

1978

George Edward Wiker v. Elaine Wiker : Respondent-Cross Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE EDWARD WIKER, :

Plaintiff-Respondent- :
Cross Appellant :

vs. :

No. 15326

ELAINE WIKER, :

Defendant-Appellant :

RESPONDENT-CROSS APPELLANT'S BRIEF

Appeal from the Judgment of the District Court
for Salt Lake County
Honorable Jay E. Banks

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE EDWARD WIKER, :
 :
 Plaintiff-Respondent- :
 Cross Appellant :
 :
 vs. : No. 15326
 :
 ELAINE WIKER, :
 :
 Defendant-Appellant :

RESPONDENT-CROSS APPELLANT'S BRIEF

STATEMENT OF THE CASE

Defendant-Appellant filed a Petition For Modification of Decree of Divorce, For Contempt and For Order to Show Cause [R. 77-80] in the District Court for Salt Lake County seeking to modify the decree of divorce by increasing child support for the minor child, Verlin Kay, to \$100.00 per month, to increase alimony to \$200.00 per month, and to collect alleged delinquent child support for the child, Roger Allen Wiker, resulting from Plaintiff-Respondent's discontinuing such support after Roger turned eighteen years of age. Defendant-Appellant also sought attorney's fees and to punish the Plaintiff-Respondent for contempt.

DISPOSITION IN LOWER COURT

The lower court granted Defendant-Appellant's request for modification of the decree and increased support for the remaining minor child to \$100.00 per month and increased alimony to \$150.00 per month. The court denied the claim for support payments for Roger after his eighteenth birthday and dismissed the contempt portion of the order to show cause. The court awarded Defendant attorney's fees of \$200.00. [R. 112-113] Defendant appealed the denial of her petition for delinquent support payments for Roger Allen Wiker. [R. 114] Plaintiff cross-appealed the lower court's decision increasing child support for the minor child, Verlin Kay, and increasing alimony. [R. 124]

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent-Cross Appellant seeks an order affirming the District Court's order and judgment denying Defendant-Appellant's claim for support payments for Roger Allen Wiker after May 27, 1975, which is Roger's eighteenth birthday. In addition, Plaintiff-Respondent, in his Cross Appeal seeks a reversal of the lower court's findings of changed circumstances and of its order and judgment increasing alimony and child support.

EXPLANATION OF PARTIES AND ABBREVIATIONS

George Edward Wiker, Plaintiff in the original divorce action filed April 29, 1964 [R. 4] is the Plaintiff-Respondent-Cross Appellant in this case. He will be referred to in this brief by his name or, where appropriate, as Plaintiff.

Elaine Wiker, Defendant in the original suit and Petitioner in this action will be referred to by her name, or as Defendant.

[R.] is a reference to the Record in this case.

[Tr.] is a reference to the Transcript in this case.

STATEMENT OF FACTS

The parties to this action were granted a divorce on January 29, 1965. [R. 21] The original divorce decree awarded custody of the two youngest minor children, Roger Allen, then age 7, and Verlin Kay, then age 4, to Defendant, Elaine Wiker. [R. 22] Plaintiff, George Wiker, was ordered to pay \$50.00 per month as support for each child as well as \$45.00 per month as alimony with alimony to increase to \$70.00 per month upon the eldest son's (Raymond) return from his mission. [R. 22] Plaintiff was awarded custody of two older minor children, Jeanne, then age 15, and George Martin, then age 14. [R. 22] The decree also made a division of the property of the parties. [R. 21-23]

Pursuant to an Order to Show Cause filed by Defendant, the decree was modified and amended on August 3, 1966, to give custody of Jeanne to Defendant and to require Plaintiff to pay \$50.00 per month child support for her. [R. 31-32]

The decree of divorce was further modified and amended on October 19, 1967, whereby Defendant was awarded care and custody of George Martin Wiker, then age 17, and Plaintiff was ordered to pay \$40.00 per month temporary support money for said son. [R. 56] By an order and amendment of decree dated November 29, 1967, Plaintiff was ordered to pay child support in the amount of \$50.00 per month for George Martin and to pay George Martin's dental bills. [R. 72]

On March 31, 1971, Defendant's employment was terminated because she was "too slow and not too accurate in counting," [Tr. 24] and because of "illness and physical problems." [R. 110] In December 1971, she was hospitalized for an operation [Tr. 24]

