

2000

# Walter L. Laak v. Mable Laak : Brief of Respondent

Utah Supreme Court

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

IN THE SUPREME COURT  
OF THE STATE OF UTAH

WALTER L. LAAK, )  
Plaintiff-Respondent. )  
vs. )  
MABLE LAAK, )  
Defendant-Appellant. )

No. 14086

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RESPONDENT'S BRIEF

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Appeal from the Judgment of the 3rd  
District Court for Salt Lake County

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STATEMENT OF CASE

This action arose on an Order to Show Cause in Re Modification wherein Appellant Mable Laak sought to increase the alimony provisions of the original Decree of Divorce.

DISPOSITION IN  
THE LOWER COURT

The Trial Court denied Appellant's Motion and Order to Show Cause in Re Modification and continued the alimony at \$200.00 per month.

RELIEF SOUGHT

Appellant seeks to have the alimony provisions contained in the Decree of Divorce modified upward to the sum of Three Hundred Fifty Dollars per month.

STATEMENT OF FACTS

The parties were first married in early 1950. Two minor children were born as issue of the marriage of the parties, to wit: Walter L. Laak, Jr., born December 2, 1950, and Gary Roger Laak, born September 10, 1954, (R.1) The parties were subsequently divorced and remarried in September, 1960, (R.1). On November 6, 1968, the plaintiff, Walter L. Laak, filed an action in divorce against the defendant, Mable Laak (R.3).

Mrs. Laak, in response to Mr. Laak's Complaint in divorce, entertained a Separate Maintenance suit against Mr. Laak, (R.12).

On November 29, 1968, the parties entered into a Stipulation and Property Settlement Agreement, (R.7-10). The Stipulation provided as follows:

1. Defendant was awarded the following items:
  - (a) \$200.00 per month as permanent alimony, effective upon the legal emancipation of Gary Roger Laak.
  - (b) Equity derived from the sale of the home of the parties after payment of \$1,171.82 on bills, and \$500 to Mrs. Laak's attorney.
  - (c) Property located in Cedar City, Utah, as her sole and separate property.
  - (d) Motor vehicle, subject to its indebtedness.
  - (e) All the household furnishings and furniture.
2. The plaintiff Mr. Laak received a motor vehicle, subject to its indebtedness and a 10-share certificate of railroad stock and was obligated to pay:
  - (a) \$350.00 per month as child support.
  - (b) The Outstanding loans against two insurance policies, to be paid in a period of 10 years.
  - (c) Health insurance for the benefit of the minor children.
  - (d) Back taxes for the property located in Cedar City, for the year 1968,

This Stipulation and Property Settlement Agreement were specifically incorporated into the Decree of Divorce which was entered on December 3, 1968, (R.19-23).

On October 9, 1969, the parties herein again entered into a Stipulation, which provided for a change of custody of Walter L. Laak, Jr., from Mable Laak to Walter L. Laak. The Stipulation also provided for a reduction in Mr. Laak's child support payments reducing the amount to \$75.00 per month, for the benefit of Gary Laak. Who was under the control of the juvenile authorities. In addition, Mr. Laak was to pay to Mable Laak, the sum of \$200.00 per month as alimony, (R.43-44). On October 10, 1969, the Court entered its Order incorporating the referenced written Stipulation into its Order, (R.45-46).

Finally, on November 29, 1974, the Court again entered its Order based upon Stipulation of the parties and their respective counsel, wherein the Order stated:

"It is further ORDERED, ADJUDGED AND DECREED that Plaintiff be ordered to continue the payment of alimony at the rate of \$200.00 per month under the terms and conditions as prescribed in the original Decree and that this Order is based upon the existing circumstances at the time of the original Decree."

"It is further ORDERED, ADJUDGED AND DECREED that each and every other term and condition of the original Decree of Divorce is in full force and effect." (R.90-91).

Thereafter, Mable Laak filed and sought a modification of the Decree of Divorce to raise the alimony based upon a change

of circumstances, (R.92-93, 100-101). Appellant sought the increase based upon three factors which she alleged constitute a substantial change of circumstances:

(a) Walter L. Laak's earnings had substantially increased.

