

1950

Ruth Elizabeth Holt Craven v. Kenneth D. Craven : Brief of Appellant

Utah Supreme Court

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7446

In the Supreme Court
OF THE
State of Utah

RUTH ELIZABETH HOLT CRAVEN,
Plaintiff and
Respondent,

- vs -

KENNETH D. CRAVEN,
Defendant and
Appellant.

Case No. 7446

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MAR 1 1950

Clerk, Supreme Court, U

APPELLANT'S BRIEF

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Attorneys for Defendant
and Appellant.

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- vs -

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Defendant and
Appellant.

Case No. 7446

APPELLANT'S BRIEF

Appeal from the Fourth Judicial District Court of Utah County, Honorable William Stanley Dunford, Judge.

This is an appeal from the Fourth Judicial District Court of the State of Utah, In and For Utah County, and from the judgment entered on the 21st of September, 1949, and from the judgment of said District Court Judge, the Honorable William Stanley Dunford, in denying the appellant's motion for a new trial.

The Appellant will be referred to as defendant and the Respondent will be referred to as the plaintiff.

STATEMENT OF FACTS

Defendant, Kenneth D. Craven, is a married man residing in Provo, Utah.

Plaintiff, the former wife of defendant, together with Robert Holt Craven, a minor son of plaintiff and defendant, resides in Salt Lake City, Utah.

On or about the 10th day of June, 1949, the plaintiff caused to be filed in the Fourth Judicial District Court a petition entitled "Motion for Order to Show Cause" which, omitting the formal portions thereof and the prayer, reads as follows:

1. That on the 16th day of April, 1945, the Court made and entered its decree in the above entitled action wherein plaintiff was granted a divorce from the defendant and was likewise given the care, custody and control of the minor child, Robert Holt Craven, and whereby the defendant was ordered to pay for the care, maintenance and support of said child the sum of \$25.00 per month, to commence on the 1st day of May, 1945.
2. That at the same time the above-entitled decree was issued the aforesaid minor child was an infant of the age of fifteen months, and that at the present time the minor child is of the age of 5 years and 4 months.
3. That this plaintiff has no funds with which to support the said infant at this time and is wholly de-

pendent upon the moneys paid by the defendant for the support of said infant.

4. That the said defendant is an architect with a place of business at Provo, Utah, is gainfully employed, and the owner and in possession of various real property, automobiles, cash and other personal property, the exact value and location of which is unknown to the plaintiff, but which is known to the defendant herein.

5. That since the aforesaid decree of divorce was issued, the child of the parties has grown from infancy to the age of five years and four months, with the result that he requires much more food, clothing and medical care; furthermore, that since the date of the aforesaid decree there has been a great increase in the price of food, clothing, housing accommodations and all other items which are necessary for the proper care and support of said infant.

6. That in consequence thereof, the \$25.00 a month paid by the defendant to the plaintiff for the support of said minor child is no longer adequate for the support of said minor child, but that the plaintiff herein is required to expend the sum of \$50.00 per month for the support of said child; that said sum is necessary for the proper support, nutrition and care of said child.

7. That the plaintiff herein has found it necessary to engage the services of an attorney to petition this Court to modify the original decree herein; that the plaintiff herein is entitled to reimbursement by

the defendant for the attorney fee incurred herein; that the plaintiff is obligated to her attorney for a reasonable attorney fee for his services herein.

The matter came on to be heard before the court on the 27th day of August, 1949. The defendant was present and was represented by counsel, but filed no formal pleadings. However, counsel for the defendant, at the opening of plaintiff's evidence, demurred to the plaintiff's petition on the ground that the petition did not allege facts sufficient to warrant a modification of the decree (TR-3). The court overruled defendant's demurrer (TR-7).

At the conclusion of the hearing the defendant moved the court to dismiss the petition on the ground and for the reason that the evidence adduced by the plaintiff did not prove facts sufficient to warrant a modification of the original decree. Said motion was denied by the court.

Thereafter on the 21st day of September, 1949, the court made and entered its Finding of Fact, Conclusions of Law, and Order of Modification which, omitting the formal parts, are as follows:

FINDING OF FACT

1. That on the 16th day of April, 1945, the court made and entered its decree in the above-entitled action wherein plaintiff was granted a divorce from the defendant, was likewise given the care, custody

and control of the minor child, Robert Holt Craven, and whereby the defendant was ordered to pay for the care, maintenance and support of said child the sum of \$25.00 per month, to commence on the 1st day of May, 1945.