The next and last modification and amendment to the decree prior to the instant order to show cause, occurred in October 1973. [R. 107]. (The Findings of Fact No. 2 showing October, 1974 appears to be in error [R. 109]). This amendment to the decree is acknowledged by the trial judge as follows:

"2. That subsequent to said decree of divorce, the same was amended, whereby plaintiff's obligation to pay support was increased voluntarily, pursuant to letter agreement in October of 1974." [R. 109]

The Record is not totally clear as to all the details surrounding the October 1973 amendment. However, it is clear there were a series of letters written by Allen Hodgson, Family Court Commissioner [R. 108] whereby the financial, health and other circumstances of the parties were considered [R. 107] and the decree amended to increase Plaintiff's payments to Defendant from \$170.00 [\$50 per child child support and \$70 alimony] to \$220.00 per month "in support and alimony." [Tr. 21-23; R. 107-109]. We do not know how much of this \$220.00 was for alimony and how much for child support. Neither Mr. Hodgson's letter [R. 107] nor the testimony of the parties in court in the instant action clarifies this matter. [Tr. 21-23].

However, we do know the October 1973 amendment to the decree was based upon changed circumstances which occurred subsequent to the entry of the November 1967 modification but prior to October 1973, and we further know these are the same changes in circumstances alleged to exist in the instant case. These changed circumstances included Defendant's loss of employment, her illness, and her operation in 1971, and her subsequent inability to work full-time. These were offset by the fact her home had been completely paid for so she no longer had to make house payments; she was now receiving disability payments from Social Security in the amount of approximately Two Hundred Dollars (\$200) per month (which is the same income she had in 1964 when the original

complaint was filed [R. 5] and also at the time of the 1967 modification [R. 54]]) and her part-time work for and receipt of goods from church welfare. [R. 107]

In 1974, the minor child, Verlin Kay, had rheumatic fever [Tr. 28] which was covered by Plaintiff's insurance. [Tr. 11-12]. Since that time his illness has only required medication and an annual physical check-up. At the time of trial he had recovered to the extent he was in the Hawaiian Islands working in a pineapple plantation. [Tr. 9-10]

In March 1975, the Utah Legislature passed a statute amending Section 15-2-1, Utah Code Annotated, lowering the age of majority for males from 21 to 18. The statute was made effective May 13, 1975. Laws of the State of Utah, 1975, p. 121. Roger Allen Wiker, child of the parties in Defendant's custody, reached age eighteen, his statutory age of majority, on May 27, 1975. [Tr. 4-5] Relying on the advice of counsel, Plaintiff ceased paying support for Roger after that date. [Tr. 5]

On August 23, 1976, Defendant filed the Petition for Modification of Decree of Divorce, For Contempt and For Order to Show Cause [R. 77] that initiated this proceeding. In her petition Defendant sought to increase alimony and support and to collect support for Roger after he reached age eighteen. The District Court increased alimony to \$150.00 per month and child support for the one child Verlin

Kay to \$100.00 per month. The Court denied Defendant's claim for support for Roger after he reached age of majority. [R. 112-113]

POINT I

THE DISTRICT COURT CORRECTLY APPLIED AMENDED SECTION 15-2-1, UTAH CODE ANNOTATED, PROSPECTIVELY, NOT RETROACTIVELY, IN DETERMINING THAT PLAINTIFF'S CHILD SUPPORT OBLIGATION FOR ROGER CEASED WHEN ROGER TURNED EIGHTEEN BECAUSE THERE IS NO VESTED RIGHT IN FUTURE CHILD SUPPORT AND BECAUSE THE COURT TERMINATED CHILD SUPPORT ONLY AFTER THE EFFECTIVE DATE OF THE STATUTE AND AFTER ROGER REACHED AGE EIGHTEEN, THE AGE OF MAJORITY UNDER THE AMENDED STATUTE.

