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George Edward Wiker v. Elaine Wiker : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE EDWARD WIKER, :
Plaintiff & Respondent, :
vs : Case No. 15326
ELAINE WIKER, :
Defendant & Appellant. :

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
Honorable Jay E. Banks, Judge

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BRIEF OF DEFENDANT-APPELLANT

* * * * *

STATEMENT OF THE KIND OF CASE

petition for modification of decree of divorce to increase alimony and support payments, for delinquent support payments under decree of divorce in the sum of \$1,200.00, order to show cause for contempt and attorney's fees.

DISPOSITION IN LOWER COURT

The Lower Court granted defendant's request for modification of the decree of divorce and increased support to be paid by plaintiff to defendant for the remaining minor child to \$100.00 per month, increased alimony to be paid by plaintiff to defendant to \$150.00 per month, denied defendant's claim for delinquent support payments and awarded defendant attorney's fees of \$200.00 plus her costs. The Lower Court specifically retained jurisdiction of the matter to determine if support for the remaining minor child should continue beyond his eighteenth birthday, after his graduation from high school. The contempt portion of the order to show cause was dismissed.

RELIEF SOUGHT ON APPEAL

Reversal of the Lower Court's order and judgment denying defendant's claim for delinquent support payments for Roger Allen Baker pursuant to decree of divorce for the period from May, 1975 to the date of hearing of the order to show cause on June 14, 1977, in the sum of \$1,200.00.

STATEMENT OF FACTS

Defendant-appellant, Elaine Wiker, was granted a decree of divorce from the plaintiff-respondent, George Edward Wiker, on January 29, 1965. Mr. Wiker was ordered to pay support; Mrs. Wiker was awarded the care, custody and control of Roger Allen, then age 7, and Verlin Kay, then age 4. (R. 21-23). She was awarded as support the sum of \$50.00 per month for each of said minor children. The original decree of divorce was amended and modified by subsequent orders of the Court. (R. 31-32; R. 55-56; and R. 71-73). Support for the two minor children, Roger Allen and Verlin Kay, was increased voluntarily in October of 1973, through the efforts of Allen Hodgson, Family Court Administrator, to \$75.00 per month per child, and support and alimony together totalled \$220.00 per month. (R. 107-108, 109). When the minor child, Roger Allen, turned age 18 on May 27, 1975, the plaintiff, Mr. Wiker, stopped paying support for said child. Defendant, Mrs. Wiker, sought a judgment against plaintiff for the support payments by petition and order to show cause. (R. 77-82). The Lower Court denied the claim of defendant, Mrs. Wiker, for the delinquent support on the basis that the Legislature had changed the age of majority for boys to 18 years of age subsequent to the decree of divorce and that plaintiff, Mr. Wiker, did not have to pay support for the child in question after age 18. (R. 105, 110).

ARGUMENT

POINT I

LOWER COURT ERRED IN DENYING THE CLAIM OF DEFENDANT FOR

DELINQUENT SUPPORT BY INCORRECT APPLICATION OF THE LAW.

The Lower Court, in denying defendant's claim for delinquent support, concluded that the law amended by the Legislature in the year 1975 relieved the plaintiff, Mr. Wiker, from paying support for the minor child, Roger Allen, after age 18, under the decree of divorce of January 29, 1965. At the time the decree of divorce in this case was entered by the Court, Title 15-2-1 U.C.A. 1953, before amendment, provided that "the period of minority extends in males to 21 years of age". The Utah Legislature, under pressure of the United States Supreme Court's decision in Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688, amended Title 15-2-1 U.C.A. (L. Utah 1975) to read:

"The period of minority extends in males and females to the age of eighteen years; * * * *."

The Lower Court applied the above cited Statute as amended to the decree of divorce in this case retroactively. The Lower Court concluded that the Legislature in so amending 15-2-1 U.C.A., changed or modified the decree of divorce. The conclusion of the Lower Court is clearly contrary to and in conflict with the rulings of this Court in the Stanton cases. In Stanton v. Stanton, 517 P.2d 1010, this Court stated at page 1013:

"The general rule is that the decree fixes the obligations of the parties; and they cannot modify it or change their obligations by their conduct. * * * *."

