1968

byron C. Watts v. Ardith D. Watts : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BYRON C. WATTS,
Plaintiff and Appellant,

vs.

ARDITH D. WATTS,
Defendant and Respondent.

Case No. 11145

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court
In and for Salt Lake County, Utah
The Honorable D. Frank Wilkins, Judge

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment entered on plaintiff's motion to modify a prior judgment of the court dated August 4, 1967, which petition sought the termination of alimony and the change of custody of a minor child, Craig Watts, age 10 years.

DISPOSITION IN LOWER COURT

The court refused to modify the decree of August 4, 1967, granted the counter-petition of defendant, found the plaintiff in contempt of court, entered

judgment against him for $972.81, restrained him from interfering with the defendant and the child Craig, and enjoined the other son, Christopher, from in any way interfering with the relationship. Plaintiff's petition for modification was dismissed with prejudice and defendant's counter-petition was dismissed without prejudice. Plaintiff was ordered to pay the cost of an audit by Main LaFrentz and the reporter's fee for the transcription of the proceedings.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the court reverse the order of the trial court, terminate the alimony to the defendant, and grant to him the custody of the minor child, Craig Watts.

STATEMENT OF FACTS

This is a second appeal in the above-entitled matter by plaintiff and involves the following circumstances. The judgment in Case No. 11072 was dated the 4th of August, 1967 and amended October 4, 1967. On the 15th of August, 1967 the defendant obtained employment with a law firm as a file clerk and telephone receptionist, earning at the rate of $275.00 per month (See counter-petition and R. 27).

The child, Craig Watts, had never, prior to the decree of August 4, 1967, exercised his right of selection (R. 14). Both parents are good people. The

custody of the child was awarded to the defendant by the decree without contest.

At the hearing on the 27th of December, 1967 it was stated that the child had moved in with his father (R. 14). Defendant indicated that she wanted both of the boys, Chris and Craig Watts, she thought both of the boys should be kept together (R. 15). It was indicated by plaintiff that the boys love each other and want to be together (R. 15). He indicated that he did everything in his power to get the boy Graig to return home and stay with his mother (R. 16). The court indicated that he would force the child Craig back to defendant's custody whether he wanted to go or not (R. 17). The court had received a copy from the Conciliation Department of a report of their study by Mr. Blatner (R. 18), and also an audit of the financial condition of Byron C. Watts & Company made by Main LaFrentz (R. 18). The child Craig had expressed his wish to the court that he be permitted to live with his father (R. 18). Requiring Craig to live with his mother was primarily to benefit the mother (R. 19). Both the father and mother are fit and proper persons to have the custody.

Exhibit P-6, prepared by Main LaFrentz Company pursuant to the court's direction, is an audit of the books of Byron C. Watts & Company for the ten months ended October 31, 1967. The Balance Sheet on Page 2 and 3 show that Mr. Watts has

a deficit of $31,591.00. The Statement of Incom shows a net loss, after taking into account the divorc settlement order, of $6,979.00. (P. 4). On Page of the accounting statement it shows that Watt started the year with a net deficit of $12,350.00 which was increased to $31,591.00 during the firs ten months of the period. The Main LaFrentz audi in general confirms the financial information fu nished by plaintiff at the trial with some minor, no material, variances.

Plaintiff seeks the termination of alimony in hi petition for modification upon the ground that de fendant, having become gainfully employed, is n longer solely dependent upon the plaintiff for he livelihood and is capable of supporting herself Plaintiff also asked the court to modify the decre relating to the Cadillac automobile which wa awarded to defendant and on which he was ordered to pay the mortgage then due and owing of $2,000.00 He requested modification of the order for attorney' fee in that no time was specified as to when it shoul be paid. He requested a general modification to mee the demonstrated inability of plaintiff to pay an provide for the numerous obligations incurred by th parties during their marriage which he had bee ordered to pay.

Defendant's counter-petition set forth a denial o the allegations that the child Craig had made a

election to live with the plaintiff, requested the court to order plaintiff not to interfere with the parental discipline of the child Craig, set forth that the Cadillac automobile was in the process of being repossessed and the mortgage on the same foreclosed, and requesting that the court find the plaintiff in willful contempt for failure to pay the mortgage on the automobile. The petition also alleged that the plaintiff had failed to pay the second mortgage on the home at 4270 Vallejo Drive.

