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Recommended Citation
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IN THE SUPREME COURT OF THE STATE OF UTAH

BYRON C. WATTS,
Plaintiff-Appellant
vs.
ARDITH D. WATTS,
Defendant-Respondent

Case No. 11145

RESPONDENT'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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FILED
MAY 17 1968
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

BYRON C. WATTS,
Plaintiff-Appellant
vs.
ARDITH D. WATTS,
Defendant-Respondent

Case No. 11145

RESPONDENT'S BRIEF

NATURE OF THE CASE

Appellant seeks to modify a divorce decree by terminating alimony and securing custody of the minor child of the parties.

DISPOSITION IN LOWER COURT

The decree sought to be modified was entered on August 4, 1967. The original decree is to be found in Case No. 11072 in this court in which case an appeal pends from the judgment entered on the 4th day of October, 1967 modifying the original judgment.

The August 4, 1967 decree awarded to respondent the child Craig who was born April 9, 1957, the court finding, among other things, that such was in the best interests of said child (Finding No. 6). The trial court in the instant matter rejected appellant's petition for change of custody.

The trial court denied appellant's petition for termination of alimony and awarded respondent judgment

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for $972.81, the same constituting arrearages of alimony and support money for September, October and November, 1967 and held appellant to be guilty of willful contempt in the nonpayment of the same. Sentence for such contempt was deferred until the further order of the court.

Appellant asked that the decree be modified to require the Cadillac automobile sold and the proceeds applied on the mortgage lien. By the time of the hearing the Cadillac automobile was repossessed by the mortgage holder. Appellant's petition in that particular was denied.

Appellant asked that the home previously awarded to respondent be ordered sold, respondent to have the net proceeds "since said home is beyond the needs of the defendant residing by herself." The trial court denied this facet of appellant's petition and other but less specific claims for relief.

Appellant and the boy Christopher were restrained and enjoined from in any manner interferring in the relationship between respondent and the son Craig as defined and delineated in the August 4, 1967 decree.

Appellant's petition for modification was dismissed with prejudice and he was ordered to pay the fee of the accountant and the court reporter. So far as the record discloses there has been no payment of the same. Respondent's cross-petition, except for matters ruled upon in her favor, was dismissed without prejudice.

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RELIEF SOUGHT ON APPEAL

Appellant, under the guise of his petition for modification, is actually attempting to have this court review the August 4, 1967 decree in the same manner as if it were the decree appealed from. Appellant was in default at the time of the filing of his petition for modification and remained in default throughout the proceedings. He was not entitled to be heard in the court below and is not entitled to be heard now. In any event there is nothing justifying a modification and the order appealed from should be affirmed.

STATEMENT OF FACTS

An investigation ordered by the trial court (R. 46-48) developed that Craig was persuaded both by appellant and by the boy Christopher, now 17 years of age, to move from the mother's home and that the environment with the father was not good (Ex. P-5).

Hearings in the instant matter were held December 27, and December 30, 1967. Appellant had paid nothing for the month of December, 1967 and was in arrears in the total sum of $972.81 for alimony and support money accrued since the entry of the decree on August 4th, through the month of November, 1967. Respondent was existing on the sum of $275.00 a month, the salary that she was receiving as a receptionist and file clerk. As reflected by the August 4th findings, respondent has a severe heart condition which restricts her ability to earn a livelihood.

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Appellant in his brief makes the rather oblique statement that requiring Craig "to live wth his mother was primarily to benefit the mother" (P. 3). This was appellant's counsel's statement (R. 19) and only he knows what was intended but the fact is that we have a good mother who wants her boy (R. 16-17) and who feels that if her former husband had performed as ordered by the court the boy would not have left her (R. 14-15).

Appellant's net earnings increased substantially over those upon which the alimony award was based and this and other relevant matters will be urged by way of argument.

ARGUMENT

POINT I.

THE ISSUE OF GOOD FAITH AND CREDIBILITY

Appellant's petition for modification dated October 13, 1967 (Tr. 30-33) followed the overruling of the motion for a new trial which ruling was made on September 28, 1967. The question of good faith was pointed up early in the instant matter. The notice of appeal in Case No. 11072 in this court dated November 2, 1967, indicates appellant's dual purpose. He was asking the trial court to modify the same decree that he was asking this court to review by an appeal route (R. 21-22). He stated to the trial court that his appeal was "from the original decree" (R. 21).

