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Norman G. Carter v. Pauline Carter : Brief of Appellants

Utah Supreme Court

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J. Franklin Allred; Attorney for Plaintiff-Appellant;

Phillip V. Christensen; Attorney for Defendant-Respondent;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

NORMAN G. CARTER,

Plaintiff and Appellant,

vs.

PAULINE CARTER,

Defendant and Respondent.

APPELLANTS' BRIEF

Appeal from Judgment of the District Court
in and for Utah County, State of Utah
GEORGE E. BALLIFF, Judge Presiding

Phillip V. Christensen
55 East Center
Provo, Utah 84601
Attorney for Defendant Respondent

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Phillip V. Christensen
55 East Center
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Case No. 15158

APPELLANTS' BRIEF

Appeal from Judgment of the Fourth Judicial District Court,
in and for Utah County, State of Utah, THE HONORABLE
GEORGE E. BALLIFF, Judge Presiding.

J. Franklin Allred
321 South Sixth East
Salt Lake City, Utah 84102
Attorney for Plaintiff-
Appellant

Phillip V. Christensen
55 East Center
Provo, Utah 84601
Attorney for Defendant-Respondent

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NORMAN G. CARTER,)	
Plaintiff and Appellant,)	
vs.)	Case No. 15158
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Defendant and Respondent.)	

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought a separate action in the Second Judicial District to modify a Decree of Divorce entered in the Fourth Judicial District. The venue was changed to the Fourth Judicial District and the complaint treated as an Order to Show Cause why the Decree should not be modified. Plaintiff alleged a material and substantial change of circumstances on the part of the divorced wife and requested that alimony be terminated.

DISPOSITION IN LOWER COURT

The trial court reduced the alimony payment required by plaintiff to defendant of \$350.00 monthly to \$100.00 monthly.

RELIEF SOUGHT ON APPEAL

The Order reducing alimony to \$100.00 per month should be modified to terminate the alimony obligation.

STATEMENT OF FACTS

The parties to this appeal were divorced by a Decree entered in Utah County on January 22, 1976 (R. 54). That Decree provided for an almost exactly equal division of the parties' real and personal property with the plaintiff getting some common stock for which the defendant got no equivalent award. The initial Decree required the husband to pay to the divorced wife the sum of \$275.00 per month for support and maintenance while she resided in the house which was the residence of the parties prior to its sale, and \$350.00 per month for support and maintenance after the sale of the home. (R. 55).

In its Findings of Fact made at the conclusion of the trial, the Court found the divorced wife's minimum needs to be \$350.00 per month after she had moved from the home which was the former residence of the parties. (R.58, 59). On October 7, 1976 the plaintiff brought an action in the Second Judicial District wherein the plaintiff then resided, to modify the Decree on grounds of changed circumstances (R. 24). The venue was changed to the Fourth Judicial District Court and the complaint treated as an Order to Show Cause and heard on March 24, 1977. The Court found that the defendant was then employed earning \$636.27 per month and had \$150.00 to \$160.00 additional income from rental property, interest and dividends,

and reduced the "alimony" to \$100.00 per month (R.14).

In his complaint, the plaintiff has asked for a termination of support and maintenance for the reason that the defendant was now fully capable of--and was--supporting herself without the assistance from the plaintiff. The plaintiff did not pursue a claimed change of circumstances for the worse on his part as an additional ground since in the interim between filing the complaint and the hearing, his health had improved.

At the hearing, the defendant testified to being employed by the Davis County School District with a monthly take-home pay of \$536.27 (TR 6). In addition, the defendant admitted that there was deducted from her gross, savings of \$100.00 monthly, and that her net was actually \$636.27. (TR. 7). Defendant's testimony in conjunction with Exhibit 1, her payroll record, show an additional deduction which is credited to her retirement account of \$19.28 monthly (TR. 8). (Exhibit 1-D). Defendant has a \$5,000.00 savings certificate placed at an annual interest of 7 1/2% and a \$4,000.00 pass-book account at 5 1/2% (TR. 8-9). Defendant also has common stock, dividends on which approximate \$250.00 to \$300.00 per year, and she expects rental income from an apartment newly finished in her basement in the sum of \$175.00 per month. (TR. 12). The defendant made an interest-free loan of \$9,500.00 to her daughter which is paid to her in monthly installments of \$100.00 (TR. 14, line 12). She has in her retirement account from previous employment an amount estimated to be \$2,000.00. At the present time, Mrs. Carter has "enough to get along" (TR. 17), but she is concerned that she has inadequate retirement (TR. 17-18).

