1976

Anita Dumesnil Cummings v. Patrick C. Cummings : Brief of Respondent

Utah Supreme Court

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Richard L. Bird, Jr.; Richards, Bird & Kump; Attorneys for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

ANITA DUMESNIL CUMMINGS, :

Plaintiff-Respondent, :

vs. : Case No. 14611

PATRICK C. CUMMINGS, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from Judgment of the District Court of the
Third Judicial District
In and For Salt Lake County, State of Utah

Honorable Bryant H. Croft,
Judge

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Respondent takes no issue with the lengthy recitals explaining the nature of the case.

RELIEF SOUGHT ON APPEAL

Appellant states that he

> "* * * seeks reversal of the lower court's order and judgment with respect to the issue of alimony."

The precise result sought is not stated.

STATEMENT OF FACTS

Respondent takes considerable offense from this statement at page 4 of appellant's brief:

> "Since the Decree of Divorce, each party has established a separate life, both entering into a long-term relationship with a member of the opposite sex * * *."

There is no evidence to support that statement and no truth in

the insinuation. Counsel asks the respondent:

> "Q. Do you have a boy friend now?
>
> "THE COURT: I don't think that is material." (R. 151)

and there is absolutely no other testimony on that subject. Respondent requests the Court to delete that statement from appellant's brief and to ignore it.

At the top of page 5, appellant makes the statement that respondent

> "* * * was unemployed for a substantial period of time, but has now taken part-time employment."

That statement is misleading, because in the trial of the action, the Court found that respondent at that time had part-time employment. (R. 26, Finding 12)

The next sentence in appellant's brief on page 5 is simply a speculation about what has caused bad feelings between the parties and that the children keep them irritated. Such speculation has no part in a statement of facts.

Likewise as to the next paragraph on page 5 in the statement of facts, any speculation as to what the Court attempted to do by its Judgment and Decree is not properly a part of the statement of facts.

FURTHER STATEMENT OF FACTS

The financial facts in evidence are as follows:

Appellant testified that his income in 1973 was $1,700 per month (R. 121); in 1974 it was around $20,000 (R. 122); and in 1975 his gross was $16,047 (R. 123); and in 1976 it is $775 per month from the vending machine business, plus $470 per month payments on the sale of June's Restaurant (R. 125 and 127) and $5,855 remaining from the down payment of $25,000 after he had paid off his obligations (R. 126).

Appellant further testified that at the time of the divorce, he was operating the Crossroads Restaurant in Tremonton and the Hub Restaurant in Salt Lake (R. 121) and he lost his lease at the Crossroads (R. 123) and gave up the Hub Restaurant (R. 123). He purchased a $115,000 home and ranch in Salt Lake County with $20,000+ down (R. 136); sold that home and purchased another (R. 137 and 143), on which the monthly payments are $320 per month (R. 145). He bought June's Restaurant in Midvale in 1975 (R. 123) and sold it in 1976 for $180,000, of which he owed $117,000 (R. 124 and 125), thereby losing its income of $500 per month (R. 124). Appellant has now gone into the vending machine business (R. 125); he purchased a new Blazer for $2,600 plus his pickup truck (R. 140), and has put a new motor in his boat at a cost of $1,155 (R. 140), and is contemplating building a place in Heber Valley (R. 137).

Respondent testified that she had monthly expenses at the present time of $906.70 (R. 148) and that at the time of

the divorce they were approximately $873 (R. 148). She is now working part time to pay her bills and had been earning $200 a month (R. 148), which was at the time of the hearing a gross of $250 (R. 151). She has borrowed money from her parents to make a down payment on a car (R. 152) and the total she owes them is more than $1,000 (R. 155). Her three boys need clothes, dental care, one needs glasses and they want to take classes in athletics, none of which she can afford for lack of money (R. 154).

