

1978

George Edward Wiker v. Elaine Wiker : Reply Brief of Appellant-Cross Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE EDWARD WIKER, :
 :
 Plaintiff-Respondent & :
 Cross Appellant, :
 :

vs

Case No. 15326

ELAINE WIKER, :
 :
 Defendant- Appellant & :
 Cross Respondent. :

REPLY BRIEF OF APPELLANT-CROSS RESPONDENT

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

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APPELLANT-CROSS RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Petition for modification of Decree of Divorce to increase child support and alimony payments, for delinquent child support payments under Decree of Divorce and Order to Show Cause In Re Contempt.

DISPOSITION IN LOWER COURT

The trial court denied the claim of defendant-appellant for delinquent support payments and dismissed the contempt portion of the Order to Show Cause. (T.175) The trial court granted defendant-appellant's request for modification of Decree of Divorce and increased support payments for the remaining minor child, Verlin Kay, (T.176), and increased alimony payments to defendant due to a mat-
ter change of circumstances. (T.177)

RELIEF SOUGHT ON APPEAL

An Order affirming the District Court's Order and Judgment increasing child support payments for the remaining minor child, Verlin Kay, and increasing alimony payments to the defendant-cross respondent.

Reversal of the District Court's Order and Judgment denying defendant-appellant's claim for delinquent support payments under Decree of Divorce.

STATEMENT OF FACTS

Defendant-appellant and cross respondent adopts and sets forth herein by reference, her Statement of Facts on page two (2) of Appellant's Brief on file with the Court in this action, together with the following statement, to-wit:

At the time the support payments were voluntarily increased due to the efforts of Mr. Allen Hodson, the then Family Court Commissioner, there was no adjudication as to a change in circumstances and no subsequent Order was entered. (T. 150-152)

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANT-APPELLANT'S PETITION FOR AN INCREASE IN CHILD SUPPORT AND ALIMONY PAYMENT DUE TO A MATERIAL CHANGE OF CIRCUMSTANCES.

Section 30-3-5, Utah Code Annotated, 1953, as amended, sets out the scope of the judge's discretion in matters of this kind. The relevant portions are as follows:

"****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 children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary. (Emphasis added)

It has been long recognized that the Courts, in the exercise of continuous jurisdiction over divorce cases, have considerable discretion and latitude as to "subsequent changes or new orders with respect to the support and maintenance of the parties" and each case must be determined on its own facts and circumstances. The trial court, in the exercise of its discretion, may modify a Decree of Divorce "as shall be reasonable and necessary" and is in a better position to determine whether or not a material change of circumstances has occurred in that no firm rule can be applied uniformly in all divorce cases. Hunsaker v. Fake, 563 P.2d 784.

Defendant-Appellant, Mrs. Wiker, clearly established from the facts presented, a material change in circumstances of the parties that supported the finding and ruling of the lower court, to-wit:

a. Mr. Wiker discontinued payment of support for . ger Allen in June, 1975 (T. 133).

b. The support of \$75.00 per month for Verlin Kay who was age 17, was not adequate and was less than Welfare. (T. 132)

c. Mr. Wiker's income had increased from \$8,600.00 per year with his veteran's benefits to \$16,300.00 per year including veteran's benefits; (T. 135-136) and his income was to increase in September, 1977, to \$17,247.00, more than double his income since the Decree of Divorce and did not include his present wife's income. (T. 145)

d. Mr. Wiker acknowledged that \$75.00 per month support for Verlin Kay was inadequate and that under the facts and circumstances, an increase in the amount of money required to support Verlin Kay was reasonable and necessary and he was willing to increase support payments to \$125.00 per month until his graduation from high school. (T. 139)

e. Verlin Kay had contracted rheumatic fever in 1976, with resulting medical problems of which Mr. Wiker was aware. (T. 140) That the medical insurance coverage of Mr. Wiker did not cover the costs of office visits, annual check-ups and required medication due to the rheumatic fever problems. That Mrs. Wiker had incurred additional costs for medication of \$15.00-\$16.00 every fifty days for Verlin Kay, and an additional \$16.00 every six months for examinations. (T. 157, T. 159)