There are no dependent children (R. 58), and the defendant is purchasing her home in Kaysville, Utah (TR. 4-5).

ARGUMENT

POINT I

ALIMONY TO THE DIVORCED WIFE SHOULD BE TERMINATED THERE BEING NO NECESSITY AND NO BASIS IN LAW FOR THE CONTINUANCE THEREOF.

This being the case in equity, this Court can determine the facts and render a decision in accordance therewith. Allred v. Alldredge, 119 U 504, 229 P.2d 681 (1951). In his decision the trial judge concluded that Mrs. Carter's net income was \$636.22 and that with other income she had an additional \$150.00 to \$160.00 more. More accurately stated, her income on a monthly basis is:

<u>SOURCE</u>	<u>AMOUNT</u>
Take-home pay	\$536.27
Savings, deductions from check	100.00
Dividends, \$250.00 ÷ 12	20.83
Certificate interest, \$5,000 at 7.5% ÷ 12	40.44
Pass-book interest, \$4,000 at 5.5% ÷ 12	18.33
Retirement contribution, deduction from check	19.28
Rental income	<u>175.00</u>

Net Income: \$910.23

In addition, the defendant is able to forego interest on \$9,500.00 which if placed at interest at 7 1/2% would equal \$59.29 monthly. Thus, the plaintiff submits that Mrs. Carter's circumstances have changed materially and substantially for the better since the divorce trial to a posture where she is no longer reliant on the plaintiff for support and maintenance, and alimony should therefore be terminated.

In another case involving parties named Carter, this Court has pointed out that among other things, the needs and requirements of the divorced wife are a major circumstance to be considered in whether or not alimony is necessary and the amount thereof. Carter v. Carter, 563 P.2d 177 (Utah, 1977). And in Hansen v. Hansen, 537 P.2d 491 (Utah, 1975), this Court rejected a claimed inadequacy of alimony and by implication established the premise that necessity is an indispensable circumstance that must be present for an award of alimony.¹ In the case at bar, there can be no dispute that the defendant (plaintiff in the original action) no longer needs a payment for support and maintenance. She has an income of \$910.00 per month, is buying her home, has substantial savings at interest, foregoes substantial interest and is gainfully employed in her profession as a school teacher.

The facts in this case are strongly similar to those in Dehm v. Dehm, 545 P.2d 525 (Utah, 1976). In Dehm, the original Decree required a payment of alimony to the divorced wife of \$300.00 per month. At the time of the Decree, the wife had income of only \$200.00 per month while the husband made \$12,000.00 to \$13,000.00 annually. Subsequent to the Decree, the wife's income increased to \$946.00 per month, and the trial court refused to terminate or reduce the award from which Order the husband appealed. In writing for an unanimous Court in reversing the

¹See also, Cummings v. Cummings, 562 P.2d 229 (Utah, 1977), Mitchell v. Mitchell, 527 P.2d 1359 (Utah, 1974), Short v. Short, 25 U2d 326, 481 P.2d 54 (Utah, 1971), Watts v. Watts, 21 U2d 306, 445 P.2d 141 (Utah, 1968).

trial Court and ordering a reduction to \$1.00 per year, Mr. Justice Maughan stated:

"The thrust of defendant's testimony is that she needs this alimony in order to augment her retirement income and to maintain the insurance policy for the two children. No claim is made that alimony is needed for support, nor could such a claim be made, in view of her present ability to support herself.

In a situation such as this, where the defendant is gainfully employed, making a salary sufficient to satisfy her needs, is adequately housed and is in good health, one of the functions of alimony is not to provide retirement income. We do not want to confuse alimony with annuity." 545 P.2d at 528, 529.

In this case, the defendant admits that she "has enough to get along on" (TR. 17). Additionally, her testimony seems to indicate that she is concerned about retirement, and thus it falls squarely within the ruling in Dehm. Clearly then, under the rationale of Dehm, Mr. Carter should be relieved of the obligation to pay alimony. There is no need on the part of Mrs. Carter, and her desire to provide retirement income is not a legal basis for alimony.

But, appellant is asking this Court to go one step further than the decision made in Dehm. That is, to terminate alimony altogether. Research has disclosed no Utah case where this has been done. This Court has affirmed findings of the trial court providing for a definite termination of alimony, however. See, Christensen v. Christensen, 21 Utah 263, 444 P.2d 511 (1969); Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956). In Wilson this Court shortened the period of termination from that made by

the trial court. On at least two occasions, this Court has

increased or reinstated alimony reduced or terminated at the trial court level. See Ring v. Ring, 511 P.2d 155 (Utah 1973) (termination); Felt v. Felt, 27 Utah 2d. 103, 493 P.2d 620 (1972) (reduction to \$1.00). The Court seems to be saying in Ring and Felt that stipulated-- default agreements ought not to be changed on motion for the reason that the agreements may have contemplated some such changes in circumstances as later evidence showed. Our case differs from them in that it was tried and a finding of needs on the part of Mrs. Carter was made in the sum of \$350.00.