(b) The minor children of the parties are no longer minors and respondent doesn't pay any child support.

(c) Appellant's needs have increased, (R.92-93).  
(Appellant's Brief, Page 2).

The plaintiff presently pays alimony to the defendant in the amount of \$200.00 per month and is current on all said payments, (R.106-107). That during the calendar year, 1974, the defendant's net earnings were \$1,102.00 per month, (R.147, L10-11). That the defendant was 51 years old, (R.128, L25-26), and presently unemployed but drawing unemployment compensation since July, 1974, in the amount of \$23.00 per week, (R.106-107). That defendant's living expenses were approximately \$388.00 per month, (R.92). That the defendant was healthy, capable and had no physical infirmities of any kind whatsoever, and had been continuously employed since the divorce, (R.124, L14-21). That she can handle jobs without difficulty, (R.123, L23-30). She stated she will find work, (R.127, L29 - R.128, L3). It is her desire to work, (R.127, L26-30).



Mr. Laak is presently providing over half of Mrs. Laak's monthly living expenses. This leaves Mrs. Laak to her own resources to come up with less than half or approximately 48 percent of her needs. This will require her to earn no more than \$188.00 per month.

She has demonstrated through a continuous course of employment, that she has the ability to do this and as late as August 5, 1974, when she terminated at the J.C. Penny Company, she was making, according to her 1974 tax return, for the first 7 months of 1974, at least \$265.71 per month.

Mr. Laak is still paying on some of the Divorce Decree obligations, and while looking forward to his date of retirement when he will experience a decrease in his earning capacity, he will remain faced with the continuing obligation of payment of \$200.00 per month alimony.

#### ARGUMENT

POINT I: WHEN A STIPULATION, WHICH IS INCORPORATED INTO THE DECREE OF DIVORCE, PROHIBITS MODIFICATION OF ALIMONY UPWARD, DOES THE COURT HAVE THE POWER TO MODIFY THE ORIGINAL DECREE.

The Utah Courts have the general power to modify a Decree of Divorce for alimony or support, and that power is not affected by the fact that the Decree is based on an agreement entered into by the parties to the action. (Section 30-3-5, Utah

Code Annotated, 1953, As Amended; Buzzo v. Buzzo [1915] 45 Utah 625, 148P. 362; Barracclough v. Barracclough [1941] 100 Utah 196, 111 P.2d 792; Jones v. Jones [1943] 104 Utah 275, 139 P.2d 222; Callister v. Callister [1953] 1 Utah 2d 34, 261 P.2d 944 and Felt v. Felt, [1972] 27 Utah 2d 103, 493 P.2d 620).

POINT II: WHEN THE STIPULATION AND THE ORIGINAL DECREE CONTEMPLATE THE VERY THING COMPLAINED OF IN THE PETITION FOR MODIFICATION OF ALIMONY THE MODIFICATION SHOULD BE DENIED.

Petitions of this kind should be entertained with great caution and the Court should be very slow under the circumstances to revise or alter the former Decree. (Viles v. Viles [C.A.3 Virgin Islands, 1963] 316 F2d 31 and Kate v. Kate [1951] 234 Minn. 402, 48 NW2d 551.)

Both parties were advised by competent counsel, and it is clear by the working of the Stipulation that the parties unquestionably had a specific intention in the settlement of alimony on a permanent basis, planning for the future events which have taken place.

"Defendant agrees that she does not need alimony at the present time and requests the court to enter its order to the effect that upon the legal emancipation of Gary Roger Laak she be awarded the sum of \$200 per month as permanent alimony and that plaintiff agrees that the court may enter its order providing that upon the legal emancipation of Gary Roger Laak he be ordered to pay for the benefit of defendant, the sum of \$200 per month constituting permanent alimony, not subject to modification upward by

defendant. Walter L. Laak and Mable Laak further state that they understand that in the event Mable Laak remarries between the time of the divorce decree and the time alimony is set to commence or after alimony commences, her right to alimony shall be forever terminated." (R.7-8, emphasis added.)