f. Mrs. Wiker had incurred additional expenses for Verlin Kay for dental care (T. 160) and for eye care and glasses, which were not covered by insurance. (T. 140, T. 160)

g. Mr. Wiker's financial situation enabled him to purchase a new automobile in 1975, a new \$42,000.00 home in 1976, and another new car in 1977. (T. 143-144)

h. Mrs. Wiker, at the time of the Decree of Divorce, was working and earning \$195.00 every two weeks. (T. 150) She was terminated from her employment due to back problems. (T. 153) She was later determined to be disabled and placed on Social Security Disability Benefits. When she was terminated from her employment, she lost her medical insurance and her life insurance. (T. 150)

i. That the Social Security Disability Benefits received by Mrs. Wiker are \$221.60 per month, approximately half of what she earned in 1971. (T. 155)

j. That subsequent to her loss of employment, and subsequent to 1973, Mrs. Wiker continues to suffer disability and physical illness on a continuing basis, in addition to her recurring back problems, consisting of lack of gamma globulin, allergies, sinus infections, ear infections with resulting loss of hearing, kidney infections. (T. 154)

That she remains under the care of several doctors (T. 161) is fifty-six (56) years of age, and requires constant medication due to the illnesses she continues to suffer. (T. 169)

k. She has had to seek the assistance of Church Welfare to pay her medical and medication bills, and to receive food to meet her basic needs. (T. 156, T. 166)

The lower court, in rendering its decision, took into consideration all of the above circumstances, and rendered its decision upon the immediate fact situation and circumstances that then existed.

That the increase authorized by the lower court was reasonable and necessary under the facts and circumstances. Cole v. Cole, 121 Utah 151, 239 P.2d 615 (1952); Anderson v. Anderson, 104 Utah 104, 138 P.2d 252 (1943); Hunsaker v. Fake, (supra). The trial court's decision granting defendant-appellant's application for increased support and alimony reflects sound judgment and does not constitute a manifest injustice or an inequity as to indicate a clear abuse of discretion, which would be required to overturn the Judge's decision in this matter. Wilson v. Wilson, 5 Ut. 2d 79, 296 P.2d 977 (1956); Craven v. Craven, 119 Utah 476, 229 P.2d 301 (1951); Owen v. Owen, Utah _____ P.2d _____ (1978); Merrill v. Merrill, Utah _____ P.2d _____ (1978).

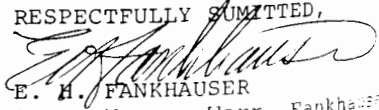
It is clear from the record that there was no court determination made as to change of circumstances at the time Mr. Hodson negotiated a voluntary increase in support payments. Thus, no order was ever entered by the Court modifying the Decree based upon the 1973 negotiations. (T. 151) Further, the lower court determined that the question of alimony had not been considered or adjudicated in

that the original decree had provided for \$70.00 per month alimony. (T. 152) Thus, the argument advanced by the plaintiff-cross appellant, Mr. Wiker, on appeal that the lower court's order increasing support payments and alimony payments, was due to circumstances which existed prior to 1973, is based primarily on assumption and supposition where the only indication as to the voluntary increase was a series of letters and the matter was not litigated. (T. 151-152)

CONCLUSION

In conclusion, we submit that the plaintiff-cross appellant failed to sustain his burden of proof that an increase in child support and alimony payments was not reasonable and necessary under the circumstances of this case as determined upon the basis of the immediate fact situation; or that the trial court in its advantaged position and in the exercise of its responsibilities clearly abused its discretion; or that an inequity or injustice has resulted. The trial court was correct in finding, among other things that a material change of circumstances had occurred with respect to the parties and that it was reasonable and necessary to increase the present child support for the remaining minor child, Verlin Kay and to increase alimony payments to the defendant to meet their needs. The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED,


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CERTIFICATION

I hereby certify that I delivered two (2) copies of the Brief of Appellant-Cross Respondent to James A. McIntosh, Attorney for Plaintiff-Respondent-Cross Appellant, 800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, this 13th day of July, 1978.



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