

2000

Henry C. Dehm v. Yvonne G. Dehm : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

30 MAR 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HENRY C. DEHM, :

Plaintiff-Appellant, :

vs. :

Case No. 13964

YVONNE G. DEHM, :

Defendant-Respondent. :

RESPONDENT'S BRIEF

Appeal From an Order and Judgment of the
District Court of Salt Lake County
Honorable Ernest F. Baldwin, Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

HENRY C. DEHM,	:	
Plaintiff-Appellant,	:	
vs.	:	Case No. 13964
YVONNE G. DEHM,	:	
Defendant-Respondent.	:	

RESPONDENT'S BRIEF

NATURE OF THE CASE

Appellant seeks to terminate the payment of alimony to respondent and would abort any obligation on his part toward the support of his twin 18 year old daughters who are mentally retarded and incapable of self-support.

DISPOSITION IN LOWER COURT

On August 14, 1973, appellant filed a motion (R23) to reduce or eliminate the award of \$300.00 per month ordered paid to respondent as alimony by the decree of divorce dated June 5, 1967 (R18-22). Appellant assigned the earning

ability of respondent since the decree of divorce as being the sole "substantial" change of circumstance warranting the granting of his motion.

Respondent filed an answer and counter-motion on September 21, 1973 (R25-31). Respondent by her answer makes specific reference to her work program, her schooling, her salary and various activities since June, 1967, through July 1, 1973. Respondent alleges that the decree of divorce and the findings of fact entered on June 5, 1967 (R11-22) contemplate an earning capacity on her part in order to augment the alimony and support provisions. The findings of fact entered on June 5, 1967 (No. 7, R14) recounts respondent's work program from the time of the marriage until appellant obtained his college education which included a Ph.D. Degree at the University of Wisconsin. During this period respondent worked part-time as a secretary while completing her own education. She contributed her talents and resources to the marriage and at the time of the divorce was employed on a part-time basis receiving a gross salary of \$220.00 per month (No. 5, R13).

The twin daughters of the marriage, born August 6,

1956, are in the care, custody and control of respondent by virtue of the divorce decree. By respondent's answer to appellant's motion it is alleged that the children are not capable of adult responsibility (R28). Respondent asked that the support for the children be increased from \$162.50 per month per child to \$300.00 per month per child and that alimony be increased to \$500.00 per month. She also asked that the insurance program be continued for an indefinite period, for attorney's fees and costs and that the decree of divorce be amended accordingly.

There was no responsive pleading filed by appellant to the counter-motions. There was no denial of the allegation that the children created additional burdens in their care and maintenance. Appellant did not urge any change of custody. Appellant did not ask that a general guardian or guardian ad litem be appointed. Appellant takes the position that regardless of the incapacity of the children, the Court in a divorce proceeding is without "jurisdiction" to award support beyond the chronological age of majority.

The trial court in the instant action denied respondent's claim for increase in alimony, for an increase in

support payments and refused to grant attorney's fees and court costs. In a very comprehensive memorandum decision (R58) the trial court made the following rulings:

- "1. Modify decree to provide that obligation of the plaintiff for support of children to continue indefinitely and is not to terminate upon children reaching chronological majority.
2. Alimony payment to remain as is. Not increased or decreased. No modification.
3. No modification as to child support. Plaintiff to continue taking children as tax deduction.
4. Medical and hospitalization insurance requirement of divorce decree to be modified so plaintiff continues to carry same, based upon the apparently irreversible mental condition of the children, they will be dependents it appears into future.
5. Plaintiff to continue life insurance with children as beneficiaries...not to change the life insurance trust to put out children as beneficiaries..primary beneficiaries.
6. Each party to pay own attorney's fees. Defendant now has substantial job and income on job..able to save money and invest money.

Court finds that there has been changes in circumstances of parties.

