1978

Betty L. Kessimakis v. Dale M. Kessimakis : Brief of Respondent

Utah Supreme Court

Brant H. Wall; Attorney for Respondent;
Robert Ryberg; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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BETTY L. KESSIMAKIS, *

Plaintiff-Respondent. *

vs. * CASE NO. 15387

DALE M. KESSIMAKIS, *

Defendant-Appellant. *

- -

BRIEF OF RESPONDENT

- -

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
OF SALT LAKE COUNTY

HONORABLE STEWART M. HANSON, JR., JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an appeal from a district court ruling wherein the Third District Court in and for Salt Lake County refused appellant's request to modify the divorce decree and awarded judgment against appellant for unpaid support, alimony and debts he was previously ordered to pay, and further found the appellant to be in contempt of court for failure to make the said payments.

DISPOSITION IN THE LOWER COURT

The district court denied appellant's request to modify the original decree of divorce, entered judgment against him for $16,391.40 for past due alimony, support money, mortgage payments, unpaid debts and attorney's fees and found him in contempt of court for his failure to make the said payments, which judgment was rendered pursuant to the respondent's Order to Show Cause.

RELIEF SOUGHT ON APPEAL

Appellant is seeking a modification of the decree, which modification would allow him a reasonable time to make up the

arrearages and to suspend further accrual of alimony and support while the arrearages are being satisfied.

PRELIMINARY STATEMENT

"R" stands for record. "TR" stands for transcript of record.

STATEMENT OF FACTS

The respondent filed a complaint for divorce in the Third District Court in and for Salt Lake County, State of Utah, on April 22, 1974 (R 1) and an Amended Complaint was subsequently filed in May 9, 1974 (R 8). A Decree of Divorce was subsequently made and entered on August 28, 1974 wherein, among other things the appellant was ordered to pay to the respondent $200 per month as alimony, $100 per month per child for support of the minor children of the parties, and respondent's attorney's fees. The respondent was also awarded the real property of the parties which was used as the family residence and appellant was further ordered to pay all of the debts of the parties incurred during the course of the marriage, including the assumption and payment of the mortgage balance on the said real property (R 19-21).

In February of 1975 the appellant filed with the district court a Motion to set aside the default divorce on various grounds (R 24-25) which motion was denied on March 21, 1975. (R 104-105).

Appellant then appealed to this court from the order denying the Motion to set aside the dafult divorce (R 108) and in February of 1976 this Court affirmed the lower court decision

After the case had been remitted to the district court the appellant petitioned the court to modify the divorce decree, alleging inequity in the original decree and a substantial change in circumstances which change would justify a modification. (R 144, 181-182).

At approximately the same time the respondent petitioned the district court for an Order to Show Cause (R 194) demanding that the appellant be ordered to show cause why he should not have judgment entered against him for various amounts for unpaid child support, alimony, mortgage payments, and unpaid debts which he had been ordered to pay in the original decree of divorce and why he should not be held in contempt of Court and ordered to pay attorney's fees (R 194). An Order to Show Cause was subsequently issued on respondent's petition (R 202) and an Order to Show Cause was also issued on appellant's petition for modification (R 188).

On the 3rd day of May, 1977 both parties appeared pursuant to the respective Orders to Show Cause which had been served upon them and which both came on for hearing on said date. Both parties appeared before the Court, the Honorable Stewart M. Hansen, Jr, presiding. After considering the testimony and evidence presented by the parties, the Court entered judgment as aforesaid and denied appellant's request to modify the decree.

The appellant, in his brief, recites a long statement as to what each party testified to, which is inaccurate in a number of places and contains false or misleading inferences. Appellant also delves into an unwarranted repetition of the testimony of the

parties which we do not find necessary to do here, but we will set forth only the necessary points.

With regard to the testimony of the appellant, the primary point of importance and interest is that the appellant testified that the only change in his income since the time of the decree was that he was no longer selling quail (TR 33) and that as a matter of fact, his income was higher than it was at the time of the decree (TR 33).

The respondent testified that she had received nothing at all from the appellant from the time of the decree until November of 1976 (TR 43,49,50) and her testimony at the time of the default divorce hearing indicated that his weekly income was from $400 to $800 per week (Default Divorce Transcript 5).

ARGUMENT

POINT I

THE APPELLANT HAS RAISED NEW ISSUES ON APPEAL WHICH CANNOT BE DECIDED BY THIS COURT

The appellant has raised the issue of whether or not the decree should be modified to allow him to pay the judgment entered below over a period of time and that while doing so, the accrual of further alimony and support payment should be suspended. This is a new issue and was never raised in the district court, either in his pleadings or in the hearing itself. The first time this point was raised was in his appeal brief wherein he states that the relief asked for on appeal is to have the judgment reversed and the case remanded "with directions to modify the decree by fixing a reasonable time within which

planitiff may be permitted to pay off the judgment for arrearages, and suspending the payment of alimony and support money during the payout period." (Appellant's brief 1-2)

This court has refused on many, many occasions to permit the raising of an issue for the first time on appeal. See Riter v. Cayias, 431 P2d 788 (Utah 1967); Westerfield v. Coop, Utah, 311 P2d 787; Dolores Uranium Corporation v. Jones, Utah, 382 P2d 883; General Appliance Corporation v. Haw, Inc., Utah, 516 P2d 346. There are many other cases which we could cite but it would serve no real purpose since the principle stated is virtually a hornbook rule.

