

2001

Margaret Ann Fake v. James D. Fake : Brief of Appellant

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF UTAH

MARGARET ANN FAKE (HUNSAKER), :

Plaintiff & Appellant, :

vs :

Case No. 14672

JAMES D. FAK :

Defendant & Respondent. :

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
Bryant H. Croft, Presiding

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BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE KIND OF CASE

Petition for modification of decree of divorce and counter-petition for modification of decree of divorce.

DISPOSITION IN LOWER COURT

The Lower Court granted defendant's request for modification of decree of divorce requiring plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses incident to transporting the four (4) minor children of the parties to Salt Lake City and back to California where they now reside with their mother; and denied plaintiff's petition for modification of decree of divorce for increased child support for the four (4) minor children where defendant's income had increased from \$45,000.00 in 1973 to \$70,000.00 in 1975, and the expenses and costs to support the minor children had increased substantially.

RELIEF SOUGHT ON APPEAL

Reversal of the Lower Court's order and judgment modifying the decree of divorce, requiring plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses incident to transporting the four (4) minor children to Salt Lake City from California and return for two (2) visitation periods per year; and reversal of the Lower Court's order and judgment denying plaintiff's petition for increased support with instructions to award plaintiff increased support. In the alternative, to reverse in total the order and judgment modifying

the decree of divorce and grant to plaintiff-appellant a new trial.

STATEMENT OF FACTS

The plaintiff-appellant was granted a decree of divorce from the defendant-respondent on the 17th day of July, 1973, which decree became final three (3) months after entry. Plaintiff-appellant was awarded custody of the then five (5) minor children and defendant was ordered to pay support of \$150.00 per month per child pursuant to a property settlement agreement. (R. 61-82). Plaintiff-appellant was awarded alimony, which was in effect a property settlement in that it was to continue in the event of her remarriage, by agreement, at the rate of \$1,000.00 per month until 1984 or her death; and was based upon defendant-respondent's estimated income for the year 1973 of \$45,000.00. (R. 63-65; 71-73; 78-80). Both parties have remarried. Plaintiff-appellant's present husband, Mr. Hunsaker, found employment in Utah to be unsatisfactory. He determined opportunity for employment to be better in California, thus, requiring moving to California. (T. 24). Plaintiff-appellant sold the home occupied by her and the children, which home was awarded to her by stipulated agreement in the decree of divorce, and moved to California with the four (4) remaining minor children in November of 1975. On or about November 13, 1975, defendant-respondent filed a petition for order to show cause asking that the decree of divorce be modified with regard to visitation rights and that plaintiff-appellant be required to pay one-half of the air travel expenses incident to visitation of the

minor children, and he be allowed to deduct such expenses from the alimony payments he is obligated to pay to his former wife. (R. 144-148). Plaintiff-appellant filed a reply to defendant-respondent's petition and a counter-petition for modification of decree of divorce setting forth visitation rights she was agreeable to; contesting that she be required to pay one-half of the expenses of travel for visitation; and requesting that the support for the four (4) remaining minor children be increased from \$150.00 per month per child to \$200.00 per month per child based upon substantial increased costs to support the children and a corresponding substantial increase in defendant's income. (R. 154-160). After hearing held on April 16, 1976, the Lower Court, Judge Bryant H. Croft, denied plaintiff-appellant's petition to increase child support; and granted defendant-respondent's petition to charge one-half of the travel expenses for visitation with the four (4) minor children against plaintiff for two (2) visitation periods per year--one at Christmas time and one in the summer and at such other time as the parties may agree. (R. 171). Mr. Gustin, attorney for defendant-respondent, prepared findings of fact, conclusions of law and judgment modifying decree of divorce as required by the minute entry of Judge Croft (R. 171; 172-179), which findings, conclusions and judgment contained matters concerning visitation rights not ordered by the Court. Plaintiff-appellant then filed a motion for relief from the judgment (R. 189) concerning the error in the visitation rights, which the Lower Court declined to hear in that this appeal was then pending. From the order and judgment of the Lower Court denying plaintiff-appellant's petition for

(4)

increased support based upon material change of circumstances, and granting defendant-respondent's petition modifying the decree of divorce requiring plaintiff to pay one-half the travel expenses incident to transporting the four (4) remaining minor children from California to Salt Lake City and back for visitation twice a year without any showing of financial hardship on defendant-respondent, plaintiff-appellant appeals.

ARGUMENT

POINT I

LOWER COURT ERRED IN DENYING THE PETITION OF PLAINTIFF FOR INCREASED SUPPORT WHERE THERE WAS A SUBSTANTIAL AND MATERIAL CHANGE OF CIRCUMSTANCES.