The general rule of law, adopted by the Supreme Court of Utah and applicable in this case, provides that ordinarily, legislative enactments are applied prospectively and may not operate retrospectively or retroactively. McCarrey v. Utah State Teachers' Retirement Board, 111 Utah 254, 177 P. 2d 725, (1947); In re Ingraham's Estate, 106 Utah 337, 148 P. 2d 340, (1944). Defendant has alleged the District Court applied 15-2-1, as amended, retroactively. The Utah Supreme Court, when confronted with a claim that a lower court had incorrectly applied an amended workman's compensation statute retroactively, defined retroactive application of a statute as follows:

"A statute is not made retroactive merely because it draws on antecedent facts for its operation. (Citations omitted). A law is retrospective, in its legal sense, which takes away or impairs vested rights acquired under existing laws." Silver King Coalition Mines Co. v. Industrial Commission, 2 Utah 2d 1, 268 P. 2d 689, 692 (1954). [Emphasis added]

It therefore appears the first test to be applied in determining whether a statute is being applied retroactive

is to see whether any vested rights are taken away or impaired. The answer to this question depends upon the nature of the decree awarding child support payments to Roger. If all future child support payments vest automatically when the decree is entered and cannot be modified nor changed, then the subsequent statutes can have no affect upon the child support payments and they must continue until the specified period has ended. If on the other hand the future child support payments do not vest until their monthly due date, it follows they can be changed or modified by the courts at any time prior to their due date but not after that time.

In Utah, the law is that the right of the trial court to modify an alimony or support money award does not extend to installments which have already accrued and which are past due, because the right to collect such installments becomes vested upon their due date. Openshaw v. Openshaw, 105 U. 574, 144 P. 2d 528 (1943), and Cole v. Cole, 101 Utah 355, 122 P. 2d 201 (1942), and cases cited therein. Consequently the courts in Utah may not impair past due installments of alimony and child support but they can modify those installments that will become due in the future.

In the instant case, the trial judge did not attempt to apply amended Section 15-2-1 Utah Code Annotated, 1953 to any past due installments of child support payments. Rather he applied the statute only to those installments that become due after the effective date of the amendment which

was May 13, 1975, and after the minor child Roger became eighteen years of age which was May 27, 1975. This conclusion by the trial judge is amply demonstrated in paragraph one (1) of his Conclusions of Law which reads as follows:

"1. That the defendant should be denied judgment against plaintiff for the claim for delinquent support payments for the minor child Roger Allen Wiker, in that he turned age eighteen (18) on or about May 27, 1975. That the Court concludes that the law as amended by the Utah Legislature in the year 1975, relieved plaintiff from paying support for said minor child after age eighteen (18) under the Decree of Divorce herein." [R. 110]

Moreover, the doctrine of "vested rights" has never been interpreted to mean that a parent or child has the right to support payments for any definite period of time, and age of majority statutes in affect at the time the divorce decree is entered do not change that result. Schmitz v. Schmitz, ___ Wis. ___, 236 N.W. 2d 657 (1975); Jungjohann v. Jungjohann, ___ Kan. ___, 516 P. 2d 904 (1973); Baril v. Baril, ___ Me. ___, 354 A. 2d 392 (1976).

Finally, the trial judge's application of 15-2-1 did not impair any "vested rights" under the original divorce decree. "To call child support payments a vested right misconceives their nature." Schmitz, supra, at 662. Under a decree providing child support until majority, a minor child has no vested right to support at a specific future date or age regardless of what age the law establishes as the age of majority. "(T)he rule has long been recognized that a child has no claim or vested right in future child support. . ." (Emphasis added) Jungjohann, supra, at 908.

"As we have previously stated, the rights of minority are not fixed or vested rights. . ." Jungjohann, supra, at 909. Age of majority "is a status, modifiable by law, which has no vested property rights." Schmitz, supra. See also Baril, supra.

In dealing with virtually identical issues and similar circumstances as those in the case at bar, courts have uniformly held that applying a new age of majority statute to a prior divorce decree does not constitute retroactive application nor deprivation of vested rights. These same courts further hold such statutes do relieve the supporting parent of his obligation to contribute child support when the child, male or female, reaches age of majority under the amended statutes. Jungjohann v. Jungjohann, ___ Kan. ___, 516 P. 2d 904 (1973); Schmitz v. Schmitz, ___ Wis. ___, 236 N.W. 2d 657 (1975); Whitt v. Whitt, ___ Tenn. ___, 490 S.W. 2d 159 (1973); Blackburn v. Blackburn, ___ Tenn. ___, 526 S.W. 2d 463 (1975); Allison v. Allison, 44 Ohio App. 2d 230, 337 N.E. 2d 337 (1975); Baril v. Baril, ___ Me. ___, 354 A. 2d 392 (1976); Shoaf v. Shoaf, ___ N.C. ___, 192 S.E. 2d 299 (1972); Fellows v. Fellows, ___ La. App. ___, 267 So. 2d 572 (1972); Baker v. Baker, 217 Kan. 319, 537 P. 2d 171 (1975); Phelps v. Phelps, 85 N.M. 62, 509 P. 2d 254 (1973); Lookout v. Lookout, ___ Okl. App. ___, 526 P. 2d 1405 (1974); Speer v. Quinlan, 96 Idaho 119, 525 P. 2d 314 (1974); Garey v. Garey, ___ Tenn. ___, 482 S.W. 2d 133 (1972).

