

1988

Margieann W. Ostler (Wyatt), State of Utah v. Raymond Floyd Ostler : Brief of Respondent

Utah Court of Appeals

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Penny Heal Trask; Dan R. Larsen.

Harold R. Stephens.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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| ----- | | |
| MARGIEANN W. OSTLER (WYATT), |) | |
| and the STATE OF UTAH, |) | |
| |) | |
| Plaintiffs- |) | |
| Appellants, |) | |
| |) | |
| vs. |) | Case No. 78-1444 |
| |) | |
| RAYMOND FLOYD OSTLER, |) | |
| |) | |
| Defendant. |) | Court of Appeals No. 880172-CA |
| ----- | | |

BRIEF OF RESPONDENT RAYMOND FLOYD OSTLER

Appeal from a Judgment of the Third District Court
in and for Salt Lake County, State of Utah
Honorable David S. Young

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CONSTITUTIONAL PROVISIONS/STATUTES

No constitutional provisions need be considered for resolution of this case. The statutory provisions involved are:

Utah Judicial Code 78-45-7(2):

"When no prior court order exists, or a material change in circumstances has occurred, the court, in determining the amount of prospective support, shall consider all the relevant factors including but not limited to:

- (a) The standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the ages of the parties;
- (g) the responsibility of the obligor for the support of others."

Utah Judicial Code 78-45-7(4):

"In determining the amount of prospective support on an ex parte or other motion for temporary support, the court shall use a uniform statewide assessment formula, adjusted for regional differences prior to rendering the support order. The formula shall provide for all relevant which can be readily identified and shall allow for reasonable deductions from the obligor's earnings for taxes, work related expenses, and living expenses. The assessment formula shall be established by the Department of Social Services and periodically reviewed by the Judicial Council under subsection 78-3-21(3)."

Rules of the Utah Court of Appeals Rule 33 (a):

"Damages for delay or frivolous appeal. If the court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney fees, to the prevailing party."

I

STATEMENT OF JURISDICTION

This is an appeal from the Third Judicial District Court in and for Salt Lake County, State of Utah, and Jurisdiction to pursue this Appeal is granted under Article 8 of the Constitution of the State of Utah and Sections 78-2-2(3) (I) and 78-2a-3 of Utah Code Annotated, 1953, as amended, and Rule 3, of the Utah Rules of Appellate Procedure.

II

STATEMENT OF NATURE OF PROCEEDINGS

This is an appeal from an Order of Modification of a Decree of Divorce which was signed by the Honorable David Young, Judge of the Third District Court, on February 2, 1988. The Order was entered after a trial held on the 16th day of December, 1987. On December 23, 1987 the Court issued a Memorandum Decision. (Copy of the Order and Memorandum Decision attached as part of the Addendum herein) Pursuant to the Memorandum Decision and the Order of Modification the Trial Court found there had been a substantial change of circumstances since the entry of the Decree of Divorce, and increased the child support for the two remaining minor children residing with the Plaintiff to \$200.00 per month per child, an increase of \$125.00 per month per child from the original decree. Additionally, the Court declined to modify

the Decree of Divorce to award the Plaintiff anything from Defendant's retirement account, and an award of attorneys' fees in the amount of \$250.00 was ordered.

III

STATEMENT OF THE ISSUES

1. Did the Trial Court abuse its discretion in the amount of the award of increase for child support pursuant to a petition for Modification of a Decree of Divorce?

2. Did the Trial Court abuse its discretion in failing to award the Plaintiff an interest in Defendant's retirement program benefits, which had not been distributed pursuant to the original Decree of Divorce?

3. Is Plaintiff entitled to an award of attorneys' fees to pursue this Appeal?

IV

STATEMENT OF THE CASE

a. Nature of the case:

Plaintiff/Appellant petitioned the Court for a modification of her Decree of Divorce on August 18, 1987. The parties to this action were granted a Decree of Divorce on September 27, 1978 after an eighteen (18) year marriage. There were seven children born of this marriage. Defendant was granted custody of the three oldest children and Plaintiff was granted custody of the four youngest. Defendant was ordered to pay child support in the amount of \$75.00 per month

for each of the four youngest children, Plaintiff was under no duty of support for the children in the Defendants custody. Defendant was further ordered to maintain health and accident insurance coverage for the children. The Decree of Divorce distributed all property, both real and personal owned by the parties at the time of the Divorce.