1. Plaintiff income has increased.
2. Plaintiff remarried but new wife has income.
3. Defendant now employed and professional

- and has substantial salary.
4. Now appears children will always be dependents. Cost, time and trouble of caring for children has substantially increased due to their mental incapacities and disabilities.
 5. Children no longer need private tutoring.
 6. Children incompetent."

The formal order of modification was signed and entered by the court on November 7, 1974 (R41-43). Among other things, the court in its findings of November 7, 1974, specifically found that the children are now and since the entry of the decree of divorce have been incompetent and will always be dependents irrespective of their chronological age of 18 years or older (R35).

Appellant's motion to amend findings of fact, conclusions of law and decree of divorce and for a new trial was filed November 20, 1974, thirteen days after the court's formal judgment. The motion is dated November 18, 1974, with a mailing certificate of the same date (R45-48). Appellant's motion was heard by the trial court on December 18, 1974 (R49). The notice of appeal is dated January 20, 1975 (R50).

RELIEF SOUGHT ON APPEAL

Respondent would have this Court affirm the rulings of the trial court in all respects.

STATEMENT OF FACTS

Appellant ignores the record in his statement of facts with reference to the incapacity of the children. Appellant departs from the record in attributing to respondent testimony purportedly contained in Exhibit 1-P to the effect that she would be contented with her earnings of \$220.00 per month claiming that her first responsibility was to her handicapped girls and that a sitter would not supply a proper emotional climate.

Exhibit 1-P is the transcript of the testimony at the time of the divorce. The exhibit was not admitted in evidence (R33,63, 68-75). The objection to the exhibit was to the effect that all of the evidence adduced at the time of the trial of the divorce action became merged in the findings of fact, conclusions of law and decree of divorce (R69-70). The objections and the ruling of the court in excluding Exhibit 1-P were in accord with the holding of

this Court in Felt v. Felt, 27 Utah 2d 103, 493 P.2d 620 (1972). In that case the evidence before the court prior to the decree was held to be "merged in the decree, (is) res judicata, * * * and hence cannot be considered in determining the modification of the alimony award".

The findings made and entered by the court in June, 1967, and referred to above do not negate the intention of respondent to augment her income. The necessity for respondent to augment her income in order to live within the standard of living equated by her talents and that of her former husband was calculated and is obvious.

Appellant totally ignores the testimony of Dr. Anthony J. LaPray, child psychologist (R76). The inadequacies of the children are briefly stated by Dr. LaPray by way of summary in Exhibit 2-D as follows:

"In summary, both of these girls are retarded and will never be able to live an independent life. They will need constant supervision by their mother or another caretaker. They will never be able to cope with the responsibilities of a family or children, and will probably need supervision of the type given in a group home for the retarded, or an institution for the retarded. They will never be able to handle financial or household responsibilities."

Dr. LaPray's letter, Exhibit 2-D, dated November 3, 1973, was used in connection with a stipulation between the parties and an order made by the court on the 23rd day of November, 1973, relating to sterilization of the children (R76-77). The sterilization was stipulated to as a matter of therapeutic necessity (R79). Dr. LaPray testified that the children would require specialized care throughout their lives (R86).

As to the earning capacity of the children, it was Dr. LaPray's uncontradicted opinion that working as waitresses at the Granite School District Rehabilitation Center was a very minimal type of job, one that could only be equated or considered under a sheltered environment. They could not operate as waitresses outside of that environment. The children are unable to prepare their meals or take care of their own personal hygiene (R90).

The children will never be able to learn how to cook or to function independently and while their mental age has been stated generally in terms of I.Q., actually their I.Q. age is higher than their abilities in terms of vocational tasks (R91). While Dr. LaPray does not feel that

the children should be institutionalized such as American Fork, he does negate the concept of their becoming independent and states as his opinion that they should not be removed from the custody of their mother (R95-96).