Gary Roger Laak was born September 10, 1954, R.1), and his emancipation would not have occurred until age 21 in 1975 or by marriage, (Section 15-2-1 U.C.A. 1953) and must have been contemplated by the parties with advice of counsel. He is emancipated and is no longer in need of child support, (having joined the military service,) (R.1-31, L19-20). The emancipation of Gary Roger Laak took place on or before July 20, 1974, (R.66).

Mrs. Laak was unemployed at the time of the divorce, (R.122). Yet, she stated that she did not need alimony at the time the divorce was granted.

By inference, it would appear that Mrs. Laak had carefully considered the situation and decided that she could appropriately live until the emancipation of the youngest minor child of the parties in 1975, on the basis of child support in the amount of \$350 per month, the assets awarded to her in the Decree of Divorce, and her own individual earnings, although not mentioned.

On October 9, 1969, the parties again entered into a Stipulation and Order, thereon dated October 10, 1969, which provided Mable L. Laak with alimony in the amount of \$200 per month.

The Stipulation and Order also transferred custody of Walter L. Laak, Jr., to his father. The Stipulation and Order also provided that the father, Mr. Laak, pay support in the amount of \$75 per month to the Department of Family Services for Gary Roger Laak who left the home of his mother and placed himself in the hands of the juvenile authorities, (R.43-46 and R.149, L7-12).

It appears to have been the intention of the parties and the Court at that time to make adjustments because of new circumstances existing at that time. Custody of one of the children was transferred from Mrs. Laak to the father and the other child was placed in the care of the juvenile authorities and payments in child support by Mr. Laak no longer were going to Mrs. Laak but were being paid at a reduced amount to the Department of Family Services. This was approximately one year after the Decree of Divorce, during which time Mrs. Laak remained unemployed, apparently having decided not to work until this time. (R.122, L27-29).

The next Order that was entered by the Court was dated November 29, 1974. That Order specifically states as follows:

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff be ordered to continue the payment of alimony at the rate of \$200.00 per month under the terms and conditions as prescribed in the original Decree and that this Order is based upon the existing

circumstances at the time of the original Decree.

"It is further ORDERED, ADJUDGED AND DECREED that each and every other term and condition of the original Decree of Divorce is in full force and effect." (R.90-91, emphasis added).

This Order was likewise stipulated to by the parties with the advice of their counsel, (R.90).

Careful reading of the Order implies that it was the intent of the parties and the Court that the payment of the alimony at the rate of \$200 per month, as of November 29, 1974, would be based upon the existing circumstances at the time of the original Decree and that each and every term and condition of the original Decree of Divorce would be in full force and effect.

Mrs. Laak, at this time, was unemployed and had been unemployed since July of 1974. Gary Roger Laak, at this time, was emancipated, having been emancipated on or before July 20, 1974, (R.66). Mrs. Laak also had whatever was remaining of the assets and equities originally awarded to her at the time of the entry of the Decree.

Viles v. Viles (C.A. 3 Virgin Islands, 1963) 316F 2d 31 is specifically on point. The Court, in that case, considered §13 of the divorce law of the Virgin Islands, 1944, 16 V.I.C, §110, which expressly granted the District Court powers to "set aside, alter or modify so much of the judgment as may

provide alimony ...or the maintenance of either party in the action." (Ibid. at page 33). In that case, the original Decree made the determination that so long as the husband's total annual income should be \$17,500 or more, he would pay his wife support in the amount of \$5,500 per year in equal monthly installments. The Decree also had a "...provision for reduction of annual payments 'proportionately' to not less than \$3,600 whenever the husband's income should fall below \$17,500." (Ibid. at page 32.) "...so long as the husband's income did not fall below \$11,455." (Ibid. at 35.) The trial court gave the defendant relief, reducing his payments to \$2,500 annually although his income had not fallen below the \$11,455 figure.