Since the entry of the Decree the parties four oldest children have reached the age of majority. Defendant has no minor children from this marriage in his custody; however, the parties 17 year old daughter, who is in the Plaintiff's custody, has elected to live with a friend and her parents and Defendant continues to pay child support to that family on her behalf. The Plaintiff has the parties two youngest sons in her custody and her petition for Modification requested an increase in the child support award, and a distribution of a purported retirement benefit not distributed pursuant to the original Decree of Divorce.

Defendant was not in arrearage under the Order of support, and had, approximately one year prior to the filing of the petition for Modification, voluntarily increased his support payment for the three youngest children to \$110.00 per month per child.

b. Course of proceedings:

By Stipulation the parties to this action agreed that there were sufficient substantial changes in circumstances to warrant the Courts review and entry of an order of modification. The changes included a significant increase in the Defendant's income, his remarriage, and the Plaintiff suffering from a condition identified as spastic disphonia which leaves her unable to speak above a whisper. Plaintiff at the time of the filing of the petition was unemployed and receiving AFDC payments and a grant through the State of Utah which will allow her to complete a schooling program.

A trial was held on the Petition for Modification on the 16th day of December, 1987. The parties and their counsel were present and Mr. Dan Larsen representing the State of Utah appeared in this matter. Mr. Larsen, upon acknowledging that the State's interest was satisfied with the amount that Mr. Ostler was currently paying, was excused. After motion by Defendant's counsel and discussion between counsel and the Bench it was agreed that the matter would be heard on the basis of a proffer from counsel because of the difficulty of Plaintiff's speech problem and the use of an interpreter.

Both counsel made proffer of the testimony that their clients would have presented on the issues before the Court, the parties were sworn and acknowledged the proffers, and the matter was taken under advisement. On December 23, 1987 Judge

David Young issued a Memorandum Decision and Findings were prepared and an Order submitted which was executed on February 2, 1988.

c. Disposition at trial Court:

Judge David Young, based of the evidence proffered at the time of trial, issued a memorandum decision and Findings based thereon were entered. The Findings were First, that the Decree of Divorce should be modified to increase the Defendant's child support from \$75.00 per month per child to \$200.00 per month per child for his remaining minor children. The child support payment was to continue until the children graduated from high school. Secondly, the Court found that the Defendant did not have a vested retirement account at the time of the entry of the original Decree of Divorce and that Defendant's payments on behalf of his children were sufficiently in excess of his legal obligation to have compensated the Plaintiff for any nominal amount that she may have lost at the time of the Divorce on her claim to a share of the retirement account. Additionally, the Court awarded the Plaintiff \$250.00 in attorney's fees in this matter.

d. Relevant facts with citations to the record:

Based on the Financial Declaration of the Defendant, the proffer of counsel, fully acknowledged by Defendant in open

court, and the Income tax figures presented at the time of trial it appears that the Defendant's adjusted gross income is approximately \$3,300.00 per month. The Plaintiff's counsel has indicated that Defendant has a monthly gross income of \$4,372.00 which, although indicated on his Financial Declaration form does not take into account adjustments to his monthly gross that result in the actual figures which were considered by Judge Young in making his decision in this matter.

At the time Judge Young entered his Order on the increase in child support he had the information before him that had been submitted at the pre-trial and the trial. That information included, Defendant's 1986 Income tax figures, his Financial Declaration form and his testimony submitted through proffer of counsel. Additionally, both counsel submitted the currently used schedule showing child support guidelines which were used on an advisory basis by the Commissioner and Judges of the Third District. (See ex.E, attached to Appellants addendum)

Based on the undisputed facts, which have been acknowledged by both counsel, Defendant/Respondent at the time of this hearing was responsible for the support of at least three children who were still attending school below the college level. The support payable, according to the schedule submitted at the time of trial, for three children at the

Defendants income level would be \$203.00-\$209.00, per child. He also provides all health care, orthodontic care and insurances on his children.