Appellant's salary with Hercules Powder Company is \$2,200.00 per month (R101) as compared with his net take-home pay per month of \$1,300.00 at the time of the divorce. On direct examination Mr. Dehm admitted to having bonus payments of \$3,200.00 in addition to salary for the prior year and that his present wife has a salary of \$500.00 per month (R103-104). Respondent estimated the cost of support at \$300.00 per month per child (R129) with the cost of babysitters at the rate of \$15.00 per day plus board (R127).

From the time of the divorce appellant took the children only one time and then for a period of five nights. Appellant's refusal to take the children on other occasions was predicated upon the proposition that his present wife had two adult children of her own and that she had refused to baby-sit her own grandchildren and was not going to act in that capacity with regard to Mr. Dehm's children (R132).

Mrs. Dehm has a comprehensive trust agreement with

a will in favor of the children Exhibits 7-D and 8-D funded by life insurance policies in the face amount of some \$54,000.00 but with declining values and which costs respondent by way of premiums \$1,048.00 per year (R111).

The burden of the children compounded by respondent's work requirements and travel in and outside of the State of Utah is comprehensively outlined by her in support of the estimated cost of \$300.00 per month per child (R127-129) which testimony was undisputed. Respondent's gross salary in her capacity with the State of Utah as Occupational Program Consultant, Division of Alcoholism and Drugs is \$946.00 per month (R114). Mrs. Dehm has been frugal in the conservation of relatively minor assets which include the home allocated to her by the decree of divorce subject to a mortgage. Counsel overlooks the allocation to respondent by the decree of June 5, 1967, of an automobile, a credit union savings in the amount of \$557.00, \$1,500.00 in cash, a membership in the Salt Lake Swimming and Tennis Club and personal effects (R20). The gross amount received by respondent by way of her earnings, the alimony and child support less respondent's financial contribution to the children do

not total the family cash flow of \$1,500.00 per month as of the time of the divorce and the standard of living equated to the living costs at said time.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN IGNORING THE CHRONOLOGICAL AGE OF THE CHILDREN SO FAR AS OBLIGATIONS FOR SUPPORT ARE CONCERNED.

Appellant cites Anderson v. Anderson, 110 Utah 330, 172 P.2d 132 (1946), construing Section 30-3-5 Utah Code Annotated (1953), to the effect that the statute without exception relates to minor children. The Anderson case was decided some eleven years prior to the Uniform Civil Liability Act for Support, Section 78-45-1 through 78-45-13 Utah Code Annotated, passed in 1957. We will refer to this Act as the Uniform Support Act. Section 6 of Section 78-45-6 Utah Code Annotated provides:

"District court jurisdiction. - The district court shall have jurisdiction of all proceedings brought under this act."

Section 8 is as follows:

"Section 78-45-8, Utah Code Annotated, Continuing jurisdiction. - The court shall retain jurisdiction to modify or vacate the order of support where justice requires. "

In Hyrup v. Hyrup, 70 Utah 274, 259 P. 925 (1927), it was held that in a divorce action it was proper to quiet title to property awarded to the parties. This was on the theory that the court merely did what was incidental and proper in the allocation of the property. In Larsen v. Daynes, 102 Utah 312, 133 P.2d 785 (1943), reference is made to Article 8, Section 19, Constitution of Utah to the effect that there shall be but one form of civil action, and law and equity may be administered in the same action.

In elaboration of this principle the court stated:

"No particular form of action or proceeding is either necessary or required to set in motion the processes of the court when the parties are before it and the court has jurisdiction of the subject matter. It is the substance and not the form that controls. Utah Association of Credit Men v. Jones, 49 Utah 519, 164 P. 1029.

* * * *

The trial court in the divorce proceeding could have made or in this action may make a partition or division of the property and quiet title in the respective parts of the property and thereby finish the controversy. Hyrup v. Hyrup, 70 Utah 274, 259 P. 925.

* * * *

The court having retained jurisdiction of the sub-

ject matter and both parties being before it, the task left unfinished should now upon this application be finished."

