

1950

# Ruth Elizabeth Holt Craven v. Kenneth D. Craven : Brief of Respondent

Utah Supreme Court

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Glen M. Hatch; Attorney for Plaintiff and Respondent;

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In the  
**Supreme Court of the State of Utah**

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RUTH ELIZABETH HOLT CRAVEN,  
*Plaintiff and Respondent,*

vs.

KENNETH D. CRAVEN,  
*Defendant and Appellant.*

} Case No.  
7446

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**RESPONDENT'S BRIEF**

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**FILED**

APR 29 1950

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Clerk, Supreme Court, Utah

GLEN M. HATCH,  
*Attorney for Plaintiff  
and Respondent.*

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

In his brief, appellant attacks the respondent's petition for modification. This he has set out in full at pages 2, 3, and 4 of his brief. He also attacks the adequacy of the evidence to support certain of the Findings of Fact, the Conclusions of Law, and the Order of Modification. He has set out the Findings of Fact, Conclusions of Law and

Order of Modification in full on pages 4, 5, 6, and 7 of his brief. He has detailed certain of the facts on pages 7, 8, 9, and 10 of his brief.

Respondent feels that it is necessary to detail the key facts for the court. Respondent contends these show considerable changes in the circumstances governing the amount of support money to be allowed. According to Finding of Fact No. 11 in the Findings in the original divorce matter herein, at the time the divorce was granted, appellant was unemployed. Appellant claims that the record (at Tr. 28, 29) shows that there is no change in circumstances between the time of the original divorce decree and the time of the trial of this matter. However, according to the respondent's testimony upon cross examination upon which appellant relies (i. e. at Tr. 28) respondent *refused* to admit that there was *no change* in the circumstances of appellant's employment between the time of the original decree and the date of the modification hearing.

At the time of the divorce the appellant was still paying for his home (Tr. 86), whereas it is now paid for (Tr. 85). Furthermore the testimony shows that appellant's elder son is now 21 years old (Tr. 82), whereas he had obviously been in his minority at time of the decree.

The testimony as to the appellant's income during the 7.8 month period preceeding the hearing on the petition for modification was not \$212.50 per month as contended by the appellant, but was actually between \$283.00 and \$380.00 per month. This appears, from an examination of respondent's Exhibit "A", which was appellant's checking account

It further appeared that nothing had been withdrawn from appellant's savings account since May 28, 1948 (Tr. 10) which would indicate the adequacy of appellant's income for his own support since that date.

In his statement of Facts, appellant claims that the child was not of school age at the time of the hearing, however, the testimony was that respondent expected to enter the child in school in the near future (Tr. 22). When respondent's testimony as to what it cost her per month for the care of the child is added up, it appears she must spend approximately \$86.74 a month for the care of the child (Tr. 21 through 27), which is considerably more than she spent for the care of the child at the time of the original divorce decree, i. e. \$25.00 per month (Tr. 17 and 40). A summary of her testimony on this point shows the following:

Food and tending (Tr. 21) per month	\$30.00
Clothing (Tr. 21), last 6 months	\$93.65
next 6 months	84.60
Minimum average per month	14.10
Medical and dental care (Tr. 24)	
Past 6 months	\$146.00
Average per month	24.33
Insurance (Tr. 25) per month	3.40
Toys (Tr. 26) per year, \$80.00—per month	6.66
Amusement (Tr. 27) per month	5.00
Haircuts and medicines (Tr. 27)	3.25
Total	\$86.74



The child was 15 months old and still a babe in arms at the time of the divorce decree (Tr. 14, 16) but was 5 years 8 months old at the time Trial Court entered its decision herein.

Evidence that an inflation had occurred in the price of items needed for children was offered in detail by Mr. Taylor (Tr. 44, 45, and 46) and Mr. Pace (Tr. 37 through 65).

No proof was offered at any time tending in any way to show that appellant was unable to pay the increased award ordered by the trial court.