It is further undisputed that the Defendant has remarried. He has one child as a result of this marriage, and he helps to provide support for step-children and for his adult children from his prior marriage who need assistance to complete their schooling programs.

Appellant alleges that the Trial Court found that Plaintiff had no interest in Defendant's retirement account because of child support payments that he had made over the level required under the Decree of Divorce. That appears to be an oversimplification of the actual Findings rendered by Judge Young. In that regard the Judge specifically found that at the time of the entry of the Decree of Divorce the Defendant's retirement account had not vested. Further, he found that vesting occurred after the entry of the Decree and that the amount at that time was nominal. The Judge then found that the Defendant had made support payments over his legal obligations and that had more than compensated Plaintiff for the nominal amount of the then-existing retirement account. It is undisputed, irrespective of Counsel's confusion, that the Sperry-Univac retirement program exhibit

(Ex. H of Plaintiff's Addendum) shows a total "estimated accumulation" in the Defendant's retirement account, in April of 1979 of \$1,338.22.

V

ARGUMENT

Of the issues presented only one can arguably be given much weight. For purpose of Defendant/Respondent's position we will deal first with the issue of the requested modification of the Decree to distribute a portion of a purported retirement program benefit. While Defendant does not question the right of the courts to distribute, incident to the entry of a Decree, retirement program benefits as provided in Dogu vs. Dogu, 652 P2d 1308 and Woodward vs. Woodward, 656 P2d 431, he does contend that the case does not meet the standards indicated in those decisions.

Inasmuch as there appears to be no specific language in the underlying Decree of Divorce regarding distribution of a retirement program benefit, certain standards must be met before a Modification of a Decree may be ordered. The threshold imposed to seek any modification must be a showing of a substantial change of circumstances, (See Adams vs. Adams, 539 P2d 147 (1979), Haslam vs. Haslam, 657 P2d 757 (1982))and although the parties here stipulated that sufficient substantial change of circumstances had occurred to warrant reconsideration of the support issue there is no

stipulation to overturn the plain language of the Decree on the retirement issue. In this Divorce the parties were both represented by counsel and the Decree was entered based upon the Stipulation of the parties. All issues presented, including distribution of real property, personal property, custody, support of children, and alimony were covered by the Stipulation and Decree. The Supreme Court established the parameters to be followed in modifying the property provisions of an existing Decree in the case of Land vs. Land, 605 P2d 1248. In that case the Supreme Court held that:

"...When a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree, and the out right abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons." (underlying for emphasis)

The Utah Court of Appeals has recently confirmed that concept in the case of Porco vs. Porco, 752 P2d 365; 79 Adv Rep. 35, when it held that:

"Ten years after the entry of the original divorce decree, plaintiff requests that this court redistribute certain items of personal property. Plaintiff has failed to show any substantive change of circumstance concerning the distribution of property and in the absence of such a showing, the decree shall not be modified and the matters

previously litigated and incorporated therein cannot be collaterally attacked in face of the doctrine of res judicata."

The Plaintiff/Appellant has failed to show or demonstrate any compelling reason to amend the property distribution and indeed none appears to exist. In this case, Defendant/Respondent was employed for a little over 9 years at Sperry-Univac. This employment occurred during the last half of the parties 18 year marriage. According to the Employee Benefits Sheet (Part of Ex. H attached to the Plaintiff/Appellant's Addendum) and submitted to the trial Court Mr. Ostler had at April 1979, eight months after the entry of the Decree of Divorce, a total of \$1,338.22 in the retirement program. The program had a ten year vesting requirement and the statement shows that no contribution had been made for 1977 or 1978 and by proffer it was accepted that no contribution by the employee or employer were made to the plan prior to these parties' Divorce.