DISPOSITION IN LOWER COURT

Appellant sets out in five numbers some of the things the decision of Judge Croft covered. Appellant omits reference to the only Finding relevant to what appellant claims is his basis for appeal, namely:

> "3. Defendant's income has been temporarily reduced with apparent good earning ability in the defendant. His current income from vending machines, games, and Southland Corporation is $775 per month, with a down payment on sale of June's Restaurant expected in the total amount of $25,000 and $470 per month with eight and one-half percent (8-1/2%) interest. Expenses of sale and obligations will leave defendant approximately $5,000 from the down payment." (R. 80)

The reasoning of the Court which led to inclusion of Finding of Fact No. 3 is found in statements of the Court

made at the conclusion of the arguments, where the Court summarized appellant's income as indicated for 1976 and concluded:

> "* * * so that puts it, you see, back up, money available for him this year $20,000." (R. 156)

and then reviewed the expenditures of appellant, as well as money available to him with which he could pay alimony, with the concluding comment:

> "I just don't view it as being something that this Court should ignore." (R. 157)

POINTS TO BE ARGUED

1. Do appellant's changed circumstances compel relief?

2. May the Court consider the temporary nature of the change in circumstances?

3. Did the trial court exceed its discretion?

ARGUMENT

POINT I

DO APPELLANT'S CHANGED CIRCUMSTANCES COMPEL RELIEF?

Respondent concedes that the appellant's circumstances have changed. Appellant formerly was in the restaurant business and is now in the vending machine business. At the time of the divorce, appellant lived in a motor home and has since purchased two homes successively and is contemplating building

a third.

Appellant's income has fluctuated from a salary of $20,400 in 1973 to in excess of $20,000 from the restaurant business in 1974 down to $16,047 in 1975 and for the year 1976 at the rate indicated from the testimony of appellant, he will have income of $775 per month from the vending machine business, $470 per month payments on his restaurant sale, a balance of cash of $5,855 from the down payment of $25,000, all of which will total $20,795.

Appellant is not suffering from lack of funds, as evidenced by his purchase of a new Blazer, his putting a new motor in his boat, his purchase of June's Restaurant in Midvale, his sale of June's Restaurant in Midvale with an equity of $63,000, and his continuing to own his motor home, his boat, his three motorcycles (R. 140), his $2,000 stereo, and his 4,000 shares of Heber Creeper stock, which may have no value (R. 142).

Respondent's circumstances have changed but little. Her expenses have gone up slightly (R. 148); she has had to borrow money from her parents to replace a worn-out automobile and for other purposes (R. 152, 155) and has been compelled to work part time to meet her obligations (R. 148) and still is unable to give her boys things which they reasonably are in need of (R. 154).

The Court, in commenting on the facts, noted that appellant's income for 1976 will be $20,000, including the net down payment on the sale of the restaurant and the monthly payments from the restaurant (R. 156). This compares favorably with the $20,400 which appellant made in 1973 at the rate of $1,700 per month (R. 121).

The Court properly considered that appellant's available income included the net down payment on his sale of the restaurant and the monthly payments from the restaurant contract. The monthly payments just about take the place of the income from the restaurant, which was $500 per month, and appellant simply elected to get out of the restaurant business and into the vending machine business, which was a choice he controlled.

Appellant cites no authority which supports his position. Appellant cites Short v. Short, 25 Utah 2d 326, 481 P.2d 54, at page 14 of his Brief. In that case, the wife had been employed before the divorce and found employment again after the divorce. Those facts alone did not call for modification of the Decree.

In Sorensen v. Sorensen, 20 Utah 2d 360, 438 P.2d 180, this Court considered all sorts of factors, including income from investments by the wife, increase in value of investments and new activities by the husband, all of which were considered and were held by this Court not to constitute a sufficient

change in circumstance and the District Court was required to reverse its order of modification.

A reduction in income from $41,000 to $30,000 per year was held not sufficient to require reduction of alimony over denial by the District Court in McRoberts v. McRoberts, 80 Idaho 511, 335 P.2d 342. Likewise, in Edwards v. Edwards, 82 Nev. 392, 419 P.2d 637, where income had dropped from $27,000 to $17,000 per year and the defendant was maintaining two excess cars, the expense of which was equal to the amount of reduction he sought, the denial of modification was held proper.