The Courts, in exercise of continuing jurisdiction over divorce cases, are given considerable discretion and latitude as to "subsequent changes or new orders" with respect to support and maintenance of children, which discretion is bounded by what, in the opinion of the Court, is "reasonable and necessary" and in the "best interests and welfare of the children". (30-3-5 Utah Code Annotated as amended 1953). To secure a modification of a support award in a divorce decree, the moving party must allege and prove changed conditions arising since the entry of the decree, requiring under rules of equity and justice a change in the decree. Ring v. Ring, 29 U.2d 436, 511 P.2d 155; Felt v. Felt, 27 U.2d 103, 493 P.2d 620; Gardner v. Gardner, 111 Utah 286, 177 P.2d 743; Jones v. Jones, 104 Utah 275, 139 P.2d 222. Thus, the burden of showing change of circumstances to warrant increasing support for the four (4) minor children of the parties was plaintiff

Allen v. Allen, 25 U.2d 87, 475 P.2d 1021; Sorensen v. Sorensen, 20 U.2d 360, 438 P.2d 180. The criterion being the needs of the person supported and defendant's ability to pay. Anderson v. Anderson, 110 Utah 300, 172 P.2d 132. Plaintiff, in the evidence presented, met this burden by an overwhelming preponderance of the evidence in that she established: That (1) defendant's income had increased in two years from \$45,000.00 in 1973 to \$70,000.00 in 1975, an increase of \$25,000.00 per year (T. 48, 56); That (2) defendant's take home pay had increased to \$54,000.00 in 1975 from \$32,000.00 in 1973 (T. 59, 70); That (3) the expenses of supporting the children had increased substantially due to the rise in cost of living for food, utilities, etc. since the entry of the decree (T. 20-25, 31-33); That (4) she was to incur dental expenses on behalf of one of the children (T. 35); That (5) Debbie needed glasses (T. 35); That (6) it was costing an average of \$354.40 per month to support each child with defendant only contributing \$150.00 per month toward these expenses (T. 21); That (7) she had not worked for 25 years and was not qualified for employment (T. 19); That (8) defendant had access to an additional \$12,000.00 annual income from JAMCO, his solely owned company, having a net worth of \$80,000.00 (T. 50-52, 58-59); That (9) as the controlling stockholder of Utility Trailer Sales, defendant's employer, defendant determined his own salary and bonus (T. 49, 55-56) with his income being tied to the tax structure rather than his needs (T. 55) and additional profits allowed to accumulate; That (10) defendant had a profit sharing plan valued in excess of

\$65,000.00 in addition to the accumulation of earnings of JAMCO as a retirement (T. 64, 68).

In the case of Harrison v. Harrison, 22 U.2d 180, 450 P.2d 456, this Court held that there was a sufficient showing of change of circumstances to support modification of decree where the defendant's income was greater than at the time of the decree. In this case, defendant's (Mr. Fake) income increased more than 55 percent in two years from the time of the decree of divorce.

Increased living expenses in supporting minor children has been considered and recognized as sufficient change of circumstance to increase support payments, especially in light of the fact that the cost of living has increased substantially in the past two years. See Ericksen v. Ericksen, 8 U.2d 381, 355 P.2d 618; Carlton v. Carlton, 4 U.2d 332, 294 P.2d 316; Craven v. Craven, 119 Utah 476, 229 P.2d 301; Gale v. Gale, 123 Utah 277, 258 P.2d 986.

The defendant testified that his expenses of supporting his present family were rather substantial. However, our Courts have consistently recognized that defendant's first family has priority in these matters. The minor children of defendant are the first and foremost obligation of defendant, and they are entitled to be provided with the standard of living which the defendant should furnish them. See King v. King, 25 U.2d 163, 478 P.2d 492; Germer v. Germer, 17 U.2d 393, 412 P.2d 923; Ericksen v. Ericksen (supra); Sorensen v. Sorensen (supra). The fact that defendant had remarried and had purchased and furnished a new home with partially borrowed funds (T. 53-54); was contributing \$2,600.00 a year to

support a child of his present wife in college (T. 60); that he anticipated expenses in supporting his daughter Susan in college in the approximate sum of \$2,000.00 per year, which expense was clearly in the consideration of the parties at the time of the decree of divorce (T. 61) do not constitute grounds for denying plaintiff's petition for increased support where there has been a clear showing of changed circumstances. King v. King (supra); King v. King, 27 U.2d 303, 495 P.2d 823; Sorensen v. Sorensen (supra).

In the instant case, the Trial Court erred in denying plaintiff's petition for increased child support where the evidence presented so overwhelmingly established a material change of circumstances since the entry of the decree of divorce that required, under the rules of equity and justice within the guidelines of "reasonable and necessary" and "the best interests and welfare of the children", that the child support be increased to at least \$200.00 per month per child under the present state of circumstances.

The prerogatives and broad discretion accorded the Trial Court in matters of divorce does not extend to arbitrary and unreasoning power to disregard credible and uncontradicted evidence. It was a clear abuse of the Trial Court's discretion in denying plaintiff's petition for increased support in light of the evidence presented and at the same time adding materially to plaintiff's expenses by requiring her to pay one-half ($\frac{1}{2}$) of the travel expenses of the children for visitation. The order denying plaintiff's

petition for increased support should be reversed with instructions to the Lower Court to award plaintiff increased support in accordance with said petition.