Respondent thus believes this argument should be dispositive of the issues before the court, however, in the event the court finds merit to the appellant's positions. the following additional arguments are submitted for the court's consideration.

POINT II

IT WAS NOT ERROR FOR THE DISTRICT COURT TO REFUSE TO MODIFY THE DECREE OF DIVORCE BY DECREASING THE ALIMONY AND CHILD SUPPORT PAYMENTS

It is the well and often stated rule in this state that in order for a decree of divorce to be modified, the moving or petitioning party must show a substantial change in his or her circumstances to warrant such a modification. King v. King. Utah, 478 P2d 492; Anderson v. Anderson, Utah, 368 P2d 264; Gale v. Gale, 258 P2d 986. Again, there are many other cases which could be cited to support this position and rule.

It is evidently one of the appellant's contentions that no

change is necessary to warrant a change, and he cites 30-3-5 U.C.A. (1953 as amended) and the case of Iverson v. Iverson, 526 P2d 1126 (Utah 1974) in support of this position. In his brief at page 11, he cites the above cited statute before and after the 1969 amendment and the court will note that there is little change in the language or meaning as far as modification is concerned. And with regard to the language used, this court has repeatedly construed the language to allow the district courts to modify the decree if a substantial change in circumstances is shown. In Dixon v. Dixon, 240 P2d 1121, 1214 (Utah 1952) this court noted that the statute "...has been construed practically since it's enactment, to confer jurisidiction upon the court to make such changes in those cases only where there has been a change in the circumstances or condition of a party since the entry of the original decree." The Iverson case which the appellant cites, in no way supports his position that no change is necessary. To so hold would mean that the dissatisfied party could circumvent the appellate procedure and have another district judge completely vitiate the original decree without showing a change in circumstances. This is an erroneous idea and without support in the statutes, cases or other authorities.

With regard to the merits of the appellant's contention that there had been a change in circumstances, it is evident from his testimony that the only change was that he no longer sold quail, which change amounted to $1,000 or maybe $2,000 per year, (TR 33) and that despite this loss he testified that his income had increased since the time of the decree (TR 33).

It is also important to keep in mind that at the time of the decree, his weekly income was from $400 to $800 per week (Default Divorce Transcript 5). It is also apparent from the hearing as a whole, that the appellant is and was receiving substantial "gifts" from his father.

Despite the fact that there was a conflict in some of the testimony, the court is not obligated to believe all testimony in which there is inherent frailty, including self-interest of the witness, People's Finance & Thrift Company Of Ogden v. Doman, 497 P2d 17 (Utah 1972). It is also the general rule, that on appeal the evidence is viewed in the light most favorable to sustain the lower court, and there will be no reversal unless from the weight of the evidence it is manifestly apparent that the court misapplied the law to the facts. Hardy v. Hendrickson, 495 P2d 28 (Utah 1972).

From the evidence and the authorities cited, it is readily apparent that no injustice has been done and that the district court's refusal to modify the decree was proper and justified in light of the testimony and other evidence presented. Even considering the one small change in the appellant's circumstances, this was brought on by himself and he is thus responsible for that change.

POINT III

THE DISTRICT COURT DID NOT ERROR IN ADJUDGING APPELLANT GUILTY OF CONTEMPT

When one views the appellant's testimony from the most favorable light it is obvious that he had a reasonably good

income, and that despite this he failed to provide any support whatsoever to his former wife and his children. (TR 4 49-50). Because of this failure on the part of the appellant, his wife was forced to go on welfare (TR 43), court actions were filed against her, and she was forced to go without heat in the home for five months (TR 45). Doctor and other bills we unpaid, and many other hardships were forced upon her and the children because of his refusal to aid and support them. It is thus obvious that the contempt finding was justified.

CONCLUSION

The original decree in this matter was entered ba upon the needs of the family and the ability of the appellant pay. The amounts were totally justified in light of the perio of time that the parties were married, the needs of the famil and his ability to pay. This decision of the district court wa upheld on appeal by this court, and since the decree the onl change in circumstances has been an increase in appellant's income. Despite the fact that he had income sufficient to pa the debts, he failed and refused to pay anything to his famil

However, it is still apparent that the only issue on thi appeal is that the appellant wants to be allowed time to pa the arrearages off while having further payments suspended fr accruing. This is obviously a new idea which was not litigate or raised in any manner in the district court.

Based upon these arguments and considerations, it is respondent's position that this court should affirm the district court's ruling.

Respecfully submitted,

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