POINT II

MAY THE COURT CONSIDER THE TEMPORARY NATURE OF THE CHANGE IN CIRCUMSTANCES?

Appellant had just gotten out of the restaurant business in March, 1976 (R. 123-124). He was, therefore, just getting started in the vending machine business and doesn't expect to stay at earnings of only $775 a month from that business. When asked:

> "So you are going to have to try a little harder and earn a little more, aren't you?"

Appellant answered:

> "You bet." (R. 140)

This Court has held that compensation must be permanent to constitute grounds to modify a provision for

alimony. Carson v. Carson, 87 Utah 1, 47 P.2d 894 (1935). Also, that potential earnings must be considered where a person seeking to have a decree modified in his favor is working at less than his potential. Osmus v. Osmus, 114 Utah 216, 198 P.2d 233 (1948); Lambert v. Lambert, 66 Wash.2d 503, 403 P.2d 664 (1965). In Lambert, the defendant lost his reputation and, therefore, his business over the matters involved in the divorce and took a salary job in a nearby town, which he lost because he was moonlighting against his employer. Modification was refused.

In Low v. Low, 79 Colo. 408, 246 P. 266, the Colorado Supreme Court set aside a reduction of alimony based upon the wife's obtaining a teaching job because she was on probation.

In Commonwealth ex rel Saul v. Saul, 175 Pa.Super. 540, 107 A.2d 182, the husband had obtained a decree reducing alimony from $90 to $75 per week based upon his reduction in salary and his heart attack. The Superior Court reversed for the reason that the heart attack was not shown to impair earning power permanently and the reduction in his earnings was a matter he had arranged.

POINT III

DID THE TRIAL COURT EXCEED ITS DISCRETION?

Respondent submits that the testimony clearly supports the decision of the trial Judge. The appellant voluntarily

changed his occupation, was just getting started in a new business, has ample total income to make the payments in 1976 and in the foreseeable future, is living very well himself and denying himself nothing, and has simply tried to take advantage of his temporary reduction in monthly income to escape his responsibilities. The respondent is patently short of funds, had obtained temporary work before the trial on its merits; and at the time of the hearing and while the boys were in school was doing part-time work to meet her ordinary and reasonable expenses.

The party seeking the modification has the burden of proof. Sorensen v. Sorensen, supra. The trial court has the same discretion in a trial for modification of a decree as in the original action. Mitchel v. Mitchel, 527 P.2d 1359 (Utah 1974). And this Court has held in Hansen v. Hansen, 537 P.2d 491 (Utah 1974), that this Court will affirm unless there is a clear abuse of discretion:

> "In a divorce action, the trial court has considerable latitude of discretion in adjusting financial and property interests. The burden is upon the appellant to prove that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or that the evidence clearly preponderates against the findings as made; or a serious inequity has resulted as to manifest a clear abuse of discretion."

The court's decision in the matter now before the Court

was announced in open court:

> "I think Mr. Cummings' reduction in income is a temporary thing and I am not impressed that there is such a substantial change in circumstances here as to justify modification of the support and alimony payments. I do think Mrs. Cummings ought to get herself a better job. She ought to get remarried and enjoy the rest of her life and bring a man into the house that can help her take care of three boys she has got to raise." (R. 159)

The court's decision was fairly reflected in the Findings of Fact and Conclusions of Law, especially Finding of Fact No. 3.

CONCLUSION

On the record before the Court, there is ample evidence to support the denial of modification by the District Court. The drop in income of the appellant is temporary and even if it should be permanent, under the authorities cited, the order is well within the discretion of the trial Judge. The trial Judge gave careful consideration to the problems of the parties, made some appropriate modifications of the Decree and its Judgment, Order and Modification of Decree (R. 111-112) should be affirmed.

Respectfully submitted,

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