She denies that the employment at a salary of $275.00 per month is a sufficient change of circumstances to entitle plaintiff to a reduction of alimony, and claims that a net cash flow of $700.00 per month is required. Defendant further alleged that the plaintiff was delinquent in his payments of support and alimony and requested a judgment as to the amount of delinquencies. She requested the court to order plaintiff to pay the mortgage payments on the Windsor Street property, discharge the lien on said property in favor of J. A. Mollerup, bring the mortgage on the home at Vallejo Drive current, bring the Memorial Gardens burial plot account current, show that the life insurance premiums are paid, and pay numerous open accounts. She claimed that plaintiff had willfully refused to pay the attorney's fees and costs of court ordered by the prior judgment of August 4, 1967.

The counter-petition requested the court to take punitive measures to force plaintiff into compliance and appoint a receiver to take over the plaintiff's assets and liquidate same. She seeks to enjoin the plaintiff and his son Christopher from interfering in the relationship between her and Craig and asks for an additional attorney's fee of $500.00.

On these pleadings the court found the plaintiff guilty of willful contempt, deferring the sentencing of plaintiff until the further order of the court. He entered judgment of $972.01 against plaintiff, restrained the boy Christopher and plaintiff from interferring with the relationship between the defendant and Craig.

He dismissed plaintiff's petition for modification with prejudice and defendant's counter-petition without prejudice, and ordered the plaintiff to pay the costs of the Main LaFrentz audit and reporter's costs.

Plaintiff has before this court at the present time an appeal from the original decree which he believes demonstrates that it is economically and physically impossible for him to perform the orders of the court. The brief of plaintiff in said appeal sets forth in detail resources that were acquired by the parties during their marriage and the distribution made by the court, and plaintiff will not restate or reargue said material. It is his opinion that it would be repetitious

and the court may refer thereto if it sees fit for an explanation of the property distribution decree.

ARGUMENT

POINT I

THE CHANGE OF CIRCUMSTANCES JUSTIFIES A MODIFICATION OF THE COURT'S DECREE OF AUGUST 4, 1967 AS AMENDED BY THE AMENDMENT OF OCTOBER 4, 1967.

The law of the State of Utah permitting the modification of decrees distributing property at the time of a divorce is U.C.A. 30-3-5. The language of said section, which is apropo to this problem, reads as follows:

> "Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

In interpreting this section, this court has set down the rule that a party must allege and prove changed conditions arising since the entry of the decree which require, under rules of equity and justice, a change in the decree. *Gardner* v. *Gardner*, 177 P. 2d 743, 111 U. 286. In *Osmus* v. *Osmus*, 198 P. 2d 233, 114 U. 216, the court stated the rule, that if an alimony decree is inequitable because of change of circumstances of the parties, a divorced husband may petition for modification. The circumstances must require, in fairness

and in equity, that a change in the terms of the decree be made.

This court has also set a limitation on its power and has stated that it will modify the trial court's decree only when there is an abuse of discretion and the award is not legally sound. *Anderson* v. *Anderson*, 138 P. 2d 252, 104 U. 104.

The court on several occasions has reduced the amount of alimony where the circumstances were such as to require, under the rules of equity and justice, a change of decree. *Hampton* v. *Hampton*, 47 P. 2d 419, 86 U. 570; *Chaffee* v. *Chaffee*, 225 Pac. 76, 63 U. 261; *Rockwood* v. *Rockwood*, 236 Pac. 457, 65 U. 261.

In *Hendricks* v. *Hendricks*, 63 P. 2d 277, 91 U. 553, the court found that the trial court's refusal to modify an alimony decree on the ground of changed circumstances was error where there was a demonstration that the price of wheat had suffered a substantial reduction which affected adversely the ex-husband's ability to pay. The court held that a husband was entitled to apply for a judgment of modification where the wife had remarried and was supported by her new husband. See *Anderson* v. *Anderson*, 172 P. 2d 132, 110 U. 300.

In *Callister* v. *Callister*, 261 P. 2d 944, 1 Utah 2d 34, this court held that it had the right to modify

decrees even if they were satisfactory to the parties to the marriage where the support of the child or for alimony was unreasonable and that the court could change these matters over the objection of both parties. Such a course was followed in *Jorgensen* v. *Jorgensen*, 406 P. 2d 304, 17 Utah 2d 159, where a readjustment of alimony was made after the children had reached their majorities and no longer required the father to support them.

The court has held, however, that modifications in divorce decrees would not be made where it was unreasonable to make such modification. *Cole* v. *Cole*, 239 P. 2d 615, 121 U. 151.

To justify modification, the trial court should have before it circumstances which have undergone a substantial change. *Gale* v. *Gale*, 258 P. 2d 986, 123 U. 277. In *Carlton* v. *Carlton*, 294 P. 2d 316, 4 Utah 2d 332, the refusal of the husband to make house payments which he had paid voluntarily and without the requirement by court decree in the past, was sufficient change of circumstances to justify modification and increase in the alimony for the wife to permit her to make such payments.