The question of bad faith with respect to the appeal in Case No. 11072 is accentuated by the fact that the

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parties were in court on the 28th day of October, 1967, in the instant matter (R. 46-48) when the court on its own motion appointed an accountant to review appellant's financial affairs and appointed an investigator to determine among other things why the son Craig had left the domicile of respondent. The notice of appeal in Case No. 11072 dated the 2nd day of November, 1967, was obviously an afterthought and as a hedge against the anticipated findings by the investigator that the home environment furnished by appellant for Craig "is not good." (Exhibit P-5)

To cap the climax, appellant sought to have the trial court defer the custody problem until the decision of this court in Case No. 11072 (R. 21-22). Appellant was not only trifling with the court but he was preying upon the deep emotional aspect of the situation and through his nonpayment of alimony and support money was literally starving respondent into submitting to his whim.

At the time of the hearing on December 27th, two days after Christmas, the appellant had paid nothing by way of alimony and support for the month of December and was $972.81 in arrears in his payments for September, October and November. The Cadillac automobile had been repossessed (R. 80). The check (Exhibit 8) dated October 23, 1967 spoke falsely when it stated that the mortgage payment on the home property in the amount of $213.00 had been paid (R. 65). The payment to respondent on the 27th day of September, 1967

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in the amount of $287.00 falsely implied that the mortgage payment for that month had been paid. On December 30th, the date at the last hearing, the mortgage on the home property was in default and had been since August.

Just before the hearing on December 27, Craig, after having stayed with his mother for a week or so told her over the telephone "You take Daddy to court one more time, I will not speak to you" (R. 23-24). In the hallway of the courtroom on the date of the hearing the 17 year old boy Chris told respondent "I heard everything in there. Don't speak to me." (R. 24). The influence of appellant was apparent. Bad manners and bad faith are synonymous and emanate from appellant.

Appellant's cash receipts for the month of November, 1967 were $4,097.25 (R. 34). Respondent was paid nothing for that month. The December 1967 cash flow was not made known (R. 35) but in December 1966 it was $7,596.00 (R. 33). The representation was that appellant's net income for the month of October, 1967 was $170.03 and for the month of November $344.47 (R. 31-32). The cry of "poor mouth" was dissipated when it was determined that appellant's books were kept on an accrual basis (R. 34). Page 9 of Exhibit P-6 discloses admitted net cash income for ten months ending October 31, 1967 of $17,171.00.

At the hearing on December 30, 1967 appellant testified that out of his drawing of $447.00 for October, 1967 rent of $150.00 per month was included (R. 75). On

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cross examination appellant vacillated on the rent item and said "I didn't pay this in October, I guess" (R. 80) and then "I paid it in November" (R. 81) and then "I owe it (rent) to him" and then finally " I haven't paid it" (R. 81).

Weasel words were used by appellant in describing his alleged efforts to abide with the prior order of the court relative to custody of Craig. "Chris * * * is agressive, precocious youngster, but just because he is a little pushy, not just to you Your Honor, but everybody, is a little bit annoying. * * * One of the reasons he is pushy is he loves this young boy and wants him there and Craig wants to be there" (R. 15). The trial court reminded appellant that on an occasion during the divorce hearing he had personally expressed the belief and desire that Craig should live with respondent (R. 18). In answer appellant stated:

> MR. WATTS: "I didn't realize if this is pertinent, what the rights were at that time, what the rights of the children were" (R. 19).
>
> THE COURT: "The record may reflect he did not. You do recall that at the hearing that it was agreed between you and Mrs. Watts, the boy Chris should stay with you and Craig with Mrs. Watts. Do you recall?"
>
> MR. WATTS: "Not exactly that way. I recall I was asked, 'Will you take care of your boy if he is awarded to you,' and I said, 'Yes, I would.' 'Would you help Mrs. Watts with the younger if he were awarded to her?' " (R. 19).

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The court was amply justified in the finding that there was no substantial or any change of circumstance entitling appellant to a modification and that there was no good faith effort to perform (R. 53). The trier of the fact was justified in disbelieving appellant on any material issue.

POINT II.

