

1978

Betty L. Kessimakis v. Dale M. Kessimakis : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

BETTY L. KESSIMAKIS,

Plaintiff-Respondent,

vs.

DALE M. KESSIMAKIS,

Defendant-Appellant.

APPELLATE

Appeal From a Judgment
of Salt Lake County

Honorable Stewart

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Salt Lake
Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

BETTY L. KESSIMAKIS,)
Plaintiff-Respondent,) Case No. 15387
vs.)
DALE M. KESSIMAKIS,)
Defendant-Appellant.)

APPELLANT'S REPLY BRIEF

STATEMENT OF THE KIND OF CASE

This was a proceeding by a divorced husband, defendant-appellant, to modify the provisions of a divorce decree entered on August 28, 1974; and a proceeding by the divorced wife to obtain judgment for unpaid alimony and support money.

DISPOSITION IN LOWER COURT

The court refused to modify the decree, found the husband in contempt, and entered judgment against him for \$16,391.40 for past due alimony, support money, mortgage payments, unpaid debts, and attorney's fees.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the district court entered on May 12, 1977, and remand to that court with directions to modify the decree by fixing a

reasonable time within which plaintiff may be permitted to pay off the judgment for arrearages, and suspending the payment of alimony and support money during the payout period.

STATEMENT OF FACTS

The facts are as set out in Appellant's opening brief.

ARGUMENT

I

The issues raised by Appellant in this appeal were implicit in the proceedings before the trial court, and may be considered by this court.

The Utah Constitution, Article VIII, Section 9, grants the right of appeal from final judgments of the district courts and provides for the reconsideration of both law and facts in equity cases:

From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below * * * In equity cases the appeal may be on questions of both law and fact.

Divorce proceedings are proceedings in equity, entitled to full appellate review. Martinett v. Martinett, 8 Utah 2d 202, 331 P.2d 821 (1958).

Implicit in the power of this court to review all factual determinations in equity cases is the power to substitute its determinations for those of the trial court

and to render its own judgments. Giving deference to the discretion of the trial court in making its finding, this court has repeatedly recognized its power to correct the findings on review, if that is warranted. DeRose v. DeRose, 19 Utah 2d 77, 426 P.2d 221 (1967); Martinett v. Martinett, supra, 8 Utah 2d 202, 331 P.2d 821 (1958).

And the court has not hesitated to change or modify the divorce decree in accordance with its determination of fairness. See English v. English, 565 P.2d 409 (Utah 1977), in which the court affirmed the decree but reduced the alimony award from \$2,000 per month to \$1,000 per month; DeRose v. DeRose, supra, 19 Utah 2d 77, 426 P.2d 221 (1967), modifying a property award by giving the wife full equity in a home, subject to her assumption of the mortgage; Barrett v. Barrett, 17 Utah 2d 1, 403 P.2d 649 (1965), in which an award of alimony of \$250 per month for an indefinite period was modified to terminate alimony payments after two years; and Martinett v. Martinett, supra, 8 Utah 2d 202, 331 P.2d 821 (1958), in which a decree that awarded a wife two dwellings was modified to award the husband the home of lesser value.

By this appeal appellant is seeking a reversal of the trial court's denial of his motion to modify the alimony and support award. In asking the Supreme Court to vacate

the denial, he is necessarily asking for affirmative relief in the form of a modification of the original decree -- a remedy consistently granted by this court in similar cases. By virtue of the power to review law and facts, the Supreme Court has the power to strike its independent balance of the equities and to direct judgment consistent with its determinations. Appellant's pleadings merely suggest what he feels would be an equitable modification by this court. It is clear that it would be useless for appellant to ask for relief in the form of vacating the denial to modify without offering a suggestion as to the affirmative relief which he prays the court to grant. Therefore, respondent has mischaracterized the relief appellant seeks by this appeal. The appellant does not raise a new issue by this appeal but is instead merely asking the court to render judgment and to award the equitable relief which is in its power to grant.

II

The circumstances of the case warrant the granting by this court of a modification of the divorce decree.

As noted in Argument I herein, this court should make its own judgment and award on appeal if the circumstances warrant such action. In DeRose v. DeRose, 19 Utah 2d 77, 426 P.2d 221, 222, (1967), the court enunciated the guidelines it must follow in deciding whether or not to correct the trial court's findings:

Due to the seriousness of such proceedings and the vital effect it has on people's lives, it is also the responsibility of this court to carefully survey what is done [by the trial court] and while the determinations of the trial court are given deference and not disturbed lightly, changes should be made if that seems essential to the accomplishment of the desired objectives of the decree: that is, to make such an arrangement of the property and economic resources of the parties that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis for themselves and their children.

The desired objectives of fair and equitable divisions of property are for the benefit of husband as well as wife. As the court stated in Martinett v. Martinett, supra, 8 Utah 2d 202, 331 P.2d 821, 823 (1958):

It is important to note that this statute [30-3-5 U.C.A. 1953 concerning distribution of property] makes no distinction between the spouses. It does not contemplate, nor should there be, any discrimination or inequality in such awards on the basis of sex. They may be made in favor of either spouse, and should be based upon the needs of the parties and the equities of the situation being dealt with.

Appellant's brief outlines the facts upon which he relies to make the claim that the decree was entered on the basis of material misrepresentations of appellant's financial conditions and appellant will not restate those facts. However, appellant urges that such misrepresentations cannot be clothed with truth simply because they were contained in the record of the original decree; the appellant's true financial condition are such a material departure from those misrepresentations as to be equivalent to a "substantial

change in circumstances," warranting the relief appellant seeks by this appeal. As noted in English v. English, *supra*, 565 P.2d 409, 411 (Utah 1977), the purpose of alimony "is to provide support for the wife and not to inflict punitive damages on the husband."

CONCLUSION

Appellant urges that his appeal is well-taken that the court has power to equitably modify the divorce decree, and that such modifications as appellant seeks are justified by the circumstances in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing APPELLANT'S REPLY BRIEF was served upon Brant H. Wall, Esq. 500 Judge Building, Salt Lake City, Utah 84111, attorney for plaintiff-respondent, this _____ day of April, 1978.