2. That at the time the above-mentioned decree was issued the aforesaid minor child was an infant of the age of fifteen months, and that at the present time the minor child is of the age of 5 years and 8 months.

3. That this plaintiff has no funds with which to support the said infant at this time and is wholly dependant upon the moneys paid by the defendant for the support of the said infant.

4. That the conditions under which the court based its original decree and the amount of payment of money for the support of the said minor child have changed in the following particulars:

A. The defendant is now employed as an estimator and draftsman in architectural work and is earning a substantial income.

B. The minor child of the parties is now five years and eight months old and is about to enter school; and

C. The necessities of the child for clothing, food, education and care have materially increased in cost, due both to the growth of the child and to a general increase of prices of such items.

5. That there is needed for the care and support of

the child at present the sum of \$35.00 per month until the child actually enters school and \$50.00 per month after the said child enters school.

6. That the plaintiff herein has found it necessary to engage the services of an attorney to petition this court to modify the original decree herein; that the plaintiff herein is entitled to reimbursement by the defendant for the attorney fee incurred herein; that a reasonable fee for the hearings had herein and services performed in connection herewith is \$100.00; that plaintiff is obligated to her attorney in the amount of \$100.00 for the services herein.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings of fact, the court concludes:

1. That the plaintiff is entitled to an order of this court modifying the original decree herein so as to provide that the defendant shall pay to the plaintiff as support money for the minor child of the parties the sum of \$35.00 per month until such time as the said child enters school and \$50.00 per month thereafter and until further order of this court.
2. That the plaintiff is entitled to an order of this court directing the defendant to pay to her the sum of \$100.00 for attorney's fees in this action.
3. That the plaintiff is entitled to be reimbursed by the defendant for her costs in this action.

ORDER OF MODIFICATION

NOW, THEREFORE by reason of the Findings of

Fact and Conclusions of law aforesaid, it is hereby ordered, adjudged and decreed:

1. That the original decree herein be modified so as to provide that the defendant be ordered to pay, and is hereby ordered to pay to the plaintiff for the support of the minor child of the parties the sum of \$35.00 per month until such times as the said child enters school, and thereupon and thereafter the sum of \$50.00 per month until the further order of this court.

2. The defendant is hereby ordered to pay the plaintiff the sum of \$100.00 for her attorney's fees in this action and her costs in this action in the amount of \$21.10; and that furthermore the said costs and attorney's fees shall be paid within 30 days from the date of the service upon the defendant of this order.

On or about the 21st day of September, 1949, the defendant filed his Notice of Motion for New Trial (JR-37). The Motion for new trial was heard by the Honorable William Stanley Dunford and on the 27th day of October, 1949, the court denied the motion (JR-44).

Thereafter defendant filed and served his Notice of Appeal (JR-57), and perfected his appeal to the court.

The evidence adduced at the hearing shows that on or about the 16th day of April, 1945, the plaintiff was granted a divorce from the defendant and she was awarded the care, custody and control of Robert Holt Craven,

minor son of the plaintiff and the defendant, and that the defendant was ordered to pay the plaintiff, for the support and maintenance of said child the sum of \$25.00 per month (JR-13).

At the time of the divorce the defendant was an independent contractor working out of his own home (TR-28) and at the time of hearing of the Petition for Modification there had been no change in that respect (TR-29). When the divorce decree was entered the defendant owned a home, and at the time of the hearing of the Petition for Modification he owned the same property. That was the real property which was referred to in plaintiff's petition (TR-29) and there is no evidence that he owns any other real property. At the time of the divorce the defendant owned an automobile, and at the time of the Petition for Modification the defendant likewise had an automobile. (TR-81) At the time of the divorce the defendant was earning between \$250.00 and \$300.00 per month and was banking the same in a checking account (TR-29), whereas, the evidence adduced at the hearing on plaintiff's petition was that the defendant had grossed approximately \$1,700.00 from the first of the calendar year 1949 down to the date of the hearing of the Petition for Modification (TR-78). At the time of the hearing the defendant had \$78.07 on deposit in a checking account and \$144.27 in a savings account (TR-10). The defendant did not own any property in 1949 that he did not own in 1945 except that he had

traded cars and was obligated to pay \$66.00 per month on his new car (TR-81).

