2000

# Jerry Hamilton Borup v. Marjorie Chandler Borup : Brief of Appellant

Utah Supreme Court


George B Handy; Attorney for Appellant.
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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

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JERRY HAMILTON BORUP,

Plaintiff and Appellant,

vs.

MARJORIE CHANDLER BORUP,

Defendant and Respondent.

Case No. 14387

# APPELLANTS' BRIEF

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THIS IS AN APPEAL OF THE APPELLANT, JERRY HAMILTON BORUP, FROM THE JUDGMENT OF THE SECOND DISTRICT COURT, WEBER COUNTY, HONORABLE CALVIN GOULD, JUDGE.

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---

## STATEMENT OF KIND OF CASE

The plaintiff above named, the appellant herein, filed an action for divorce against the defendant and respondent herein. Trial was had before the Honorable CALVIN GOULD and judgment rendered therein. All references herein to the record of the case will be designated as (R); all references to the transcript will be designated as (T).

## DISPOSITION IN LOWER COURT

The court granted defendant-respondent a divorce, approved the Stipulation of the parties in all respects except as to an unstipulated matter pertaining to support

money for the minor children of the parties and as to this matter made the following order in the Decree:

> 3. Plaintiff is ordered and required to pay to the defendant child support and alimony as follows: $600.00 per month until June 1, 1976; $500.00 until September 1, 1976 with $100.00 of said amount to be alimony; thereafter child support in the sum of $85.00 per month per child until the youngest child's 21st birthday;provided the child is enrolled in college, trade or business school within 4 months of high school graduation or is physically unable to provide his or her own support. (R.27) (Emphasis ours).

It is to be noted that the provision of the Decree relating to support money does not conform with the decision announced from the bench as shown by the Memorandum Decision of the Court (R.20) which reads as follows:

> 1. The plaintiff is to continue support for each child until the respective child's 21st birthday,who is either:
>
> (a) Enrolled in college or trade or business school beyond high school within 4 months from high school graduation; or
>
> (b) Physically unable to provide his or her own support.

## RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Decree reviewed, reversed or modified only in respect to the part requiring the appellant to pay support money under any circumstances until the minor children are 21 years of age.

## STATEMENT OF FACTS

The facts insofar as they are pertinent to this appeal show that the parties hereto were married in May 1953. As issue of the marriage 7 children were born to the

parties, who at the time of the divorce were MARK, age 19 years; MELVIN, age 17 years; JERRY, age 16 years; KELLIE JEAN, age 14 years; PHILLIP, age 10 years, CARL, age 9 years; and LANCE, age 4 years. (R.1).

During the marriage the parties accumulated certain properties and debts that were divided among them by Stipulation in open court. (T.36, 38, 39, 40, 41) (R.24, 25, 27, 28).

The Court took under advisement the unresolved issue as to whether support money should be paid for the minor children of the parties until age 18 or whether the Court had the authority to extend the time to age 21. The Court by Memorandum Decision (R.20) rendered judgment in this respect as follows:

> 1. The plaintiff is to continue support for each child until the respective child's 21st birthday, who is either:
>
> (a) Enrolled in college or trade or business school beyond high school within 4 months from high school graduation; or
>
> (b) Physically unable to provide his or her own support.

The Decree drawn by respondent's counsel did not conform to the above and provided as follows in respect to support money:

> 3.*******thereafter child support in the sum of $85.00 per month per child <u>until the youngest child's 21st birthday</u>; provided the child is enrolled in college, trade or business school within 4 months of high school graduation or is physically unable to provide his or her own support. (R.27) (Emphasis ours).

ARGUMENT

POINT I.

THE COURT ERRED IN ORDERING PLAINTIFF TO CONTINUE TO PAY SUPPORT MONEY UNDER ANY CIRCUMSTANCES UNTIL THE 21st BIRTHDAY OF EACH CHILD.

Although the Decree in paragraph 3 (R.27) states that the child support was to be in the sum of $85.00 per month until the youngest child was 21 years of age, (Emphasis ours) this was in clear contravention of the Memorandum Decision of the Court (R.20) that provided:

> 1. The plaintiff is to continue support for each child until the respective child's 21st birthday, who is either:
>
> (a) Enrolled in college or trade or business school beyond high school within 4 months from high school graduation, or
>
> (b) Physically unable to provide his or her own support.

If the wording of the Decree were to be upheld, it would mean that the support money for each child would continue until the youngest child (LANCE, who is now 4 years of age) was 21 years old. This could mean that when LANCE is 21, 17 years hence, that MARK would be 36; MELVIN, 34; JERRY, 33; KELLIE JEAN, 31; PHILLIP, 27; and CARL, 26 and that during all of this time that the appellant would be required to pay $85.00 a month for each of said children.