## FINDINGS OF FACT

### CONCLUSIONS OF LAW AND DECREE

The Findings of Fact, Conclusions of Law and Order of Modification have been set out in full by the appellant on pages 4, 5, 6, 7, of his brief. These Findings are well supported by the evidence, and conclusions based upon them to the effect that an increase should be made in the support money allowance, and the order based thereon, are well supported by, and in complete harmony with, the law.

## ARGUMENT

1. THE RESPONDENT'S PETITION FOR MODIFICATION ALLEGED THREE IMPORTANT MATERIAL CHANGES IN CIRCUMSTANCES WARRANTING A MODIFICATION OF THE DECREE; NAMELY, THE

CHANGE IN AGE AND THE GROWTH OF THE CHILD, THE GENERAL INFLATION IN PRICES OF ITEMS NECESSARY FOR THE CHILD, AND LASTLY THE FACT THAT THE APPELLANT WAS EMPLOYED AT THE DATE OF THE FILING OF THE PETITION.

Respondent alleged (in Par. 5 of her Petition) that since the decree of divorce was issued, the child of the parties had grown from infancy (fifteen months) to the age of five years and four months, with the result that he required much more food, clothing and medical care; furthermore, that since the date of the decree there had been a great increase in the price of food, clothing, housing accommodations and all other items necessary for the proper care and support of the infant; that in consequence, Respondent now needs \$50.00 per month to care for the child (Paragraph of Respondent's Petition).

Respondent further alleged (in Par. 4 of her Petition) that Appellant is now gainfully employed, which contrasts with finding of fact number 11 of the original divorce proceedings.

This question has been dealt with by the Court in numerous previous cases. The authority to modify a divorce decree is contained in *Section 40-3-5 U. C. A. 1943* as follows:

“Disposition of Property and Children.

“When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; provided,

that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

The rule as to pleading has been stated as follows in *Cody vs. Cody*, 47 Utah 456, 154 P. 952:

"\* \* \* where material new conditions have arisen after the decrees were made, which conditions were not, and could not have been, considered or passed on by the courts, then, upon proper application and proof, the courts may make 'subsequent changes or new orders' respecting the allowance of alimony or the distribution of property or the disposal of children."

And in *Buzzo vs. Buzzo*, 45 Utah 1621, 148 P. 362:

"\* \* \* under statutes like ours, the courts upon the application of either party have the power to change, modify, or revise such a decree, and whenever it is satisfactorily made to appear that the circumstances and conditions of the parties, *or one of them*\*, have changed so that the amount originally allowed is no longer just or equitable, the court may modify the same." (\*Italics ours.)

Appellant contends that respondent's petition does not meet the requirements of this rule. He cites numerous cases in support of this contention.

We contend that the cases denying modification are clearly distinguishable.

In *Hamilton vs. Hamilton*, 89 Utah 554, 58 P. (2d) 11, the court denied modification because the petition had no other basis than that the husband had failed to make certain specified payments under a property settlement agreement.

In *Chaffee vs. Chaffee*, 34 Utah 261, 225 P. 76, modification was denied because the defendant had alleged as the only basis therefore, salary changes and health impairments which had occurred *before* the granting of the original decree.

In *Rockwood vs. Rockwood*, 65 Utah 261, 236 P. 457, modification was denied where the husband's only allegation of change was that the wife had remarried. The court pointed out that this did not of itself shift the burden of support to the wife or new husband.

In *Gardner vs. Gardner*, 111 Utah 286, 177 P. (2d) 743, modification was sought by the husband in relation to the custody. The District Court increased the support money. The Supreme Court reversed this, since there were no allegations at all in relation to the sufficiency of the original award.

In *Jones vs. Jones*, 104 Utah 275, 139 P. (2d) 222, a decree by the District Court was reversed where it was alleged that additional sums were needed for a *child*, and the District Court awarded an increase in alimony to the *wife*.