The defendant is frequently unemployed now and the situation with respect to his employment is similar to that of 1945, when the divorce was obtained (TR-87). Robert Holt Craven, the minor son of the plaintiff and defendant, was fifteen months old at the time the divorce decree was entered and was five and one-half years old at the time of the hearing of the Petition for Modification (TR-14). The child wasn't of school age and wasn't in school at the time of the hearing and is not in school at the present time.

Witness Mrs. Craven did not have an independent recollection of the items of food and clothing that might have been purchased for the child in 1945 (TR-18). She would not say that it did not cost \$50.00 per month to maintain the child in 1945 (TR-32). The plaintiff had been paying \$30.00 per month for the child's food and shelter since the divorce decree was entered and she anticipated that the same arrangement would continue in the future (TR-21). The plaintiff is employed and makes \$208.00 per month (TR-36), and the plaintiff has been able to save \$60.00 per month from her earnings (TR-37).

Witness Rex Taylor testified that in his opinion clothing costs had increased somewhere between 20 per cent and 30 per cent from 1945 to 1949 (TR-44). The witness could not give any evidence as to the difference in

the cost of clothing for a fifteen month old boy in 1945 and the cost of clothing for a boy five years old in 1949. (TR-52).

Witness Kenneth L. Pace testified that in his opinion foods generally were 20 per cent higher in 1949 than in 1945 (TR-65). The witness's testimony was based on OPA price ceiling schedule which became effective as of March 1, 1946, (TR-60).

The defendant had at all times made all payments required of him under the original decree and at the time of the petition for Modification was entirely current on all payments due for the support and maintenance of the minor child growing out of the original decree of divorce.

POINTS RELIED UPON FOR REVERSAL

1. Plaintiff's petition for modification did not contain facts sufficient to show a material change in circumstances warranting a modification of the decree and the defendant's timely objection thereto was erroneously overruled by the trial court.

2. The evidence and proof adduced at the hearing was insufficient to warrant a modification of the decree and the trial court erred in denying defendant's motion to dismiss the petition.

3. Finding of Fact numbered 3, to the effect that plaintiff was entirely dependent upon defendant for the support of the minor child is without any factual basis.

whatever and is clearly contrary to the evidence.

4. Finding of Fact numbered 4 (A) which states that defendant was earning a substantial income is not supported by any substantial evidence.

5. The court erred in granting plaintiff a special award to cover educational costs for the minor child.

6. Finding of Fact numbered 4 (C) insofar as it implies an increased burden on the part of the plaintiff by reason of increases in the cost of food, education and care is without any substantial evidence and is contrary to the evidence.

7. Finding of Fact numbered 5 is not supported by the evidence and is a Conclusion of Law.

8. The court erred in granting plaintiff judgment against the defendant for the sum of \$100.00 for her attorney.

ARGUMENT

I

The court erred in overruling defendant's demurrer to the plaintiff's petition.

It is well settled in Utah that the power of the court to modify a prior decree is limited to cases where a material change of conditions has occurred, **Hamilton v. Hamilton**, 58 P (2) 11; **Chaffee v. Chaffee**, 225 P 76; **Car-**

son v. Carson, 47 P (2) 894; and that a modification may be had only upon allegation and proof of such material change. Doe v. Doe, 158 P. 781; Gardner v. Gardner, 177 P (2) 743. An order modifying a decree will be reversed where the petition does not sufficiently allege a material change of conditions. Jones v. Jones, 139 P (2) 222.

Plaintiff's petition shows nothing more by way of changed conditions than that the minor child has aged from 15 months to 5 years and four months and that there has been some increase in the cost of food and clothing. Such allegations, standing alone, lack the significance and materiality essential to the modification of an existing decree. That a child of tender years will grow and age and prices will fluctuate are factors of which the court must have been cognizant when the original decree was entered.

The allowance of plaintiff's petition on such a slight and insignificant basis would set a precedent likely to deprive original decrees of all semblance of stability and force. See, Rockwood v. Rockwood (Utah) 236 Pac. 457, and Snyder v. Snyder, (Cal.) 25 P (2) 403.

II

The court erred in failing and refusing to grant the defendant's motion for a dismissal of the petition on the ground that the evidence and proof was insufficient to warrant a modification of the decree.

Defendant, of course, concedes that the allegations contained in paragraph 1 and 2 of the plaintiff's petition are true.

The allegation in paragraph 3 that the plaintiff had no funds with which to support the child and was wholly dependent upon the moneys paid by the defendant not only was not supported by any evidence whatsoever, but was contrary to the plaintiff's own testimony. Plaintiff testified that she was employed; that she was earning \$208.00 per month, and that she made a practice of saving \$60.00 per month (TR-36-37).