For that reason alone the Decree in regard to the support money payment should not be allowed to stand.

The Court did not so intend, as is shown by the Memorandum Decision of the Court (R.20),and the law does not so provide. Section 15-2-1, Utah Code Annotated, enacted in the last regular session of the legislature provides:

> The period of minority extends in males and females to the age 18 years; but all minors obtain their majority by marriage. It is further provided that courts in divorce actions may order support to age 21.

The above-cited statute provides that under no conceivable circumstances could support be ordered beyond age 21.

Although the wording of the Decree does not conform to the intent of the Court shown by the Memorandum Decision (R.20), if the intent of the Court was:

> 1. The plaintiff is to continue support for each child until the respective child's 21st birthday, who is either:
>
> (a) Enrolled in college or trade or business school beyond high school within 4 months from high school graduation, or
>
> (b) Physically unable to provide his or her own support;

the case should still be reversed in regard to the objectionable provision and the case remanded for modification of the Decree.

This is apparently the first time the Supreme Court of our state has been called upon to interpret the above-quoted statute (15-2-1, U. C. A., 1953, as amended). This

statute, apparently, is the legislature's product in the aftermath of STANTON vs. STANTON (43 L. ED.,2d 688) in which the United States Supreme Court held that Utah's former statute making the age of majority of a female 18 years and of a male 21 years to be violative of the Equal Protection Clause of the Fourteenth Amendment. This was an appeal of the Utah State Supreme Court of STANTON vs. STANTON,30, Utah 2d, 315, 517 Pacific 2d, 1010) (1974).

Although the STANTON case in Utah Supreme Court and the United States Supreme Court dealt with various related matters, the main thrust of the case was that there was a denial of the Equal Protection Clause of the Fourteenth Amendment of the Constitution if the father's obligation to support a daughter terminated at age 18, but continued until age 21 for a son.

It is the contention of the appellant that there is discrimination present in the case at hand, although not on the basis of sex. The decision of the Court requiring him to continue to support his children after age 18 is still discriminatory and violative of the Equal Protection Clause of the Constitution. Under the provisions of 15-2-1, Utah Code Annotated, 1953, as amended the appellant because he divorced the minor children's mother can be required to continue to support the children until they are 21. However,

if the appellant had continued to be married to the children's mother, no matter what the relationship, under no circumstances could he be compelled to support the children beyond age 18, they having reached the age of majority, but by the terms of 15-2-1, it is provided that courts in divorce actions may order support to age 21.

Where is the equal protection of the laws if at the time of a divorce or even thereafter a divorced father can be compelled to support his children until they are 21 years of age, but the father who remains married regardless of the relations between father and mother need only support his children until they are 18 and under no provision of the law can he be compelled to continue support thereafter? Obviously, the father who is divorced is discriminated against and does not have the equal protection of the law as guaranteed to him by the Fourteenth Amendment of the United States Constitution.

The Court in its initial observation of the matter concluded he was without authority to make an award of support money that continued beyond age 18 (T.37):

> THE COURT: Well, let me interrupt counsel. I don't believe that a judge having a divorce case prior to the time the children reach the age of 18 can make that determination. I think that is a discretionary determination that has to be made at that point.

We submit that even though the statute is discriminatory and violative of the Equal Protection Clause

of the Constitution of the United States, that if such a determination were to be made at all, it should be when the child has reached age 18 and a need for the continuation of the support money is shown at a proper hearing or if there is evidence before the Court that the child is because of physical or mental defects unable to provide for himself between the ages of 18 and 21 and there were no other resources available to said child.

There is absolutely no evidence in the record whatsoever to substantiate the contingencies provided for by the Court in the Memorandum Decision or the Decree in regard to education or physical disabilities.

Section 30-3-5, Utah Code Annotated, 1953, as amended provides the continuing jurisdiction of the court in these matters as follows (only the portion of the statute deemed as pertinent is quoted):

> *******The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance or the distribution of the property as shall be reasonable and necessary*******.

If it is deemed that support money for minor children should continue beyond the age of 18 years, this matter should be left to the future determination by the court under its continuing jurisdiction upon a proper hearing at the

proper time when the said minors have reached the age of 18 years. See McLEAN vs. McLEAN, 523, Pacific 2d, 862, RIDGE vs RIDGE, 542, Pacific 2d, 189.

Respectfully submitted,

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