In *Barracclough vs. Barracclough*, 100 Utah 196, 111 P. (2d) 792, modification was sought on the grounds that the stipulation of the petitioner as to alimony amount was based on duress. The Supreme Court pointed out there was no allegation of change here.

In *Osmus vs. Osmus*, 198 P. (2d) 233, modification was denied where all changes alleged had occurred *before* the granting of the original decree.

On the other hand, modification has been allowed in the following Utah cases:

In *Hampton vs. Hampton*, 86 Utah 570, 47 P. (2d) 419, a very substantial change in income was involved and modification was allowed.

In *Hendricks vs. Hendricks*, 91 Utah 553, 63 P. (2d) 277, the price of wheat, upon which defendant's income depended, had fallen from \$1.10 a bushel to \$.26 a bushel and modification was allowed.

In *Carson vs. Carson*, 87 Utah 1, 47 P. (2d) 894, it was alleged a serious impairment of defendant's health had occurred since the granting of the original decree and that he needed funds for medical and surgical care, and hospitalization, and that modification was essential.

The case, almost entirely like the present case, is *Sandall vs. Sandall*, 57 Utah 150, 193 Pac. 1093.

In this case a final decree of divorce was entered for the plaintiff (the wife) against the defendant on July 28, 1910. The decree also awarded the plaintiff the custody of their minor child, at that time about two years of age. On September 26, 1919, the plaintiff filed her petition for a modification of the decree, in substance alleging the granting of the divorce and the award to plaintiff of custody of the child. The petition then alleged that the decree of divorce was granted on the ground of failure of the defend-

ant to provide plaintiff and the child with the common necessities of life, and also on the ground of defendant's drunkenness and profligacy. The petition then alleged that at the time of the hearing in the divorce proceedings, and for a long time prior thereto, the defendant had been addicted to the use of liquor to the extent that he could not, and did not, work sufficiently to provide plaintiff and her minor child with the common necessities of life; that the reason she did not insist at the trial of the divorce proceedings on an allowance for support and maintenance of the minor child was owing to defendant's habit and his lack of ability to occupy a position of responsibility. Plaintiff further alleged that owing to the growth of the child and the high cost of living and the increased cost of clothing, it had become practically impossible for the plaintiff to provide the child with the necessities of life and that within the last three or four years defendant had improved his habits to such an extent that he was now able to contribute to the support and maintenance of the child; that defendant was earning upwards of \$200.00 a month and had inherited certain property which made it then possible for him to make a proper allowance for the child's support, and that \$40.00 per month would be a reasonable sum for that purpose.

The relief sought was granted, and defendant appealed on the ground (among others) that the petition for modification of the decree did not state facts sufficient to entitle the plaintiff to relief. The Court held that the petition *did* state grounds for relief. The Court stated at Page 156:

“\* \* \* It is sufficient to say the petition seems to state all the elements necessary to sustain the order of the Court. It refers to the divorce without alimony and reasons therefor, it recites the changed condition of plaintiff and her child and also the changed condition of the defendant in respect to his ability to support the child.”

It thus appears that where circumstances similar to these alleged in respondent's petition have been dealt with by this court in the past modification has been granted.

2. AMPLE EVIDENCE WAS ADDUCED AT THE TRIAL TO WARRANT THE COURT'S ORDER OF MODIFICATION OF THE DECREE: TO-WIT: THAT DUE TO THE INCREASE IN THE CHILD'S AGE AND ACTIVITIES, THE EXPENSE OF CARING FOR THE CHILD HAD GREATLY INCREASED; THAT THE CHILD WAS APPROACHING SCHOOL AGE, WHICH FURTHER INCREASED THE COST OF CARING FOR THE CHILD; THAT THERE HAD BEEN A GENERAL INFLATION OF THE PRICE OF GOODS USED IN THE CHILD'S CARE; AND THAT THE DEFENDANT WAS NOW EMPLOYED AND EARNING AN ADEQUATE WAGE TO ENABLE HIM TO PAY AN INCREASED SUPPORT ALLOWANCE.