In Schmitz, supra, the divorced husband, following enactment by the legislature of the statute reducing the age of majority to eighteen years, ceased making support payments for children who had reached ages 19 and 20 as of the effective date of the statute. The divorced wife petitioned the court to require the divorced husband to continue support payments. The trial court denied the wife's petition. The Supreme Court of Wisconsin affirmed, stating:

"In refusing to order further payments the trial court noted that the phrase 'minor children' was the crucial language of the decree, and that the twenty-one age reference was merely descriptive of the then existing majority status. A new majority status being defined by Ch. 213, Laws of 1971, the court noted that the decree's application ceased for those children who attain or attained eighteen years." Schmitz, supra, at 661.

As to the wife's claim [exactly as the wife Mrs. Wiker alleges in the instant case] that the trial court incorrectly applied the new age of majority statute by applying it retroactively, the Supreme Court held:

"To the extent that the new act does not demand the return of payments made for the parties' children who were over age eighteen prior to the effective date of the law, retroactive application is clearly avoided. (Emphasis added). Schmitz, supra, at 662.

Similarly, in the case at bar, the amended statute (15-2-1) became effective on May 13, 1975, while the child, Roger, was only seventeen years old. The Court did not apply the statute to support which accrued and was paid prior to the effective date of the statute and prior to Roger's eighteenth birthday. Nor did it apply the statute

to recover support paid by plaintiff for another child, George Martin Wiker, for the years after George reached eighteen. These two applications would have been retroactive. Amended Section 15-2-1 was applied to Roger's support prospectively only, that is, only to support claimed after the effective date of the statute and after Roger's eighteenth birthday.

The divorce decree in Jungjohann, supra, provided child support until the daughter reached age of majority. At the time the decree was entered, the age of majority in Kansas was 21 years. The daughter turned 18 on August 5, 1971. The Kansas legislature reduced the age of majority to 18 effective June 1, 1972. In determining the father's child support obligation, the Kansas Supreme Court held:

"We hold that where by a decree of divorce a defendant is required to make child support payments until a child has reached her age of majority the duty imposed by such decree is terminated by K.S.A. 1972 (Supp. 38-101) [amended Kansas age of majority statute] on the effective date thereof. . . Jungjohann, supra, at 909. (Parenthetical explanation and Emphasis added).

The court in Jungjohann further held that even though the divorce decree was entered prior to the effective date of the statute, application of the amended age of majority statute to child support payments after the statute's effective date constituted prospective application, not retroactive, and did not run counter to the rule against retroactive application of statutes. The court concluded:

"The ruling of the trial court terminated support payments prospectively from and after July 1, 1972. No application was made nor order entered herein which attempted to operate retrospectively back to the eighteenth birthday of Elizabeth. The statute made eighteen the age of majority from and after July 1, 1972. It affected no rights accrued before that date. It did not reach back. . .but only operated from and after the effective date of July 1, 1972. [Emphasis added] Jungjohann, supra.

By the same token, amended Section 15-2-1 of the Utah Code made 18 the age of majority from and after its effective date. It did not attempt to terminate the support payments after the person's 18th birthday when that birthday occurred prior to the effective date of the act, rather it operated from and after its effective date of May 13, 1975 and this is the way the trial court applied it.

POINT II

THE DISTRICT COURT CORRECTLY APPLIED SECTION 15-2-1 U.C.A. 1953, AS AMENDED, IN THIS CASE WITHOUT VIOLATING ARTICLE I SECTION 18 OF THE UTAH CONSTITUTION WHICH PROHIBITS EX POST FACTO LAWS OR LAWS IMPAIRING CONTRACT OBLIGATIONS BECAUSE SECTION 15-2-1, UTAH CODE ANNOTATED, AS AMENDED, WAS NOT APPLIED EX POST FACTO OR RETROACTIVELY AND BECAUSE DIVORCE DECREES ARE NOT CONTRACTUAL IN NATURE.