Section 78-45-2 Utah Code Annotated (Uniform Support Act), sub-paragraph 4 in defining "child" means one who is incapacitated from earning a living and is without sufficient means. Section 78-45-7 of the Act specifies but without limitation the relevant factors to be considered by the court in determining the amount due for support which includes the standard of living, the relative wealth and income, the ability of the obligor (Mr. Dehm) to earn and the age of the parties.

Page 12 of appellant's brief would have it appear that Section 9 of the Act gives the right of enforcement to the child or the State Department of Public Welfare. Fortunately for all concerned including the harrassed taxpayer, the State Department of Public Welfare has not had to support the children and so far as an action by the children is concerned, appellant made no request for a guardian, being content, undoubtedly, that his former wife was a woman of integrity and would use the money for the support of the children.

The Court has before it the parties directly responsible and the vehicle of a divorce action is merely a procedural vehicle. The district court is a court of general jurisdiction and the Uniform Support Act is in addition to the rights already afforded the district court.

On page 7 of appellant's brief he states that the Supreme Court of the United States in Stanton v. Stanton, 43 Law Ed. 2d 688 (April 15, 1975) did no more than reverse on constitutional grounds. We challenge this concept for the reason that the Supreme Court of the United States specifically characterized the appellant mother as "a fiduciary" on the suggestion that the support issue was moot in this respect. Direct reference is made to the Uniform Support Act.

Last but not least is the action of the 1975 Legislature in amending Section 15-2-11 Utah Code Annotated (1953), wherein it is now provided that minority extends to males and females to the age of 18. It is further provided by the amendment that in divorce actions the court may order support to 21.

Section 78-45-12 of the Uniform Support Act to the

effect that the rights are in addition to those presently existing and not in substitution brings into focus the statement of the Court in Harmon v. Harmon, 26 Utah 2d 436, 491 P.2d 273 (1971):

"For the foregoing reasons decrees and orders in divorce proceedings are of a different and higher character than judgments in suits at law; and by their nature are better suited to the purpose of protecting the interests and welfare of children.

* * * *

Based upon what we have said herein it is our conclusion that where it appears to be in furtherance of the court's responsibility of safeguarding the welfare of children, the District Court may upon conditions which he deems appropriate and consistent with that objective, make an order such as the one here under attack, staying the issuance of an execution. When this is done, consonant with the usual rule of review in equitable matters, his action will not be disturbed on appeal unless it clearly and persuasively appears that he abused his discretion."

POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO ELIMINATE OR REDUCE ALIMONY.

In the foregoing statement of facts the record is documented to the effect that the respondent in her present occupation has a gross salary of \$946.00 per month as compared

with her gross salary of \$220.00 per month on a part-time basis at the time of the decree of divorce in June, 1967. Appellant has a gross salary of \$2,200.00 per month (R101) with Hercules Powder Company as compared with a net salary of \$1,300.00 per month in June of 1967. Appellant's salary is in addition to bonus payments which amount to \$3,200.00 in 1973 (R103). By the decree of divorce appellant takes all tax advantages which include the children as dependents and alimony. Respondent's scholastic and post graduate efforts are documented by her answer and counter-motions in the instant matter (R26-27). Respondent's testimony is uncontradicted to the effect that the cost incident to the care and maintenance of the permanetly dependent twin daughters is \$300.00 per month each.

Christensen v. Christensen, 21 Utah 2d 263, 414 P.2d 511 (1968), a case not cited by appellant, holds that the wife in a relatively long marriage is not always entitled to alimony. Alimony is one of the factors to be considered with all of the other incidents of the marriage in making an adjustment which the court deems just and equitable between the parties.

"This is also true of the relative guilt, or perhaps better stated, the greater responsibility one spouse may appear to have than the other for bringing about the failure of the marriage."