With respect to the allegations contained in paragraph 4 of plaintiff's petition the evidence shows that the defendant was not an architect but was an estimator and draftsman working out of his own home on an independent contractor basis (TR-28), and that there had been no change in that respect (TR-29). The evidence further shows that at the time of the divorce the defendant usually earned between \$250.00 and \$300.00 per month (TR-29). From the first of the calendar year 1949, down to the time of the hearing of the petition for modification the defendant had earned only about \$1,700.00, (TR-78) an average of about \$212.50 per month. At the time of the hearing the defendant had only \$78.07 in his checking account and \$144.27 in a savings account. (TR-10). The defendant did not have enough work to keep him busy (TR-78). He was frequently unemployed

and the situation with respect to employment was similar to what it had been in 1945, when the divorce was obtained (TR-87).

The defendant owned no real property in 1949 that he had not owned in 1945, at the time of the divorce. The "various" real property mentioned by the plaintiff in her petition referred only to defendant's home (TR-29) which he had also owned at the time of the divorce. At the time of the divorce the defendant had owned an automobile (TR-29). At the time of this hearing he had acquired a different automobile, but had obligated himself to a payment of \$66.00 per month to pay for the same. (TR-81).

Defendant submits that the plaintiff's petition failed to allege any change in the defendant's financial circumstances and that plaintiff's evidence with respect thereto not only failed to establish a change for the better but actually indicated that the defendant was, at the time of the hearing, in a worse financial condition than when the divorce was granted.

Insofar as the allegations in paragraph 5 of plaintiff's petition are concerned, the evidence indicates that ever since the granting of the divorce decree in 1945, the plaintiff and the child had resided in Salt Lake City with plaintiff's parents, and plaintiff had been, and was at the time of the hearing, paying her mother \$30.00 per month for the care, food and shelter for the child. Plain-

tiff anticipated that the same cost would continue in the future. (TR-21) In view of that arrangement the evidence with respect to the increase in food prices was immaterial and defendant's objection thereto on that ground should have been sustained.

The most that could be said for plaintiff's proof is that there is some evidence that the general cost of clothing had increased somewhere between 20 per cent and 30 per cent from 1945 to 1949. Witness, Rex Taylor, however, could not correlate the difference in the cost of clothing for a 15 month old child in 1945, as against the cost of clothing for a 5 year old in 1949. Furthermore, if it is true that clothing and food costs have generally increased, it must be assumed that the increase has affected the defendant also. If he made substantially the same money at the time of the hearing of the petition as he did at the time of the divorce, his economic situation is adversely affected by increased prices.

Paragraph 6 of the petition is a mere conclusion.

III

The court erred in making and entering its Finding of Fact numbered 3, which reads as follows:

"That this plaintiff has no funds with which to support said infant at this time and is wholly dependent upon the moneys paid by defendant for the support of said infant."

The only evidence relating to this assignment of error

is that of the plaintiff herself. Plaintiff stated that she was employed and that she was earning \$208.00 per month and that she made it a practice of saving \$60.00 each month (TR-37). Defendant finds nothing whatsoever to the contrary in the transcript.

IV

The court erred in making and entering its Finding of Fact numbered 4 (A) which reads as follows:

"The defendant is now employed as an estimator and draftsman in architectural work and is earning a substantial income."

It is clear that the defendant is not an "employee" in the usually accepted sense of the word. He is, and at all times herein material has been, an independent contractor functioning out of his own home (TR-28-29). He did not have enough business to keep him busy (TR-78). He is often without any work to do. The situation in the respect is similar to what it was in 1945 (TR-87).

The evidence shows that the defendant has remarried and that his gross income for the year 1949, down to the time of the hearing, was only about \$1,700.00. Making no allowance whatever for his ordinary and necessary business expenses, he grossed only about \$212.50 on a monthly average. He had entered into another marriage and had incurred an obligation on an automobile to the extent of \$66.00 per month. Those obligations, coupled with the \$25.00 per month due under the original

decree, certainly left the defendant in short financial circumstances to say the least.

There is no evidence whatever that the defendant was "employed" or that he had a job of work to do at the time of the hearing. No inquiry concerning his status at that time was directed to him or to any other witness at the hearing.

V

The court erred in granting the plaintiff a special increase to cover educational costs for the minor child.