IN SUPPORT OF RESPONDENT'S CUSTODY OF THE SON CRAIG

The findings of August 4, 1967, paragraphs 4, 5 and 6, spell out with considerable detail the reasoning and the ground rules with regard to the award of custody of Craig to respondent. In finding No. 6 the court finds that it is in the best interests of the child Craig that he be awarded to respondent. Finding No. 4 is descriptive of the mother's aptitude in such respect as follows:

> "That the parties have no natural children as issue of said marriage, they being, nevertheless, the foster parents of the child Christopher, born April 6, 1951, and the parents by adoption of the Child Craig, born April 9, 1957; that defendant has deep and sincere maternal affection for both of said children, having reared and nurtured the child Christopher since he was of the age of approximately two years and the child Craig since birth and has the temperament and the ability to provide each of said children with proper home, school and church environments, and is in all respects a fit and proper person to have the care, custody and control of said children awarded to her and has expressed such to be her desire."

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Appellant by his complaint filed in August 1966 alleges that respondent is entitled to have custody awarded to her. At the trial of the divorce action in July, 1967 appellant was equally as solicitous of the best interests of Craig and did, in fact, assure the trial court of his utmost cooperation in a harmonious relationship with Craig in the custody of respondent and Chris in the custody of appellant.

In the instant proceeding the report of the investigator comprehensively reviews the relative environments offered by both parties and describes the facilities offered by appellant as being "a stale environment" for the boys and particularly Craig. It is stated that appellant leaves Chris with the responsibility of the younger boy. According to the report, Craig is of the impression that his father is going to get him a dog and a horse if he, Craig, will live with the father. The father has supplied Chris with a new Toyota Corona automobile and Craig has a "hero-worshiping" attitude with respect to Chris.

The trial court had the opportunity of talking with Craig subsequent to the divorce (R. 18) and in the judgment appealed from reiterated the admonition contained in the original findings and decree to the effect that appellant and the boy Christopher should in no manner interfere in those respects (R. 54).

The trial court when threatened by counsel with an appeal in the instant matter specifically stated that no change of circumstance had occurred since the finding in the original hearing of the matter; that respondent

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continues to be a fit and proper person to have such custody; and that it is in the best interest of the child that respondent has the custody of Craig "That is my reasoning and my finding" (R. 20). At another place in the record the trial court expressed the view that Craig is not "frustrated * * * there has not been abuse by his mother. He is just having a heyday. It is going to take a painful re-adjustment." (R. 17).

There is much that can be said concerning the "pushy" attitude of the "precocious youngster" Chris, but of extreme significance are the overt acts of appellant in breeding contempt for law and the order of the court. Appellant has disregarded the order of the court. Chris has disregarded the order of the court and now Craig has no compunction in giving way to his own whims rather than to regiment himself to and conform with any discipline whether it be from the mother or from the court. In this respect appellant challenges the trial court and invites this court to condone the disrespect so plainly evidenced.

In essence, the question of custody, realigns the respondent on the one side, with the precociousness and "pushy" domination of Chris on the other side. Appellant, the father, is either too weak or too disinterested in the role entrusted to him by the court or else he is actively aiding and abetting Chris in inducing Craig to make a mockery out of the court order and the mother's directives. If appellant is, in fact, using Chris as a shield to hide a direct affront to the order of the court.

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his conduct is most reprehensible. The record viewed in a light most charitable to the appellant makes him the victim of the precociousness of Chris. In any event, and regardless of whether it is appellant or Chris that dominates the roost we are at the grass roots of respect for law and order. The trial judge unequivocally stated: "The boys better learn to obey. This boy ought to realize, maybe with a steel fist approach with some velvet on it. Maybe we ought to use it to show this ten year old he is not immune. He has to operate by law. If there was some disadvantage in either of these people — there is not. These are both good people. That youngster ought to learn that." (R. 14)

What appellant is contending for and what he seeks this court to condone is that if you do not like a law or the order of the court "ignore it."

In *Stone v. Stone,* 19 Utah 2d 378, 431 P.2d 802 (1967) the majority court cites *Anderson v. Anderson,* 110 Utah 300, 172 P.2d 132 (1946) as holding that in proceedings supplemental to the divorce the choice of the older children as to parental custody is advisory only. The *Anderson* case is cited in the dissenting opinion to the effect that the election of the child ten years or more of age applies only at the time of the divorce.

> "To permit children to change custody when they arrive at the age of ten years would be to enable them to pit one parent against the other, and this the court will not do."