The Findings made by the Court and the evidence submitted are reasonable and no abuse of discretion appears evident from the facts presented. Plaintiff argues that the case of Thompson vs. Thompson, 709 P2d 360, (1985), would allow her to collaterally attack the Decree and now require distribution of a retirement benefit where there was no vesting and no contribution of any kind by the Defendant or the company at the time the Decree was entered. The Thompson case, supra,

has no rational application to our facts. In that case, an auto loan, outstanding and the time of the entry of the Decree of Divorce, was not allocated by the terms of the Decree, and the Supreme Court held that the Defendant, after assuming responsibility thereon, making certain payments, and having stopped those payments to the plaintiff's detriment, that a modification to include the loan in the Decree was appropriate.

If there is an indication of fraud, or deception as to a substantial asset and one party withholds information to another, then the court may have the compelling circumstances necessary to consider this type of modification, but no such indication appears from the record or the facts in this matter.

On the issue of child support, Defendant acknowledges that the factors, once the threshold of a substantial change of circumstances has been met, to be considered are set out in the Uniform Civil Liability for Support Act, §78-45-7(2) which provides:

"When no prior court order exists, or material change in circumstances has occurred, the court, in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;

(e) the need of the obligee;
(f) the ages of the parties;
(g) the responsibility of the obligor for the support of others."

The record submitted on appeal would show that the court considered many items in making its decision in this matter. The court held, prior to issuing its Memorandum Decision, the complete Financial Declaration Forms of the parties, (See Ex. G & H of Appellants Addendum) it had the proffers of counsel regarding the Plaintiff/Appellants circumstances, (Transcript pages 7 thru 12) and the most current available support schedule being used by the Commissioner and the courts as an aid in determining support amounts (See Ex. E of the Plaintiff/Appellants Addendum, Defendant denies that Ex F, the purported Child Support Obligation Worksheet was submitted at the time of trial or used as an exhibit in the lower court). The court also had a proffer as to Defendant/Respondent's current circumstances as set out in the Transcript at pages 16 through 24.

This information included all of the points covered under Utah Code Annotated §78-45-7(2) as set out above. Obviously, Defendant does not have, as his only obligation, the support of his two youngest sons, he is providing support for his youngest daughter, who although in Plaintiff's custody, has elected to live with another family, he has a child from his current marriage and provides assistance to his other children

and step children for schooling and mission purposes. We are not dealing in this action with an issue of temporary or prospective support as alleged under §78-45-7(4). We are dealing with an increase, of a permanent award on a modification basis, and the court has ordered an eighty-two percent (82%) increase in the level of support which was being paid from \$110.00 per month to \$200.00 per month and that was made after Defendant had voluntarily, at the State's request, increased his support from \$75.00 per month as required under the Decree to \$110.00 per month per child, the total increase over a year is 167% of the original award.

In the case of Martinez vs. Martinez, 754 P2d 69 (1988), a recent landmark decision this court in an appeal on an issue of child support made a determination in favor of an appellant/wife who had received an award of \$300.00 per month per child for three children. The Court of Appeals, considering the record and the original Decree was convinced that the trial Court had clearly abused its discretion. Based on the finding that the Defendant/Respondent had an income of \$100,000.00 per year, and that he had no other responsibility but the support of himself, his children and his ex-spouse the Court of Appeals in an unusual direct order increased the child support payment required from \$300.00 to \$600.00 per month per child.

A comparison of the facts is interesting in this case and the Martinez case (supra). In Martinez the Defendant's gross income was \$100,000.00 per year or \$8,333.00 per month in the instant case Defendant has a gross income (according to his 1986 income tax figures) of \$43,000.00 per year adjusted for loss on real property by \$3,600.00 would be \$39,400.00 or approximately \$3,283.00 a month as his adjusted gross income. Both cases show a need to support three children who are still in school, although in the instant case Defendant also has a new family including one daughter and assists in the payment of support on his other children for schooling and missions. The percentage of gross monthly income awarded in Martinez (supra) for child support is approximately 22% in the instant case assuming a level of support at \$200.00 per month for the three minor children, the percentage is 18%. The Court of Appeals in Martinez noted, as is the case here, that the court did not fully address all child support factors in its findings but held that such was not reversible error because of the information which was presented. In the case at hand there is not a clear abuse of discretion and the trial court having conducted the pre-trial on the matter, having heard the matter at trial and having prepared a Memorandum Decision does not appear to have wrongly assessed the parties capacities or needs. The court must take many facts into consideration in arriving at its decision, facts which include in the case,