Only where changed circumstances are demonstrated is a party entitled to have a modification made. In *Anderson* v. *Anderson*, 368 P. 2d 264, 13 Utah 2d 36, the court ordered that the question of

costs and attorney's fees could also be examined in a petition for modification.

The financial reports which are a part of the record on appeal clearly demonstrate that the plaintiff's economic resources are not sufficient to comply with the court's decrees, that there has been a change on the part of defendant. She now has substantial earnings—$275.00 per month. In equity and good conscience, a change in the court decree is required.

POINT II

THE MINOR CHILD, CRAIG WATTS, SHOULD BE PERMITTED TO EXERCISE HIS RIGHT TO SELECT THE PARENT TO WHOM HE WISHES HIS CUSTODY AWARDED.

UCA 30-3-5 governs the right of a child to make his selection. The relevant language of said section reads as follows:

> "That if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves."

This court, in one of the early cases, held that where a parent is not immoral or an unfit person to have the care and custody of a child, the court would find that it is in the best interests of the child that it be awarded in the manner it selected. *Dorsey v. Dorsey*, 172 P. 722, 52 Utah 73. See also *Anderson*

v. *Anderson*, 172 P. 2d 132, 110 Utah 300. In re *Olson*, 180 P. 2d 210, 111 U. 364, this court has held that in the matters involving child custody the appeal is of an equitable nature and that the court will review both the law and the facts.

In *Smith* v. *Smith*, 262 P. 2d 283, 1 Utah 2d 75, the court changed the award of custody where it appeared that the child under supervision of the parent who was not awarded the custody had made considerable progress, it being in the child's interest that his custody be changed.

Motzkus v. *Motzkus*, 406 P. 2d 31, 17 Utah 2d 154, a recent decision decided by this court held the paramount consideration is the welfare of the child. A motion to dismiss petition to modify and change custody should not have been granted.

In the present case the boy himself has contacted the court on several occasions and expressed his wish to live with his father and older brother. At the time of the hearing he had made the change over the objection of his mother. These facts, it would seem to plaintiff, demonstrate that this child is anxious to live with his father and brother and will not be happy living with his mother. He will not voluntarily live with her. *UCA* 30-3-5, it is submitted, may be a recognition by the Legislature that when a child reaches ten years of age he has a will which should

be taken into consideration in awarding his custody. This factor, plus the belief that such children have a sufficiently developed discretion to choose the home where they will be happiest, furnish the rationale of the act.

It is submitted that this conduct of the child shows a determination on his part which bolsters his express selection of his father as the party with whom he desires to live. In *Anderson* v. *Anderson*, 172 P. 2d 132, 110 U. 300, a situation similar to that before the court at this time was presented. There the parents had failed to plead the welfare of the child and it had not been made a matter of dispute at the time of the divorce. Subsequently the child did express his choice. This court set down the rule that where the choice was not a temporary whim, not dictated by some present lure, but is the considered judgment of the child, that it may well be the determining factor. In *Smith* v. *Smith*, 386 P. 2d 900, 15 Utah 2d 36, the court moved further to strengthen the child's right of selection. It held that where the parents were both fit, the child must be awarded to the parent chosen (P. 37). In *Stone v. Stone*, 431 P. 2d 802, 19 Utah 2d 378, the court stated where the child makes his choice in supplemental proceedings to the divorce, it is only advisory (P. 381).

It would seem rather convincing to plaintiff that the happiness and welfare of a child ten years of age

is not served by being placed in the custody of a parent he does not prefer, while no reason exists for his custody not being with the parent he does prefer.

The child knows he is desired by both parents and they are both fit. This case is the first that we have discovered where the custody is viewed as a benefit to the parent, so the wishes of the child and the other parent are overridden (R. 16). The trial court seemed to recognize he might not be able to obtain compliance by the child voluntarily and even hinted at punishment of the child if he did not obey (R.17).

It is difficult to believe such an order is in the best interest of the child. Certainly it would make for an unhappy and rebellious one. Other than the mother's comfort, what reason can there be for overruling the child's wishes.

It would seem to be that the law of the state of Utah is that a child should be permitted to select a fit parent and that this would be conclusive as far as the trial court is concerned where no factors demonstrating that his selection would be contrary to his best interests are presented.

CONCLUSION

It is respectfully submitted that the evidence shows that the trial court abused its discretion in refusing to modify the decree of court heretofore entered and refusing to permit the minor child Craig to live with his father. The custody decree should be modified awarding his care, custody and control to his father. This court should order other modifications making for an equitable decree or a new trial should be granted.

Respectfully submitted this ..... day of ....., 1968.

DWIGHT L. KING

Attorney for Plaintiff and Appellant