"In the absence of any modification of the decree, the support money accrued in accordance with its terms; and it was not the prerogative of the defendant to unilaterally decide that he would not pay support money * * * *."

Mr. Wiker, the plaintiff in this case, discontinued paying

support for Roger Allen when he turned 18 years of age, May 27, 1975. There was no modification of the decree of divorce which was entered when the law provided that support would be paid for males to age 21. In the later Stanton case, 552 P.2d 112, the age of the male child was never called into question. This Court said at page 114:

"The question before us is the interpretation to be given to the decree of divorce from which no appeal has ever been taken by either party. That decree is final and cannot now be changed. At the time the decree was made, everybody knew that for almost one hundred years the age of majority for girls was and had been 18. The Judge and the parties to this proceeding all assumed that when the decree stated that the father should be the one to furnish the support for the children during their minority it meant that the father should furnish the support for the son until he reached age 21 * * *. No honest interpretation of that decree can be made to the contrary." (Emphasis Added).

Chief Justice Henriod, in his concurring opinion, stated at pages 114 and 115:

"Because this Court upheld an award for support of a female child until she became 18, but not thereafter, certainly is no matter of res judicata as to the fact, therefore, that a male (who is not particeps here), is entitled to support, in a divorce, only until he is 18, * * *."

"At the time of the entry of the decree, * * *, our Statute Section 15-2-1 U.C.A. 1953, provided:

The period of minority extends in males to age of twenty one years and in females to that of eighteen years."

"It could not be plainer that under both the statutory and decisional law of this State as it existed at the time the decree was entered, and therefore as was necessarily in the contemplation of the parties, and of the trial court, the only obligation it imposed upon the defendant was that he pay the \$100 per month until his daughter Sherri was 18." (Emphasis Added).

Applying the same rational to this case, it is clear that the decree of divorce, under both the statutory and decisional law existing at the time the decree was entered, imposed upon plaintiff that he pay support for his son until age 21 at the rate of \$75.00 per month.

Justice Maughan, in his dissenting opinion, advanced an additional theory in support of the position of defendant, Mrs. Wiker. He stated at page 117:

"Under one theory, if the statute be deemed void, the common law "shall be the rule of decision in all Courts of this State". (68-3-1) Under the common law, both male and female attain their majority at the age of 21 years."

Applying this theory to the instant case, the plaintiff, Mr. Wiker, was obligated to pay support for Roger Allen until age 21, as well as by order of the Court under the decree of divorce.

Article I, Section 18, Utah Constitution prohibits the passing of ex post facto law, or law impairing the obligation of contracts. If this in fact be the law in the State of Utah, the amending of Title 15-2-1 by the Legislature should have had no retroactive effect on the decree of divorce in this case entered prior to such amendment. The law in force and effect at the time of the decree provided that support should be paid for males until age 21. Until the decree of divorce was modified as to the age when support would terminate, Mr. Wiker was obligated to pay support for Roger Allen until age 21. The defendant, Mrs. Wiker, was entitled to a judgment for all delinquent support payments admittedly not paid by plaintiff under the decree. The retroactive application of

Title 15-2-1 after amendment by the Lower Court was error.

CONCLUSION

In conclusion, defendant, Mrs. Wiker, submits that the Lower Court committed error in denying her claim for delinquent support of \$75.00 per month for the minor son, Rober Allen Wiker, under the decree of divorce of January 29, 1965, as modified, for the period of May 27, 1975 to the date of hearing in the total sum of \$1,200.00, plus interest.

Respectfully Submitted,



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Served two (2) copies of the foregoing Brief Of Appellant on Respondent by delivering the same to James A. McIntosh of James A. McIntosh & Associates, 525 South 300 East, Salt Lake City, Utah, on this 13 day of January, 1978.