Article I, Section 18, Utah Constitution, prohibits the enactment of ex post facto laws or laws impairing the obligation of contracts. Defendant contends that in light of this Constitutional provision, Section 15-2-1 should have had no retroactive effect. Plaintiff has already argued that the District Court, in the case at bar, applied 15-2-1 prospectively, not retroactively. [Rather than repeat those arguments and citations, reference is made to Point I, above, of this brief.]

In the case of Allison v. Allison, supra, where the court faced issues very similar to those in the case at bar, the custodial parent alleged the application of the new age of majority statute violated the constitutional prohibition of ex post facto laws. The Ohio appellate court responded: "We do not think this is the type of ex post facto action which Article II, Section 28 of the Ohio Constitution is designed to prevent." Allison, at pp. 667-8.

As to defendant's impairment-of-contracts argument, she seems to assume, without foundation or support, that a

divorce decree occupies the status of or is in the nature of a contract. In Whitt v. Whitt, supra, the husband reduced his child support payments for his eighteen-year-old daughter when the legislature lowered the age of majority from 21 to 18. The wife attempted to enforce the parties' divorce settlement agreement provisions which required support until the former age of majority on the grounds such an agreement was a binding contract. The Supreme Court didn't disagree that the agreement, standing alone, was a contract, only that the divorce decree was not a contract. The Court held that:

"When the trial judge accepted this agreement of the parties. . . and incorporated it in the decree, the agreement became merged into the decree and lost its contractual nature. Whitt, supra, at 160.

The reason divorce decrees are not deemed to be contracts or contractual in nature "is the continuing statutory power of the trial court to modify its terms when changed circumstances justify." Penland v. Penland, ____ Tenn. ____, 521 S.W. 2d 222 (1975) at 224; Blackburn, supra, at 465.

Thus, it is clear that the District Court's application of Section 15-2-1 in this case does not violate ex post facto and impairment of contract prohibitions of the Utah Constitution.

POINT III

THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL ERROR IN HOLDING THAT PLAINTIFF'S OBLIGATION TO PAY CHILD SUPPORT CEASED WHEN THE CHILD REACHED AGE EIGHTEEN BECAUSE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND DECISIONS OF THE UNITED STATES SUPREME COURT PROHIBIT ANY DISTINCTION BETWEEN MALE AND FEMALE AS TO AGE OF MAJORITY IN THE CONTEXT OF CHILD SUPPORT AND BECAUSE THIS COURT HAS ALREADY DETERMINED AGE OF MAJORITY FOR FEMALES TO BE EIGHTEEN; BECAUSE THIS COURT HAS ALSO RECOGNIZED THAT ITS DECISION AS TO AGE OF MAJORITY OF FEMALES HAD THE EFFECT OF IMPOSING MAJORITY ON BOTH MALES AND FEMALES AT AGE EIGHTEEN; AND BECAUSE THE AMENDMENT TO SECTION 15-2-1 UCA, 1953, CLARIFIES THE LAW AND ESTABLISHES AS PUBLIC POLICY THE AGE OF MAJORITY AT AGE EIGHTEEN.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution guarantees to individuals the equal protection of the laws and limits the power of states to legislate or accord different treatment to individuals according to differing classifications. Although it does not preclude legislative classifications altogether, it requires that,

"A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
Stanton v. Stanton, 421 U.S. 7, 13-14, 43 L. Ed. 2d 688, 95 S. Ct. 1373 (1975), quoting from Reed v. Reed, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S. Ct. 251 (1971).

The Stanton case just cited is one of a series of cases under the same name that dealt with the issue of whether the Utah statute which specified a greater age of majority for

males than for females denied, in the context of a parent's child support obligation, the equal protection of the laws as guaranteed by the Fourteenth Amendment. In analyzing this issue, the United States Supreme Court set forth the following test:

"The test here, then, is whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn by the Utah statute. Stanton, supra, at 14, 43 L.Ed. 2d 688, 95 S.Ct. 1373.

The Court's holding in that case was clear and unequivocal:

"We therefore conclude that under any test--compelling state interest, or rational basis, or something in between--§15-2-1, in the context of child support, does not survive an equal protection attack. In that context, no valid distinction between male and female may be drawn." [Emphasis added] Stanton, supra, at 17, 43 L.Ed. 2d 688, 95 S.Ct. 1373.