The requirement of \$1.00 per year alimony fixed by this Court in Dehm when viewed with the modification made in the order of the trial court in King v. King, 495 P.2d 823, (Utah 1972) where this Court changed a definite termination date to allow for continuing nominal alimony indicate a desire on the part of this Court to allow a divorced wife the benefit of continuing jurisdiction to deal with the alimony question. Appellant contends that the trend in our society is to allow the husband to live without the specter of alimony once the divorced wife is able to support herself. Women are pushing for "equality" and "independence" in many areas, and plaintiff believes that with the burgeoning expansion of self-reliant women--Mrs. Carter being one--this Court should adopt the policy that when the divorced wife is no longer in need of alimony, the children are grown and no longer dependent and the woman is gainfully employed and in good health and earning an adequate living, she should not continue by virtue of a past

marriage to hold a claim for future needs in the form of a nominal alimony provision. This principle has been implicitly and expressly enunciated and adopted in the highest courts of several neighboring States. See, e.g. Coker v. Coker, 460 P.2d 424 (Oklahoma, 1969) (upheld trial court's refusal of alimony to 50 year old school teacher who received one-half of property); DeMarce v. DeMarce, 101 Ariz. 369, 419 P.2d 726 (1966) (working wife's earnings although not great, when coupled with income from property made alimony unnecessary).

In McClure v. McClure, 90 New Mex. 23, 559 P.2d, 400 (8), the Court found that the wife's income had gone from \$8,000 annually to \$17,400 while the husband's had gone from \$26,500 to \$38,400, and therefore alimony should be terminated. The Court said,

"Alimony is a personal right and not a property right. (Citation omitted), as such it should not continue without end if circumstances have changed. . . and the recipient is able to support herself." 559 P.2d at 400.

The Supreme Court of Washington in deciding another case with a fact situation marketedly similar to our's has stated:

"When the physical-income producing property of each party is substantial, and when each party is trained in a profession and has the ability to earn and is earning a living, it is not the policy of the law to give a wife a perpetual lien upon her divorced husband's future earnings." Young v. Young, 47 Wash. 2d 497, 288 P.2d 463 at 465 (1955).

saying thus, the Court modified a perpetual Order to terminate alimony in three years. Again in Washington in another strikingly similar case--where a 50 year old wife earned \$5,500 annually as a school teacher and the 51 year old husband made \$12,000 annually and the Decree had apportioned \$9,000 of the property to him and \$13,000 of the property to her--the trial court entered an Order requiring the payment of \$150.00 per month alimony. On the appeal of the husband, the Washington Court reversed, terminating alimony, saying:

"There is no evidence of an existing or reasonably anticipated future impairment of (wife's) health that now adversely effects her earning capacity. It is, therefore, clear that a finding of necessity, upon which an award of alimony depends cannot be based upon the conjectural possibilities of a future change in circumstances. Morgan v. Morgan, 59 Wash. 2d 639, 369 P.2d 516 at 519.

Mrs. Carter's argument is that she is entitled to continuing alimony to insulate her from the vagaries of the future. The appellant asks the Court to relieve him of the obligation of ensuring Mrs. Carter's future and reject her position as not cognizable under the law of our State.

CONCLUSION

The defendant is receiving in various forms at least \$910.00 per month. She is in a position where her own assessment of her financial picture allows her to make an interest-free loan at a cost to her of \$59.00 per month. She is getting along all right but is concerned for her future.

The parties divided substantial assets and are now rebuilding their lives separately. Each is employed at a good wage, is in good health and meeting their obligations. Under such circumstances, neither party should--in equity and fairness--continue to hold a claim against the other. The appellant therefore respectfully urges this Court to relieve him of the obligation to pay alimony to the defendant.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. Franklin Allred", is written over the typed name.

J. FRANKLIN ALLRED
Attorney for Appellant

MAILING CERTIFICATE

The undersigned hereby certifies that on the 16th
day of December, 1977, he properly mailed two copies to
Phillip V. Christensen, postage prepaid, at 55 East Center,
Provo, Utah 84601.



J. FRANKLIN ALLRED