The Christensen case is quoted at some length in Pickens v. Pickens, 24 Utah 2d 409, 473 P.2d 397 (1970), a case where the marriage was endured for less than four months and each party was guilty of mistreatment toward the other and no alimony was awarded. The quotation from the Christensen case is as follows:

"Whether we as individual judges would or would not have arrived at the exact same formula as to what the most practical and just treatment of the economic aspects of this situation is not the question on this appeal. Even though it is the established rule that divorce cases being in equity, it is the duty of this court to review and weigh the evidence, it is equally true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment, declaring that they should not be upset unless the evidence clearly preponderates against them, or unless the decree works such an injustice that equity and good conscience demand that it be revised * * *."

Appellant cites King v. King, 27 Utah 2d 303, 495 P.2d 823 (1972), as being "somewhat analogous" to the instant matter. Mrs. King appealed from the judgment modifying the alimony payment from \$250.00 per month to \$100.00 per month for a period of six months and thereafter to the sum of \$50.00

per month for a period of one year and thereafter to terminate. This Court affirmed the judgment but directed the court below to provide for alimony in a nominal sum rather than its termination.

The prior appeal in the King case, 25 Utah 2d 163, 478 P.2d 492 (1970) was by the defendant husband, a 22 year old employee of Kennecott with an income of between \$470.00 and \$490.00 per month. The contention was that the former wife at the time of the divorce was physically unable to work and subsequently her condition in that respect changed. There is no similarity to the instant case and appellant in so indicating goes outside of the record in his reference to Exhibit 1-P.

In Ring v. Ring, 29 Utah 2d 436, 511 P.2d 155 (1973), the trial court was reversed having reduced the former wife's alimony from \$600.00 a month to \$1.00 a year. The earnings of the wife at the time of the petition for modification amounted to approximately \$7,000.00 per year in the public health field. The husband was a physician earning a little over \$29,000.00 per year. The former wife's duties required her to travel to Hawaii, Arizona and throughout California.

She had burdens of consequence with her children. The case reviews in detail other expressions of this Court including the following.

Harding v. Harding, 26 Utah 2d 277, 488 P.2d 308 (1971), is cited in the Ring case to the effect that when neither party has appealed from the decree of divorce it must be assumed that the decree is a fair and equitable disposition of property as well as the requirements for alimony and support money. The Court in the Ring case stated the following:

"Defendant must furthermore sustain the burden of proving that there has been a substantial change in the material circumstances of either one or both of the parties since the decree was entered. In the recent cases of Allen v. Allen (25 Utah 2d 87, 475 P.2d 1021 (1970) and Short v. Short (25 Utah 2d 326, 481 P.2d 54 (1971) this court affirmed the order of the trial court, denying modification of alimony, where at the time of the decree was granted, the parties contemplated that the wife would secure employment and contribute to her own support."

The Ring case also comments on Felt v. Felt, supra, to the effect that the wife's income is not an absolute factor in determining whether there has been a change of circumstances warranting modification of alimony. This is closer to the present situation than anything urged by appel-

lant. Mr. Dehm seeks to modify the decree solely upon the demonstrated earning capacity of his former wife since the decree of divorce. There is no other fact or circumstance leading to "manifest injustice or unconscionable inequity" which Mr. Dehm, the moving party on the alimony issue, had the burden of showing.

We do not belabor this point, there being nothing in the record to indicate an arbitrary ruling on the part of the trial court and to the contrary the uncontradicted evidence clearly supports the retention of alimony.

POINT III

THE COURT DID NOT ERR IN ITS RULING ON EVIDENCE WITH RESPECT TO APPELLANT'S EARNINGS OR THAT OF HIS PRESENT SPOUSE.

Appellant called as a witness on his own behalf testified in accordance with questions propounded by Mr. Roe.

"Q. Can you tell us what your salary is at the present time?

