could earn five to six times more working part time as a dental hygienist as opposed to a substitute teacher. (\$25 per hour vs. \$5.67 per hour) (R-402, 403)

10) Mrs. Gerber did not want to be a dental hygienist.
(R-4~2)

In order to fully deal with the issues before it, Judge Cornaby should have found that Mrs. Gerber had not maximized her earning potential as she had agreed and been ordered to do. By not so doing, he erred and fashioned a remedy that was unfairly beneficial to Mrs. Gerber and patently unfair to Dr. Gerber. The evidence before him required him to find that Mrs. Gerber was capable of earning at least \$3,440 per month (\$25 per hour x 32 hours per week x 4.3 weeks per month), rather than the \$700 per month she was making as a substitute teacher and in so finding, he then would have been required to reduce Mrs. Gerber's alimony award by at least the amount she was capable of earning.

Dr. Gerber has demonstrated without question that the trial court failed to make appropriate findings on a material issue in the case, and had it done so, the evidence presented would have required an immediate reduction in Dr. Gerber's alimony obligation far greater than the deferred minor adjustment the trial court erroneously made.

POINT II

THE TRIAL COURT ERRED IN NOT FINDING THAT A MATERIAL CHANGE IN CIRCUMSTANCES HAD OCCURRED SO AS TO IMMEDIATELY REDUCE DR. GERBER'S ALIMONY OBLIGATION BY AT LEAST \$1,363/MONTH

Points II and III of Mrs. Gerber's Brief unsuccessfully attempt to respond to Point II of Dr. Gerber's Brief regarding the trial court's arbitrary disregard of the fact that Mrs. Gerber's monthly income had significantly increased and her monthly expenses had significantly decreased since the entry of the original decree.

She argues that her increase in monthly income working part time, to \$1,000 per month is not significant. She does not even address the fact that, by her own evidence, her monthly expenses had decreased by \$1,200 per month. (See page 32 of Appellant's Brief). Under no stretch of the imagination can a \$2,200 per month swing in income and expenses be deemed not substantial or material for purposes of modifying an alimony award. Said in another way, if Dr. Gerber's income had decreased by \$1,000 per month and her expenses increased by \$1,200 per month, would she have a justifiable basis to seek an increase in her alimony award? The answer to that question is an unequivocal yes. Likewise, based upon the facts presented, Dr. Gerber had more than a justified basis for requesting relief from his \$4,000 per month alimony obligation when his former spouses, income had increased \$1,000 per month and her expenses had decreased \$1,200 per month based upon her own evidence.

Mrs. Gerber places great weight (as it appears the trial court did) on the fact that Dr. Gerber earns \$16,666 per month. Dr.

Gerber must work over 80 hours per week to earn that monthly figure. Mrs. Gerber argues that a \$6,100 per month support award is insignificant in comparison to the amount of money Dr. Gerber has left for himself. She claims Dr. Gerber has the sum of \$10,566 left for himself each month. It appears that Judge Cornaby felt the same way.

In reality however, the following more accurately demonstrates what Dr. Gerber actually has left each month and the injustice of the current support award:

Dr. Gerber's gross monthly income	\$16,666
Alimony payment	(4,000)
Net monthly income before taxes	12,666
Federal and State combined tax [38% (Low estimate)]	(4,813)
Net monthly income after tax	7,853
Child support payment	(2,100)
Dr. Gerber's net take home after estimated taxes and payment of support obligations	\$ 5,753

As can be seen, Dr. Gerber presently pays over half of his net income to meet his child support and alimony obligations working 80 hours per week. For Mrs. Gerber to suggest that a \$1,000 per month increase in her income is not significant nor material and to simply ignore a \$1,200 per month reduction in her monthly expenses is cavalier at best.

The undisputed changes in circumstances which occurred since the entry of the Decree and which Judge Cornaby erroneously ignored are as follows:

1) Dr. Gerber's monthly income upon which the original support obligations were based remained unchanged.

2) Mrs. Gerber's monthly income increased from \$0 to \$1,000.

3) Mrs. Gerber's monthly expenses decreased by \$1,200 per month.

It was an abuse of discretion for the trial court to conclude that these changes in the parties, financial condition were not material so as to give Dr. Gerber relief from his monthly alimony obligation by at least \$1,363.