There is no question but what a rebellious attitude has already been instilled in Craig that will not be cor-

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rected overnight by the judgment of this court or of the lower court. Respondent will have at least the opportunity once this court has spoken to be left alone with her boy without the overt and willful acts on the part of appellant calculated, as the record so clearly shows, to frustrate the same. The effort on the part of respondent will be a difficult one but it will be aided immeasurably by the final ruling of this court that the order granting her such custody is no longer the subject of vacillation or debate. Proper corrective measures from that point on can be taken both by respondent and the trial court. This, for the moment at least, is all that one can reasonably expect.

POINT III.

THERE SHOULD BE NO CHANGE IN THE ALIMONY AWARD.

Appellant seeks to terminate the alimony award. There is nothing in the record to support relief of that nature.

The temporary award in January, 1967, required appellant to pay $638.00 a month to his family (R. 64). The August 4th decree required the payment of $350.00 per month as alimony and $150.00 per month for the support of Craig. Finding No. 7 as entered on August 4, 1967 fixes appellant's gross income at approximately $4,300.00 per month from all sources with an average net income from his accounting practice of $13,215.00 per year. The net cash income for the first six months of 1967 was $8,013.00. The trial court found respondent

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to have a health condition that inhibits her from work involving excessive strain and tension.

Finding No. 8 as entered on August 4, 1967 expressly states that it is contemplated respondent will obtain some remunerative employment within her capacity; that the present award of alimony is inadequate relative to the standard of living of the parties prior to their separation and the contributions made by respondent to the marriage; that remunerative employment within the capacity of respondent should not be treated as a change of circumstances sufficient in and of itself to entitle appellant to any reduction of alimony unless it is made to appear that such remuneration, coupled with the present *payment* of alimony and child support, exceeds the sum of $700.00 per month and then only as to such part of such remuneration as exceeds the *gross cash flow* of $700.00 per month.

In the instant matter and at the time of the hearing appellant was in arrears in the payment of alimony and support and had been in arrears ever since the entry of the August 4th decree. Appellant was not entitled to be heard at all with respect to reduction of alimony, this being an equitable proceeding and his hands not being very clean.

The award of alimony was predicated on appellant's net earnings for the first six months of 1967 of approximately $1,335.00 per month. At the time of the hearing, appellant from his own figures (Exhibit P-6) had net cash income for ten months of $17,171.00 or approxi-

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mately $1,717.00 per month. The gain in favor of appel lant over the base figures used in the August 4th decre is $382.00 per month and in equity and good conscienc the paper gain of $75.00 per month to respondent is o trifling consideration.

The judgment and discretion of the trial court wit its advantage in making perhaps a sounder appraisal o the situation, including the issue of credibility, is entitle to considerable weight. This is recognized by this cour in the recent case of *Sorensen v. Sorensen,* 438 P.2d 18 (Utah 1968). In the *Sorensen* case it is held that th parties are entitled to rely on the finality of the alimon award in determining the right to receive and the dut to pay and then summarizes as follows:

> "Our statute permits subsequent change which are reasonable and proper. This has bee construed to empower the court to make a modifi cation where there has been a substantial chang in the material circumstances of either one or both of the parties since the decree was entered. A application for a modification should be subjected to thorough scrutiny by the court. There ar many factors that can have a bearing on the reso lution of the question."

The trial court in the instant matter placed som weight on appellant's admission that he could be as con servative or as profligate as he cared (R. 67) but stated that the original concept of the alimony award found support in the independent audit Exhibit P-6 (R. 68 In any event, the burden to show a change of circum

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stances was upon appellant and this he failed to do. *Sorensen v. Sorensen, supra.*

It seems somewhat of a distortion of the connotation of equity, justice and fair play to say that a man who is able-bodied with substantial earning capacity can withhold what the court has ordered him to pay and then when his wife is forced into a meager salary in order to survive that there is thereby brought about a situation entitling him to modification without having first responded to his moral and legal obligation to pay under the prior order.

CONCLUSION

To affirm the order appealed from will give respondent and the son Craig some semblance of security and respondent a clear opportunity to enforce compliance. The present record justifies punitive action against appellant not only with regard to enforcement of respondent's rights but as a precedent for the adult and child alike who might believe themselves to be immune from the orderly processes of the law. We urge that the judgent appealed from be affirmed with such admonition as to the court seems meet and proper in the premises.

Respectfully Submitted,
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