A. It's \$2,200.00 a month (R101).

* * * *

Q. Did you receive a bonus last year?

A. Yes.

Q. And how much was that?

A. It was \$3,200.00 (R103).

* * * *

Q. Have you remarried since the divorce?

A. Yes.

Q. And when was that?

A. It was in September, 1967.

Q. Is your wife working at the present time?

A. Yes.

Q. Do you know what she makes in the way of income?

A. Her gross is, I believe, \$500.00 per month (R104)."

The above matters were volunteered by appellant and it seems strange he would now claim error in those respects.

As to the contention that the trial court erroneously sustained an objection to Mr. Dehm's testifying with reference to the condition of his home, this was a voluntary and irrelevant part of Mr. Dehm's testimony offered in his case in chief.

We again reiterate the fact that Mr. Dehm's petition to modify was based solely on his former wife's present earning capacity. There was no responsive pleading filed in connection with Mrs. Dehm's counter-motions but in any event the ruling of the trial court was not conclusive or prejudicial. We point to portions of the record following the quoted portion as found on page 18 of appellant's brief:

"MR. ROE: Some of this may come in by way of rebuttal.

THE COURT: Yes. It may do on that matter, Mr. Roe.

MR. ROE: And I'd just as soon leave that for rebuttal, if the Court will please. In response to their case I may be anticipating just a little (R105)."

The condition of Mr. Dehm's home was never thereafter pursued and we submit that the voluntary statement of appellant adduced by his own counsel cannot be assigned as error.

POINT IV

THE MOTION FOR A NEW TRIAL WAS PROPERLY DENIED AND THIS APPEAL WAS NOT TAKEN WITHIN THIRTY DAYS AFTER THE ENTRY OF THE JUDGMENT AND ORDERS COMPLAINED OF.

In advocating his motion for a new trial, appellant

merely reiterates his concept of no support for the children after their majority, the findings with respect to his own earning capacity and that of his present wife and other matters that we believe to be amply covered by the foregoing.

There is one problem that goes to the "jurisdiction" of this Court. The amendment to the decree of divorce and orders pertaining thereto was dated and filed November 7, 1974 (R41-43). Appellant's motions to amend the findings and for a new trial were filed November 20, 1974 (R45) with a certificate of mailing dated November 18, 1974 (R48). The 10th day from the entry of the amendment to the decree fell on a Sunday and appellant had all day on Monday, the 18th of November to serve his motion for a new trial. The question is whether Rule 59 (b) Utah Rules of Civil Procedure requires that a motion for a new trial be filed not later than 10 days after the entry of the judgment.

In Vanjonora v. Draper, 30 Utah 2d 364, 517 P.2d 1320 (1974), the Court held that the order of dismissal as to the defendant, Harvey Draper, made and entered on December 21, 1972, was a final order notwithstanding a motion dated January 4, 1973, and filed with the clerk of the court on

January 5, 1973. The motion was considered as a motion for a new trial but was held to be abortive as to Draper, not having been "timely filed" and therefore not tolling the time for appeal.

In Watson v. Anderson, 29 Utah 2d 36, 504 P.2d 1003 (1973), there was no motion for a new trial but Rule 59 (b) Utah Rules of Civil Procedure is specifically referred to as providing "that a motion for a new trial must be served not later than 10 days after the entry of judgment", but the opinion concludes with the language "In as much as there was no motion for a new trial timely filed, the time of appeal expired one month from July 9, 1971, and the attempted appeal filed December 27, 1971, is not timely, and this court, therefore did not acquire jurisdiction to consider the matter.". (emphasis added)

In Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970), it is stated "Defendant's motion for a new trial was not timely filed". (emphasis added)

We repeat that the motion for a new trial in the instant matter was filed 13 days after the judgment and orders appealed from. If it is the filing date that controls then

we are not concerned with the troublesome problem as to whether the certificate of mailing dated November 18, 1974, can be equated with service of the notice within the 10 day period.

CONCLUSION

With all due respect to counsel, appellant has no standing of consequence before this Court and the rulings of the trial court should be confirmed in their entirety.

Respectfully submitted,

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