Appellant claims much for the testimony as to the respondent's earning power. The trial court chose to ignore this, ruling that it was irrelevant; that the duty to support the child rests on the husband. No evidence was offered to show that this duty had been lifted, nor that appellant was unable to pay the increased amount sought.

This court has indicated that a wife's earnings may not be considered in determining the amount of support money to be paid by a husband. In the case of *Holbrook vs. Holbrook*, 208 P. (2d) 1113, a decree of divorce was entered on May 11, 1948 awarding the plaintiff wife the custody of 4 minor children of the parties and directing the defendant to pay her \$150.00 per month for the support of these four children. A cash settlement of approximately \$10,000.00 was allowed the plaintiff for the purpose of purchasing a new home. She also was given a certain other cash and assets, but no alimony.

On January 11, 1949 an Order to Show Cause was issued against Mr. Holbrook, and at this time he filed a petition for modification of decree. The testimony showed, among other things not pertinent to our question, that since the decree Mrs. Holbrook had acquired work which paid her approximately \$175.00 per month. Upon the basis of this, the defendant founded his contention that circumstances had changed entitling him to a modification of the decree to \$80.00 per month for the support of the children.

The lower court stated it would not consider this fact and that it would limit its decision to a change in status of the defendant or of the children. The Supreme Court, affirming the lower court, stated as follows: (We quote from Page 1115 of 208 Pacific Second.)

“We see nothing in these facts that would justify the court modifying the allotments to the four children. The \$150.00 was for their support, not the support of the mother. Naturally the mother would have to support herself. This she proceeded to do.



It would seem strange to permit the husband and father to force her into such a situation, then to take advantage of it to escape his liabilities without showing some change for the worse in his ability to meet his obligations."

Appellant claims the proof fails to show a change in his ability to pay, or that he can pay the increase at all. However, Finding of Fact number 11, states that at the time the divorce was granted (April 16, 1945) defendant was unemployed. This was alleged in paragraph 11 of the Complaint. Defendant entered a voluntary appearance, waiver and consent in this matter. We submit that he can not now come in and say that he was employed at the time of the decree, for the matter is *res judicata*. We quote from 30 A. J. (Judgments) Sec. 178:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the parties."

This principle is announced and supported in *Smith vs. Clark*, 37 Utah 116, 106 P. 653, (at pages 131, 132, and 133 of 37 Utah).

In 17 A. J. (Divorce and Separation) § 486, it is stated:

"As between the parties to the proceedings a valid judgment or decree is conclusive of all charges set forth and of facts found, or which might have been found, and of defenses raised at the trial."  
(Citing cases.)

Appellant claims that he earned about \$1700.00 during the period from January 1, 1949 to August 25, 1949 (Tr. 78.) In his brief he contends this shows a decreased ability to pay. However, on cross examination, during which time he was shown respondent's Exhibit "A", (Appellant's checking account record) he admitted that he deposited *all deposits* shown during the 7.8 month period in question, except \$800.00 (Tr. 81, 82) which he claimed was deposited there by his twenty-one year old son. He further admitted that the deposits he made all came *from his earnings* (Tr. 83).

Exhibit "A" shows the following deposits:

Jan. 19, 1949.....	\$1,000.00
Mar. 1, 1949.....	500.00
Mar. 2, 1949.....	300.00
Mar. 8, 1949.....	100.00
Mar. 22, 1949.....	150.00
Apr. 1, 1949.....	175.00
Apr. 22, 1949.....	100.00
May 23, 1949.....	150.00
June 3, 1949.....	363.30
Aug. 2, 1949.....	150.00
<hr/>	
Total.....	\$2,988.30

Even if appellant did not earn the \$800.00 he claims his 21 year old son deposited in his account, he still has earned an average of \$283.00 a month for the 7.8 month period in question. This shows his statement of earnings of "about \$1700.00" for this period was untrue.