The importance of the Stanton decision is that the Court made clear that in any situation or circumstance in the child support context, both male and female children must be treated as reaching the age of majority at the same age.

Although the U.S. Supreme Court declared the Utah statute unconstitutional, it did not attempt to fix the age of majority for Utah. Rather, it remanded the case for such determination to the Utah Court. On remand, this Court concluded that females reach the age of majority at age eighteen. Stanton v. Stanton, 552 P. 2d 112 (Utah 1976). In the early Stanton cases the age of the male child was never "called into question." Stanton, supra, at 113. However, the Utah Supreme Court recognized that under the equal

protection clause its decision as to females would ultimately and inevitably be applied to males in the same context. Thus, after some further proceedings, this Court concluded, in an opinion by Justice Hall, that,

"...the prior decision of this court, made at a time when the age of majority statute was invalid, and which determined that females reached the age of majority at age eighteen, had the effect of imposing majority upon both males and females at age eighteen. The amendment to Section 15-2-1 has seemed to further clarify the status of Utah law and establishes as a matter of public policy the age of majority for both sexes at age eighteen." [Emphasis added] Stanton v. Stanton, 564 P. 2d 303, 304-5 (Utah 1977).

Plaintiff admits the Utah Court's determination of age of majority for males has force only as dictum. However, the Court's decision that females reach age of majority at age eighteen leads necessarily to the application of that age to males because:

"The thrust of Stanton I, and therefore the starting point for the Utah Court on remand, was that males and females cannot be treated differently for child support purposes consistently with the Equal Protection Clause of the United States Constitution." [Emphasis added] Stanton v. Stanton, 429 U.S. 501, 503, 50 L. Ed. 2d 723, 97 S. Ct. 717 (1977).

Thus, whether by extension of the age of majority for females to males under the equal protection clause, or directly under the Utah Supreme Court's determination of age eighteen for men, the result is the same, to-wit: the age of majority for both males and females for child support purposes is and must be eighteen. Any contrary holding by this court would deprive the plaintiff of his equal protection of the law and would be therefore unconstitutional.

POINT IV

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR WHEN HE INCREASED THE ALIMONY AND CHILD SUPPORT BECAUSE THEY HAD BEEN INCREASED, IN OCTOBER 1973, BASED AS THE SAME SET OF CIRCUMSTANCES ALLEGED IN THE INSTANT MOTION AND ORDER TO SHOW CAUSE.

It is firmly established in Utah law that the party seeking to modify a divorce decree must prove that "material" circumstances have "substantially" changed since the original decree or the most recent or subsequent modifications or amendments were adopted. Gale v. Gale, 123 Utah 277, 258 P. 2d 986 (1953); Ring v. Ring, 29 Utah 2d 436, 511 P. 2d 155 (1973); Hendricks v. Hendricks, 91 Utah 553, 63 P. 2d 277 (1936). Such a change in circumstances must be substantial and may not include factors which "were within the knowledge and contemplation of the court when the modified order was entered. . ." Mears v. Mears, ____ Iowa ____, 213 N.W. 2d 511 (1973). Especially important in the case at bar is the requirement that the changes in circumstances must be permanent and continuous, not temporary, Carson v. Carson, 87 Utah 1, 47 P. 2d 394 (1935); Spaulding v. Spaulding, ____ Iowa ____, 204 N.W. 2d 634 (1973); Heidemann v. Heidemann, 96 Idaho 602, 533 P. 2d 96 (1974); Murphy v. Murphy, 26 Ariz. App. 302, 547 P. 2d 1102 (1976); and the requirement that such changes must have occurred or arisen since the date of

the most recent proceeding which considered the situation of the parties. Dworak v. Dworak, ____ Iowa ____, 195 N.W. 2d 740 (1972); Haase v. Haase, ____ Colorado ____, 376 P. 2d 698 (1962); Spaulding, supra; Mears, supra.

Following the trial of this matter the lower court concluded there had been a change of circumstances and ordered an increase in support and alimony. [R. 110-111] The Findings of Fact of the lower court indicate the change of circumstances upon which the court's order was based:

"4. That since the entry of said decree of divorce and the amendments thereto, the defendant has experience a change of circumstances in that she has become disabled due to illness and physical problems. . . .

"5. That subsequent to the decree of divorce, the minor son, Verlin Kay, suffered rheumatic fever. . . .