The Circuit Court went on to say that: "The fact that an award of alimony has been based on a separate agreement may provide a sound reason for judicial reluctance to modify the original Decree.

"...the original decree should be treated as a final adjudication of the rights of the parties at the time it is entered, and the court which entered it should be presumed, in the absence of a direct appeal, to have given appropriate consideration to the circumstances which should have affected its judgment. ...Moreover, it is quite proper for the court, in framing the original decree, to anticipate future changes in circumstances of the parties and to provide specific adjustments of the postmarital rights and duties of the parties which will be made in the event that the circumstances do change as anticipated. ...When it is clear that the court which entered the original decree has considered and provided for future eventualities, the party seeking a modification of his obligation should be required to prove more than what the events anticipated have actually occurred."

The Utah Supreme Court has followed that line of reasoning in its decision on Short v. Short, [1971] 25 Utah 2d 326, 481 P2d 54. When a husband petitioned for modification of alimony because his former wife had obtained employment, the Court determined that the modification should be denied where the original award was obviously based on the assumption that the wife, who had previously held a job, would again be able to obtain employment.

The Court stated:

"We think the facts in this case themselves reflect no abuse of discretion on the part of the trial court in refusing to vacate the \$75 alimony award," ...the denial was not capricious when viewed in the light of circumstances existing at the time of the decree, the \$75 award implemented by a necessary and incapable assumption by the court that Mrs. S. could not survive under any conceivable hypothesis on \$75 per month, and there is nothing in the record to indicate she had any other means of livelihood." (Ibid. at page 327).

Also, the Minnesota Supreme Court, in analyzing this same problem stated:

"...the alimony awarded in (the original decree) was fixed by a bargain and not by an original judicial determination of the amount to which defendant was then entitled. If defendant wishes to default on her bargain, she may not at the same time seek to use it as a measure of her present rights. If the alimony which she is presently receiving is adequate, considering all of the factors governing an original award, then there is no occasion to modify the award merely because the alimony that she bargained for and received in (the original Decree) gave her a better standard of living then than it does today. The circumstances of the parties may have changed materially, and yet, if defendant drove a hard bargain in her original agreement for a property settlement and alimony, she may still be receiving all that a court would be required to award her if it were considering the matter

originally. In such a case, there is no abuse of discretion if the trial Court determines that no revision of the decree is necessary." (Kate v. Kate, Supra.)

It would appear that defendant's present circumstances are created by her. Although she was terminated from the J. C. Penny Company on August 5, 1974, (R.122, L 16) she was able to earn \$1,860 for only seven month's work, (R.92). Her tax return does not reflect unemployment compensation which has been paid to her and at the time of the hearing, was still being paid to her at the rate of \$23 per week, (R.123, L 16-19). Therefore, in addition to the \$200 per month received from the plaintiff in alimony, she received \$265 per month for the seven months of employment at J. C. Penny Company, and during those months she was on unemployment, she received a monthly compensation of approximately \$99 per month.

In King v. King, [1970] 25 Utah 2d 163, 478 P2d 492, which was remanded for rehearing and an appeal taken from the rehearing in King v. King, [1972] 27 Utah 2d 313, 495 P2d 823, the facts and circumstances were very similar to this case except there were no minor children from the marriage.

In King, the parties married in 1949 when the plaintiff was 37 years old. The marriage lasted a total of 16 years and at the time of the divorce the plaintiff, wife, would have been 53 years old.

The plaintiff wife was given the most substantial part



of the family assets:

1. The family home with an equity of between \$12,000 and \$14,000.
2. The furniture.
3. Each of the parties got an automobile.
4. The defendant paid all of the family debts and obligations.
5. The defendant paid \$250 per month alimony to plaintiff until the home was paid off;
6. Upon pay-off of the home, the defendant paid \$200 per month alimony thereafter.

In 1967, the defendant ran into some financial problems associated with the Kennecott Copper Corporation strike which lasted for 6 months. As a result of the strike, the plaintiff filed an action against the defendant in Re: Contempt for nonpayment and the defendant filed an Order to Show Cause to reduce alimony.