After hearing this falsity the trial court would have been warranted in concluding that appellant was not telling

the truth about the \$800.00, since the exhibit shows that the account may be drawn on only by his wife and him, and since he testified that they made all of the withdrawals themselves (Tr. 83). In any event the money was received and spent by appellant. With this added, his monthly income averaged approximately \$380.00 per month. The trial court considered this adequate for the increase, since no showing was made that it was inadequate.

The testimony further shows that appellant's elder son has now attained his majority (Tr. 82) and so the appellant is thus relieved of the responsibility of supporting him. It also shows that his home is now paid for (Tr. 85), although it was not at the time of the divorce decree (Tr. 86).

Appellant offered absolutely no testimony which would indicate inability to pay the increase requested. This would seem to imply that his earnings are adequate for that purpose. Since May 28, 1948, no withdrawals were made from his savings account (Tr. 10).

Thus we see that appellant, who was unemployed April 16, 1945, is now employed, earning \$283.00—\$380.00 per month, now has his house paid for, and is no longer responsible for the support of his other son.

As to plaintiff-respondent's situation:

The record shows she spent about \$25.00 a month for the support of the minor child of the parties at the time the decree was granted (Tr. 17, 40). The court found that defendant could pay \$25.00 a month (Finding of Fact

Number 11, in the original divorce action) for the support of the child and awarded that amount.

Plaintiff now finds it necessary to spend an average of approximately \$86.74 a month for the care of the child (Tr. 21 through 27). There are two apparent causes of this. First, the child has grown from 15 months—still a babe in arms (Tr. 14, 16)—to five years, eight months at the time of the trial court's decision herein, in consequence of which he is much larger, more active and is about to enter school. Secondly, there has been a general inflation in the cost of the items necessary for the child. Both Mr. Taylor (Tr. 44, 45, 46) and Mr. Pace (Tr. 57 through 65) supported this.

The court is entitled to look beyond the evidence offered to show this inflation. The court may take judicial knowledge of economic and social conditions, *National Bank of the Republic vs. Beckstead*, 68 Utah 421, 250 P. 1033, and matters of common knowledge, *Little Cottonwood Water Co. vs. Kimball*, 76 Utah 243, 289 P. 116.

Furthermore, under the provisions of Section 104-46-1, U. C. A. 1943:

“In all these cases the court may resort for its aid to appropriate books or documents of reference.”

According to the Bureau of Labor Statistics, a substantial inflation occurred during the period in question. Appellant criticizes witness Taylor's testimony since he could not correlate the differences in cost of clothing for a 15 month old child in 1945 as against a 5 year old child in 1949. Such correlation is unnecessary. Where we know

that the cost of supporting the child has increased from two causes, i. e. because he now wears trousers instead of diapers, and the trousers now cost more than diapers and also more than trousers did in 1945, it is not necessary to decide how much of the additional cost was due to each factor since the total change in cost of caring for the child gives us the measure and the changes in circumstance furnish the reason.

As far as the effect of the inflation on appellant's own financial condition, this makes no difference as long as appellant has adequate funds to support the child.

3. FINDING OF FACT NO. 3 WAS SUPPORTED BY THE EVIDENCE, FOR THE OBLIGATION TO SUPPORT THE CHILD RESTED UPON THE APPELLANT, AND ANY EVIDENCE TENDING TO SHOW THE RESPONDENT'S INCOME WAS IRRELEVANT AND COULD NOT BE CONSIDERED BY THE COURT; AND THE TESTIMONY WAS CLEAR THAT NO FUND HAD BEEN SET UP BY THE DEFENDANT TO PROVIDE FOR THE CHILD'S CARE NOR HAD ANY OTHER FUNDS BEEN PROVIDED ON BEHALF OF THE APPELLANT FOR THE CARE OF THE CHILD.