that Defendant provides all health and medical care coverage on the children, that Defendant has met and continues to pay for orthodontic and dental care for the children, that Defendant spends time with and provides clothing and other benefits which do not become a part of any record.

There is no evidence that Judge Young has abused his discretion in this matter. He has ordered a modification which substantially increases the level of child support and he has correctly determined that no claim exists for the Plaintiff against a non-vested retirement program which contained at the time of the Divorce no employee or company contributions.

Finally, the issue of attorneys' fees has been raised in the Plaintiff's appeal and must be addressed. Judge Young, awarded \$250.00 to Plaintiff incident to the District Court action and there appears to be no allegation presented in the appeal which challenges either the amount or sufficiency of that award. Defendant does not contest that award and would ask only that the court uphold the award, without modification.

Plaintiff seeks an order on appeal, for an award of substantial attorneys' fees to allow her to prosecute this matter. That request does not appear to be well taken.

The Plaintiff in this action, due to problems which are not in any way attributable to the Defendant, a subsequent

marriage and divorce have alleviated any alimony claim, has, after assigning her rights to funds received to the State of Utah hired an independent counsel to pursue a modification. It should be noted that the State of Utah requested and received, on a voluntary basis, an increase in the support that Plaintiff was originally awarded. The State of Utah was and arguably still is the real party in interest in this action and they have chosen to make only a brief appearance and will apparently not participate in the appeal taken. The State acknowledged that Defendant was current in all support obligations and had voluntarily increased his support payment to meet the AFDC levels.

There is no statutory provision in the rules of Court to justify the requested award of attorneys' fees. Rule 33(a) of the Rules of the Appellant Court, provides that attorneys' fees may be ordered on appeal if the appeal is frivolous or not well taken. The Defendant in this action makes no allegation as to the nature of this appeal but Defendant/Respondent is certainly not guilty of pursuing a frivolous action. The Plaintiff/Appellant has not brought before the Court a question of the sufficiency of the award of attorneys' fees in the lower court and as in the Martinez case (*supra*) at page 72, in our opinion, this matter is not validly before the court.


VI

CONCLUSION

Defendant has not ignored his obligations and to the best of his ability has met the ongoing living needs of both families. The award of the trial court was not one which shocks the conscience or shows an abuse of discretion. The decision is based on equitable grounds and is within the guidelines established in the Third District and this Court for payment for support, and the issue of the retirement benefit distribution.

Defendant would ask that the order of the court be affirmed in all respects and that each party bear their own costs and attorneys' fees in the prosecution of this appeal.

RESPECTFULLY SUBMITTED this 16 day of December, 1988.

A handwritten signature in dark ink, appearing to read 'H. Stephens', written over a horizontal line.

HAROLD R. STEPHENS
Attorney for Defendant-
Respondent Raymond Floyd Ostler

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IN THE UTAH COURT OF APPEALS

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| MARGIEANN W. OSTLER (WYATT), |) | |
| and the STATE OF UTAH, |) | CERTIFICATE OF DELIVERY |
| |) | |
| Plaintiffs- |) | |
| Appellants, |) | |
| |) | |
| vs. |) | |
| |) | Case No. 78-1444 |
| RAYMOND FLOYD OSTLER, |) | |
| |) | Court of Appeals No. |
| Defendant- |) | 880172-CA |
| Respondent. |) | |
| ----- | | |

I hereby certify that on the 16 day of December, 1988,
true and correct copies of the foregoing APPELLATE COURT BRIEF
were delivered to each of the following:

Penny Heal Trask
350 East 500 South, Suite 201
Salt Lake City, Utah 84111

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