Plaintiff's petition makes no mention whatever respecting the education of the child. The child was only five years old and was not of school age. There is no evidence whatever in the record of this case to indicate that special educational costs will be incurred or that if and when the child becomes of school age it would be necessary for it to attend other than a free public school. The pleading will not support the order of the trial court. **Jones v. Jones** (Utah) 139 P (2) 222.

VI

The court erred in finding that the cost of providing food, education and care of the minor child has placed an increased burden on the plaintiff.

As has hereinbefore been pointed out, the plaintiff testified that since the granting of the original decree she had continuously paid her mother \$30.00 per month for

food, lodging and care of the child. She anticipated that such arrangement would continue in the future (TR-21).

That the price of groceries may have increased from 1945 to 1949, became an immaterial factor in this case. Plaintiff for a number of years had expended \$30.00 per month to secure these items for the child. That arrangement was operative at the time of the hearing and so far as the plaintiff could foresee would continue indefinitely.

VII

The court erred in ordering the defendant to increase his payments for the support of the minor child.

The defendant respectfully submits that the needs of the child (assuming that the need has been shown) is certainly not the sole criteria for the granting of an increase in the monthly allowance. Of necessity, the ability of the father to pay is one of the dominating factors.

The evidence indicates that the defendant was grossing about \$212.50 per month. He was in business for himself and although the record does not disclose the extent of his business expenses, it would have to be assumed that his earnings were not all profit. He had remarried and had thus assumed an additional burden. He had obligated himself to the extent of \$66.00 per month for the purchase of a car. This latter obligation coupled with his

expense of \$25.00 per month for the support of the child under the original decree, would leave him only approximately \$121.50 per month for his business and living expenses.

Although the father owes the primary duty to support the child, the mother likewise has a responsibility. Where as in the instant case the mother's earning capacity substantially equals that of the father and the requirements of the child are beyond the reasonable means of the father owing to his limited earning ability and to other prior obligations incurred by him, the mother should be expected to contribute to the support of the child. In such case the trial court is not justified in placing the entire responsibility upon an overburdened father. Cf: The concurring opinion of Mr. Justice Woolf in **Holbrook v. Holbrook**, No. 7296.

VIII

The court erred in granting plaintiff judgment against defendant for the sum of \$100.00 for her attorney.

It is conceded by the parties that at the time of the hearing the defendant had made all payments required of him by the original decree and was not in default thereunder in any manner whatsoever.

Where a defendant is not in default under the original decree, and the decree has become final so that his former spouse is no longer his wife within the meaning of the statute, attorney's fees are not allowable even though

it may be said that the action is for the benefit of a minor child. **Barish v. Barish**, 180 N.W. 724, an Iowa case involving a statute indential to that of Utah. Also see, **Duvall v. Duvall**, 244 N.W. 718; **Dolby v. Dolby**, (Wash.) 160 P. 950; **Hector v. Hector**, (Wash.), 99 P. 13; **Hayton v. Hayton** 211 P. 745.

Defendant concedes that there are numerous Utah cases involving a defendant in default where attorney's fees have been allowed. A number of such cases are referred to in the Honorable Trial Judge's memorandum decision on motion for new trial. In all of those cases the actions being tried grew out of the original decree and were designed to either preserve or enforce the original decree. Counsel for defendant could not find any Utah case allowing attorney's fees against a defendant who was not in default under the original decree.

The Honorable Trial Judge's rationale is based on the equities as he saw them. But, the allowance of attorney's fees is statutory and such fees may be granted only as provided by law. There are many situations where the allowance of attorney's fees would apparently be equitable, but the court is without authority to grant them. Here the plaintiff is no longer the wife of the defendant. This suit did not grow out of the original decree, but by its very nature must be predicated upon changed conditions arising since that time. Furthermore, as far as the equities are concerned the facts here would support a

finding that the plaintiff was better able financially to bear her attorney's fee than was the defendant.

The very nature of a situation such as the one at hand impels a defendant to resist the petition for modification, if for no other reason than to ward off a judgment against him for attorney's fees. He is not in default but has complied in all respects with the order of the court. Yet, without warning and without opportunity to voluntarily increase his payments, under the holding of the instant case, a defendant may find himself under judgment for attorney's fees.

CONCLUSION

We respectfully submit that the court should reverse the trial court's decision in the above entitled cause.

Respectfully submitted,

ALDRICH & BULLOCK,

Attorneys for Defendant
and Appellant.