Appellant's objection to Finding of Fact number 3 arises from a misconception of the law, which is clearly stated in the Holbrook case (supra, page 11). If the appellant had set up a trust fund, an annuity, or by some other means provided for support for the child in addition to what the decree directed him to pay, that would constitute other "funds with which to support the child," and the

husband would be entitled to credit therefore. But as long as the support of the child remains the responsibility of the father, and he is able to support the child, he is not entitled to credit for the mother's efforts. (Holbrook case, Supra, page 11.)

4. THE TESTIMONY SHOWS THAT THE APPELLANT'S INCOME WAS AMPLE FOR THE PAYMENT OF THE INCREASED ALLOWANCE, AND THERE WAS NO TESTIMONY WHICH IN ANY WAY CON-TROVERTED THIS; THEREFORE, FINDING OF FACT NO. 4-A WAS CLEARLY SUPPORTED BY THE EVIDENCE.

The original divorce decree was based on a finding that defendant—appellant was unemployed on April 16, 1945. He now tries to add additional meaning to that finding. This can not be done. The question is res judicata. (See discussion starting at page 12 above.)

Nor can the fact that as an independent contractor he occasionally has some free time be said as a matter of law to show that he is not "employed" now, since from the proof the court was entitled to infer that his average monthly earnings for the 7.8 month period prior to the trial were from \$283.00 to \$380.00 per month. This was not only a substantial income, but defendant made no effort to show that the cost of supporting himself and his wife was such that he would be in any way inconvenienced if required to pay the increased support money allowance.

5. THE TESTIMONY CLEARLY WARRANTED THE COURT'S GRANTING TO THE RESPONDENT AN ADDITIONAL AWARD TO COVER THE COSTS FOR THE MINOR CHILD DURING THE EDUCATIONAL PERIOD.

There is ample proof in the record to support an order of the Court raising the allowance to \$50.00 a month without regard to the boy's entrance in school. The trial Court chose not to do this, but placed it at \$35.00 a month till he started school. It would seem that the respondent, not the appellant, should be entitled to complain of this. However, we feel that the Court has judicial knowledge that after children start school they require more and better clothing, and we have not complained of this. If the appellant's argument on this point is recognized, we feel the order should be modified to allow respondent \$50.00 per month from the date of the modification order rather than from the date of commencing school.

6. THERE IS AMPLE EVIDENCE TO SUPPORT FINDING OF FACT NO. 4-C TO THE EFFECT THAT THE COST OF FOOD, EDUCATION AND CARE FOR THE CHILD HAD INCREASED.

The record shows that respondent spent on the child before the original decree about \$25.00 a month. She detailed the present expenses fully (Tr. 21 through 27) and they average about \$86.74 per month. They indicate that the various items for which expenditures must be made have increased in number and that the cost of the individual

items necessary has increased (Supra page 3). There is no testimony that the grandmother pays for the child's clothing, medical care, toys, or does more than provide food and tend the child. Furthermore, this \$30 item alone is more than the allowance originally made the respondent, and more than respondent expended for the care of the child before the original decree.

7. THE FINDING OF FACT NO. 5 INDICATING THE AMOUNTS NECESSARY FOR THE APPROPRIATE CARE OF THE CHILD UNTIL AND AFTER IT ENTERS SCHOOL IS AMPLY SUPPORTED BY THE EVIDENCE AND IS A PROPER FINDING OF FACT BASED UPON THAT EVIDENCE.

Appellant contends he lacks the means to pay the increase. He analyzes (p. 18 Appellant's Brief) his income as amounting to only \$212.50 per month. We have shown it is from \$283.00 to \$380.00 per month. Furthermore, no evidence was offered to show that his expenses were such as would make it at all difficult for him to pay the increase.

Appellant also claims that the mother in this case should bear some of the responsibility for supporting the child, claiming that the appellant is an "over-burdened father." There is no evidence of any such over burden on the appellant as would invoke any such principle, and certainly the respondent will be bearing a good share of the cost any way. While appellant would be paying \$35.00, respondent would be paying \$51.74 a month and when appellant is paying \$50.00, respondent will be paying \$36.74 a month.