"6. That subsequent to the decree of divorce, the defendant has experienced a change of circumstances in that the costs of living have increased substantially. . . ." [R. 110] [Emphasis added]

Plaintiff submits the court's Findings of Fact Number 4 is contrary to the evidence which clearly shows disability due to illness and physical problems occurred prior to the last amendment in October 1973, and was in fact specifically relied on by the Family Court Commissioner as a ground for increasing the alimony and support payments at that time. [R. 107] The modification to the decree by the Family Court Commissioner is acknowledged by the court in Finding of Fact number 2 which states:

"2. That subsequent to said decree of divorce, the same was amended, whereby plaintiff's obligation

to pay support was increased voluntarily, pursuant to letter agreement in October of 1974. [R. 109][The date of October 1974 appears to be in error since the letter agreement referred to is dated October 1973. See R. 107]

The record is not totally clear as to all the details surrounding the October 1973 amendment. However, it is clear that there was a series of letters written by Allen Hodgson, Family Court Commissioner [R. 108], whereby the financial, health and other circumstances of the parties were considered [R. 107] and the decree amended to increase plaintiff's payment to defendant from \$170 per month for the support of two minor children and the wife to \$220 per month for the same number of persons. Unfortunately neither the Family Court Commissioner in his letter decision [R. 107] nor the trial judge in his findings, conclusions, or decree [R. 109-113] ever stated how much of this \$220 monthly support payment was for alimony and how much was for child support for each of the minor children.

However, the Family Court Commissioner did clearly state the changes in circumstances he was considering. He states:

"Your former wife has responded to my letter of October 11. Her health will not permit her to work more than about three days a week for church welfare, where she is permitted to work at her own pace. She receives food and clothing in return for that work. She has never been advised of the monetary value of the food and clothing but I assume it would not average more than \$100.00 per month. Her disability is such that she receives \$200.00 per month from Social Security.

"She acknowledges that the house is now paid for and she is relieved of the \$81.00 per month payment." [R. 107]

It appears clear the wife's total disability as determined by the Family Court Commissioner had not worsened between October 1973 and the date of the hearing in the instant case. [R. 107, Tr. 23-26, 36 and particularly lines 18-20] The wife was still able to work for church welfare assistance at the time of the hearing to the same extent she had in October 1973. [Tr. 36] Consequently, there was no basis for increasing the alimony in this regard.

Furthermore, the social security payments had increased from \$200 per month in October 1973, to \$221.60 at the time of the instant hearing. [Tr. 26] Both of those amounts are the same as the wife was earning in 1964 when the original decree was filed [R. 5] and in 1967 at the time of the first modification [R. 54]. Consequently, the wife's income was the same in 1964, 1967, 1973, and 1977 and consequently could not be any economic basis for justifying an increase in alimony. In addition the wife's house was paid for by October 1973 and that gave the wife an added economic benefit of Eighty-one Dollars (\$81) per month that she did not have earlier. [R. 107]

The lower court also erred in finding the son's rheumatic fever with its resultant costs [Finding #5, R.110] constituted sufficient grounds for increasing Plaintiff's support and alimony obligations. The cases cited in the first paragraph of this Point establish the rule that a change in circumstances must be permanent and continuous, not temporary. Verlin

suffered rheumatic fever in "the middle of March in '74." [Tr. 28] His recovery was so complete as to allow him to spend the summer of 1977 working full-time on a pineapple plantation in the Hawaii Islands. [Tr. 9-10] At the time of trial Verlin's bout with rheumatic fever only required him to undergo an annual physical check-up [Tr. 28] and to take 30¢ worth of medication per day (2 tablets per day, tablets are \$15.00 per 100 or 15¢ each). [Tr. 28] Plaintiff contends this fact situation is clearly insufficient to support a necessary finding of either a material, or a permanent change of circumstances.

As to Defendant's allegations and the court's Findings of Fact Number 6 that increases in the cost of living, inflation, standing by itself is a sufficient factor to warrant an increase in alimony, this conclusion is also erroneous. It is a circumstance that bears equally upon both parties and should therefore be considered irrelevant. In Schweidler v. Schweidler, 329 Ill. App. 643, 70 N.E. 2d 89 (1946), the divorced wife petitioned the court to modify its decree of divorce to increase alimony. As one of the grounds for her petition she alleged the increased cost of living, or inflation. On appeal the court held that the increased cost of living "is immaterial and need not be considered" since "such fact affects both parties similarly."