POINT III

THIS APPEAL IS NOT FRIVOLOUS AND AN AWARD OF ATTORNEY'S FEES TO MRS. GERBER IS NOT APPROPRIATE

At the conclusion of her Brief, Mrs. Gerber claims that Dr. Gerber's appeal of Judge Cornaby's decision on alimony is "frivolous", and asks that she be awarded her attorneys fees on appeal, "Frivolous" is defined in Webster's Ninth New College Dictionary as "of little weight or importance" Id. at 494.

The issues raised by Dr. Gerber in this appeal are substantial and of very great importance not only to Dr. Gerber but also to all individuals in Utah who may be paying alimony to a spouse who is voluntarily underemployed. Further, an award of alimony which results in a spouse receiving between \$1,363 and \$2,260 per month more in income than what her monthly financial needs are, as established by her own figures, is certainly significant to Dr. Gerber who has been required to work over 80 hours per week to meet his alimony and child support obligations of \$6,100 per month.

This Court has specifically formulated the standard to be applied when determining whether or not an appeal is "frivolous". In Hinkley v. Hinkley, 815 P.2d 1352, (Utah App. 1991), Judge Russon, in writing for a unanimous panel on an appeal of a modification award, denied a wife's request for fees on appeal based upon a claim of frivolousness and stated:

. . . this court has previously held that 'sanctions for frivolous appeals should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions., Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988). Utah R.App.P.33 (b) defines a frivolous appeal as "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." The appeal in this case is not frivolous inasmuch as both the change in circumstances claim and the waiver claim had some merit and a reasonable legal basis. Therefore we decline to award attorney's fees and costs on appeal. Id. at 1355, 56

In this case, Dr. Gerber has certainly met the minimum burden of demonstrating that the legal issues he has raised on appeal have merit and a reasonable legal basis".

Moreover, he has demonstrated that Judge Cornaby ignored undisputed evidence that Mrs. Gerber was voluntarily underemployed and was receiving support monies well in excess of her own statement of financial need.

If anything, Dr. Gerber should be awarded the attorneys fees he has been required to incur in asking this court to rectify the trial courts errors so that he likewise will be treated fairly.

Mrs. Gerber's request for fees on appeal should be denied.

CONCLUSION

Simply put, Judge Cornaby was wrong in the way he dealt with Dr. Gerber's request to reevaluate and reduce or eliminate the original alimony award. That award was premised on the fact that Mrs. Gerber had specifically agreed one year earlier that she would rehabilitate herself and go back to work in her field of training as a dental hygienist and would earn \$36,000 to \$48,000 per year. In so doing, she would then be able to support herself and provide Dr. Gerber with some much needed financial relief. The original alimony award was premised on that agreement by her. She voluntarily elected not to maximize her earning potential - a material element of the parties, original Settlement Agreement, and she now wants all of the benefits of that original agreement without fulfilling her part of the bargain.

In considering Dr. Gerber's request for relief, he respectfully asks each member of this Court to put himself/herself in Dr. Gerber's position for a moment. Each month he works over 344 hours. Each month he is required to write a check for \$6,100 to satisfy his support obligations. While writing this check, he knows that his former spouse, a trained dental hygienist, and capable of making \$36,000 to \$48,000 per year, has voluntarily chosen not to pursue that career. She has instead chosen to pursue a more leisurely lifestyle, electing to work part time and earn only \$5.76 per hour rather than the \$25.00 per hour she could earn as a dental hygienist. She justifies her choice to work only part time with the pretense of being able to tend to the extracurricular

needs of the parties, three children, aged 15, 13 and 11. One can only conclude that Mrs. Gerber's real reason for not working to her full capacity is that she does not want to. The monies Dr. Gerber currently pays her are more than adequate to meet her monthly expenses and allow her to remain underemployed. It is not fair to require Dr. Gerber to shoulder all of the financial responsibilities of the parties when the record is clear that Mrs. Gerber has the ability and the duty to assist in the financial support of herself as much as she can.

The duty of a trial court in divorce actions is to fashion remedies fair and equitable to both parties. In this case, Judge Cornaby did not correctly fulfill that duty. The remedy he fashioned was patently unfair to Dr. Gerber given the undisputed evidence before him. Dr. Gerber respectfully asks this Court to remedy the error committed by the trial court and grant the relief requested on page 15 of his Brief.

Respectfully submitted this day of August, 1996

DART, ADAMSON & DONOVAN

By: Shawn A. Donovan
for Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned, a representative of Dart, Adamson & Donovan, hereby certifies that two (2) true and correct copies of the above and foregoing **Appellant's Reply Brief** to David S. Dolowitz, dated August 6, 1996, was mailed, postage prepaid, to the following counsel of record:

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