In the Court's deliberation, they compared the present status of the parties to their status at the time of the divorce. The Court considered the defendant's income which had remained approximately the same. The Court recognized as a subordinate obligation, the fact that the defendant had remarried a woman with four children by a previous marriage and for which she was receiving some income.

However, the main consideration of the Court was that

the plaintiff, at the time of the divorce, was suffering from a nervous disorder and back trouble which prevented her from being gainfully employed. At the time of the hearing on the Order to Show Cause to reduce alimony, the Court found, (1) the plaintiff was capable of doing everything but the heaviest of lifting after a successful back fusion; (2) that she was capable of engaging in normal household activities and, (3) that she had had two or three different jobs, although for short periods of time. The Court found that the health of the plaintiff had improved to the extent that the plaintiff was able to seek and accept gainful employment, although she was, at the time of the hearing, unemployed.

It was the Trial Court's Order that the alimony be reduced to \$100 per month for six months and then to \$50 per month for one year, and thereafter alimony would be terminated. On the second appeal, the Utah Supreme Court modified and affirmed the Trial Court's decision to provide that alimony continue in a nominal sum in the event that plaintiff would not be able to sustain herself in the event of unforeseeable circumstances.

In the case at bar, Mrs. Laak has demonstrated and testified that she is fully and completely capable of employment, that she does receive a substantial alimony payment which amounts to more than 50 percent of her living expenses. Mrs. Laak is young, 51 years of age, and need only provide \$188 per month to meet all of her monthly requirements. She has demonstrated

her ability to do this in the past and has provided no evidence that she is not capable of doing so presently and in the future.

In appellant's brief, page 6, she alleges that modification should be granted because of a material change of conditions and she lists the following three:

- (a) Walter Laak's earnings had significantly increased;
- (b) The respondent no longer paid any child support;
- (c) Mable Laak's expenses had increased.

It would appear that each and every one of the alleged material changes in circumstances were completely identifiable, and were in fact identified at the time of the entry of the Stipulation in the original Decree and were anticipated and conceded at the time of the original Decree.

Obviously, since the Stipulation provided that her alimony would start only after the last minor child had been emancipated, it can be no surprise or materially changed circumstance that the respondent no longer pays any child support upon emancipation of the parties' last minor child and that plaintiff would not benefit from that change.

Mr. Laak also was employed by the railroad at the time he was married to Mrs. Laak and obviously would be receiving wage increases and has been receiving wage increases for the past 7 years. This also must have been anticipated by Mrs. Laak and can come as no surprise to her that Mr. Laak

is earning additional monies.

However, Mrs. Laak must have realized and anticipated that she would be employed during this period of time and her wages would have increased or at least been sufficient enough to pay at least half of her needs.

Alimony should not be made a form of retirement fund as prayed for by Mrs. Laak on page 8 of appellant's brief, wherein she feels that alimony should be raised to \$350 per month leaving her only a difference of \$33 to meet her stated monthly obligation of \$388 per month or if she were to cut some of her expenses by \$33 she could effectively retire at age 51.

It is the respondent's contention that the Trial Court carefully reviewed and considered each and every one of these points and made its decision fully within the sound discretion afforded the Trial Court.

#### CONCLUSION

The appellant should be precluded from going beyond the Order of the Court dated November 29, 1974, which reinstated the terms and conditions of the original Decree of Divorce and ordered the continued payment of alimony at the rate of \$200 per month.

Alimony should not be a form of retirement, and a healthy and capable individual should provide at least one-half of her income, especially if her contribution would be at a

nominal amount of \$138 per month.

Finally, when all of the facts and circumstances considered by a party petitioning for a modification, are the same facts and circumstances that were in existence and considered by the parties at the time that the original Stipulation and Decree of Divorce were entered, and when the Stipulations in those proceedings were bargained for and the resulting circumstances were fully anticipated seven years ago, then they are not the substantial material change necessary.

Respectfully submitted,

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