Clearly Defendant has failed to establish that the circumstances of her health and finances have changed since

the date of the most recent amendment or proceeding which was October 1973. With respect to the instant hearing vis a vis the 1973 amendment hearing, the court's statement in Haase, supra is pertinent:

"Although we do not have the benefit of a transcript of the hearing first held on the original petition for modification, it is clear from the testimony in the second hearing that the alleged changes of circumstances were exactly the same. . . (S)office it to say that the court in the second hearing was limited to inquiry into a change--if any--since the last order. Haase, supra, at 699.

Plaintiff submits the lower court also erred in its statement at trial that the divorced wife is entitled to any increases in her husband's income after the divorce. In Dehm v. Dehm, 545 P. 2d 525 (Utah 1976), where alimony was reduced from \$300.00 per month to \$1.00 per year, this Court held that:

"Although an increase in the income of a divorced wife does not, of itself, determine a reduction of alimony; neither does an increase in the income of a divorced husband, of itself, determine the maintenance of alimony." Dehm, supra, at 528.

Similarly, the Arizona Appellate Court denied a petition for increased alimony, holding that:

"An increase in the earning capacity of the husband after the divorce, standing alone, however, is not sufficient. A former wife has no continuing right to share in future accumulations of wealth by her divorced husband." [Emphasis added] Sheeley v. Sheeley, 10 Ariz. App. 318, 458 P. 2d 522 (1969) at 525.

Similarly, "The defendant's increase in income does not necessarily require an increase in his obligations to the plaintiff. . ." Hunsaker v. Fake, 563 P. 2d 784 (Utah 1977).

The plaintiff submits the above references and discussion amply show the trial judge had no basis for increasing the alimony and child support for the reasons he described in his Findings of Facts Numbers 4, 5, and 6 [R. 110-111]. Consequently, the decision of the trial judge must be reversed with respect to these increases. This court should further remand the case for the trial judge to determine what portion of the \$220 monthly payments awarded by the Family Court Commissioner related to child support payments for each of the minor children and deduct from the \$220 per month the amount attributable to the child Roger Allen who had reached majority [May 27, 1975] at the time of the instant hearing.

In this respect the law in Utah is that the Supreme Court may review this case on the record and is not bound by the lower court's findings. Gross error is not necessary for reversal. In Hendricks, supra, at 279 the court said,

"This court is required to review the evidence in the nature of a trial de novo on the record and the appellant is entitled to the judgment of this court, as well as the trial court, on this question."

It has further been determined by this Court,

"that it is not necessary for this court to find a gross abuse of discretion on the part of the trial court before modifying the judgment as to alimony."
.."

In conclusion, plaintiff submits there has been no significant change of circumstance since the decree was last amended. All of the facts and circumstances alleged by

defendant and included in the Court's findings as the basis for increasing alimony and child support were within the knowledge and contemplation of the parties and the family court commissioner when Plaintiff's payments were increased under the 1973 amendment or modification from \$170 per month to \$220 per month.

Plaintiff further submits the lower court's findings of changed circumstances are not supported by the evidence in this case and that any change of circumstances since 1973 is neither sufficient not substantial, continuous nor permanent. Consequently, the lower court incorrectly increased alimony and child support based on said findings and thereby abused its discretion in this matter. Plaintiff asks this court to correct these errors and reverse the lower court's findings, conclusions, judgment and order on this issue.

CONCLUSION

In conclusion the plaintiff respectfully requests this court to reverse the trial judge with respect to the increased alimony and child support and to affirm the trial judge with respect to the child support payments for Roger Allen after he reached age 18. The plaintiff also requests this court to remand this case to the trial judge to determine what portion of the family court commissioner's \$220 monthly

award was for alimony and what portion was for child support for each of the minor children and to delete from the said \$220 that portion attributable to Roger Allen after he reached age 18 on May 27, 1975.

RESPECTFULLY SUBMITTED

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By

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CERTIFICATION

I hereby certify that I mailed two (2) copies of Respondent-Cross Appellant's Brief to E. H. Fankhauser, of Cotro-Manes, Warr, Fankhauser & Green, Attorneys for Defendant-Appellant, 430 Judge Building, Salt Lake City, Utah 84111, this 10th day of May, 1978.

JAMES A. McINTOSH