8. IT WAS PROPER FOR THE COURT TO GRANT RESPONDENT JUDGMENT AGAINST THE APPELLANT FOR THE SUM OF \$100.00 FOR REIMBURSEMENT FOR ANY ATTORNEY FEE IN THIS ACTION, EVEN THOUGH APPELLANT WAS NOT DELINQUENT IN HIS PAYMENTS AT THE TIME OF THE COMMENCEMENT OF THE ACTION.

This question is thoroughly dealt with in the Honorable Trial Judge's opinion. The appellant relies heavily on the Iowa cases, since the Iowa Statute is similar to Sec. 40-3-3, U. C. A., 1943. However, the Iowa Court has at all times refused to make any allowance of attorney fees *after the decree becomes final*, so it holds directly contrary to the rule announced by this court in the many adjudicated cases, where at the time modification was sought, the husband was delinquent in the payment of his support money.

In *Barish vs. Barish*, 180 N. W. 724, decided by the Iowa Supreme Court in 1920, the Court states:

"We hold that neither this nor any other statute gives this appellant any better claim to the taxation of an attorney fee than is given any litigant who seeks to make a money recovery without having a contract for the taxing of attorney fees."

The court states with reference to his wife that "she is no longer the wife of the appellee."

In *Stone vs. Stone*, 212 Ia. 1344, 235 N. W. 492, the husband sought the modification and the wife resisted it and it was denied and the Iowa Court held up even in this case the wife was not entitled to an attorney fee.

As is pointed out by the trial judge's memorandum, the Washington cases cited by the appellant are not in point inasmuch as the Washington statute provides for the taxing of attorney fees only "pending the action for divorce." Washington has no such statute as our 40-3-5.

In the Wisconsin case of *Blake vs. Blake*, 35 N. W. 551, there is no showing that defendant's husband was in arrears at the time the decree of modification was sought and yet the Wisconsin Supreme Court allowed an attorney fee to the wife.

In *Chambers vs. Chambers*, 106 N. W. 993, the Nebraska Supreme Court on similar facts, allowed an attorney fee to the wife.

Counsel for respondent has been unable to find any case which draws a distinction in allowing an attorney fee to the wife in an action for modification between the situation where the husband is delinquent and where he is not delinquent. The learned Trial Judge in his memorandum points out that when the circumstances indicate that the support money allowance is no longer adequate, the mother is well justified in bringing an action and since this is done for the benefit of the child whose support is the responsibility of the husband, then the husband, not the wife, should pay the attorney fees.

The trial judge further points out that in cases like this, the husband has not been making an adequate provision for the support of the child and this action is brought to require that he make adequate provision. It would seem logical that it would be just as reasonable to require the

husband to pay the attorney fee where his failure to make adequate provision is due to the inadequacy of the support money allowance as where it is due to his failure to keep up the payments required by the court order.

We further respectfully submit, that the award of the attorney fee is not made as a punishment in any of the Utah cases dealing with this situation. Rather, a change of circumstances has arisen creating a situation requiring further legal proceeding in the divorce matter. The court has retained jurisdiction of this matter under our statutes, and the change is made for the benefit of the child. Therefore, the fee, it would seem, is awarded for the benefit of the child.

### CONCLUSION

Respondent respectfully submits, that the pleadings and the proof were entirely adequate to support the Findings, Conclusions and Modification Order of the District Court. There is ample evidence of a need for the increase and ample evidence of the appellant's ability to pay it, but no evidence to show that it would work any hardship upon him.

Furthermore, respondent contends that the Trial Court was justified under the law of this State in ordering the appellant to pay to the respondent her attorney fee.

It is therefore respectfully submitted, that both on the facts and the law, the judgment of the lower court should be affirmed.

Respectfully submitted,

GLEN M. HATCH,  
*Attorney for Plaintiff  
and Respondent.*