POINT II

THE ORDER OF THE LOWER COURT REQUIRING PLAINTIFF TO PAY ONE-HALF ($\frac{1}{2}$) THE TRAVEL EXPENSES OF THE FOUR (4) MINOR CHILDREN FOR VISITATION WAS ERROR WHERE DEFENDANT FAILED TO PROVE CHANGED CONDITIONS REQUIRING UNDER RULES OF EQUITY AND JUSTICE A CHANGE IN THE DECREE.

It is the contention of plaintiff that in order for the Lower Court to grant the petition of defendant to modify the decree of divorce requiring the plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses of the four (4) minor children for visitation purposes that defendant must allege and prove changed conditions arising since the entry of the decree, requiring under rules of equity and justice a change in the decree. (See cases cited in Point I). The net effect of the Court's order in requiring plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses of the four (4) minor children for visitation purposes is to decrease the support monies already ordered to be paid by defendant to plaintiff for the support and maintenance of the minor children. This is clearly contrary to the rules of equity and justice under the circumstances and the evidence presented at the time of hearing. The mere fact that plaintiff changed her residency with the minor children from the State of Utah to the State of California is not sufficient change of circumstances which would warrant in effect a decrease of the support payments ordered to be paid by defendant to

plaintiff for the minor children.

In the case of Earl v. Earl, 17 U.2d 156, 406 P.2d 302, this Court stated:

The right of child to support is a paramount right which it possesses quite apart from any consideration relating to the conduct of its divorced parents. The mere removing of the child from the jurisdiction is not sufficient in the absence of further evidence as to the reasons for such removal to sustain an order changing the right to support payments."

The Lower Court, prior to hearing any of the evidence, was disposed to order plaintiff to pay some of the costs of returning the children to the State for visitation. Thus, the Lower Court was somewhat prejudiced against plaintiff in favor of defendant. (T. 3-4, 15). Defendant presented no evidence which would indicate that he was financially unable to afford the costs of the travel expenses of bringing the children from California to Utah for the purpose of visitation. In fact, the evidence presented was to the contrary in that defendant had paid entirely the costs of all of the children visiting during Christmas of 1975. (T. 4). Further, the evidence presented as set out in Point I of this brief clearly shows that defendant's income had substantially increased since the entry of the decree of divorce, that he had access to additional income in excess of \$12,000.00 through his solely owned company of JAMCO, and that he had additional income by reason of the fact that the salary and bonuses he received from Utility Trailer Sales, of which he was the controlling stockholder, was tied to tax structure and not to his actual needs. That the company

had accumulated additional profits and retained earnings over the years in excess of \$22,000.00, after the payment of salaries and taxes and other expenses. (T. 49, 56, 57, 59). Thus, defendant failed to show any change of conditions which would justify the order of the Lower Court requiring plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses of visitation of the minor children. Scott v. Scott, 105 Utah 376, 142 P.2d 198; Chaffee v. Chaffee, 63 Utah 261, 225 Pac. 76. Defendant clearly failed to meet the burden required for a change of circumstances as set down by the cases cited in Point I of this brief, and in applying the criterion as set down in the case of Anderson v. Anderson (supra). The costs to support the minor children had increased and exceeded the amount of support contributed by defendant by \$200.00 per month for each child. The defendant unquestionably had a much greater ability to pay travel expenses of the children for visitation where he had experienced a substantial increase in income and plaintiff's income had not.

The evidence presented by defendant in support of his petition to have plaintiff pay a portion of the travel expenses of visitation with the minor children was mainly expenses he was incurring in supporting his second family. In the case of Sorensen v. Sorensen (supra), this Court rejected such expenses as grounds for a change of circumstances on the basis that they are voluntary. This Court has also recognized that the taking on of a new family obligation is subordinate to defendant's prior obligation to his first family. See King v. King (supra).


The defendant failed to make out a proper case for change of circumstances which would warrant a modification of the decree of divorce under the rules of equity and justice so as to place upon plaintiff the burden of paying one-half ($\frac{1}{2}$) of the travel expenses of the minor children for visitation. The order of the Lower Court requiring plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses of the minor children should be reversed in that the evidence does not support or sustain such order.

CONCLUSION

The plaintiff clearly met her burden of proving a material and substantial change of circumstances since the entry of decree of divorce which would support a modification of the decree of divorce increasing support payments ordered to be paid by defendant to plaintiff from \$150.00 per month to \$200.00 per month where the costs of supporting the children have risen substantially and defendant had experienced a corresponding increase in income in excess of 55 percent in the two years since the entry of decree of divorce. The Lower Court erred in denying plaintiff's petition for increased support payments and the order denying plaintiff's petition for increased support should be reversed with instructions to the Lower Court to enter an order modifying the decree of divorce and increasing the support for the minor children from \$150.00 per month per child to \$200.00 per month per child under the evidence presented.

The facts and circumstances of this case and the evidence presented require reversal of the order of the Court modifying the decree of divorce requiring plaintiff to pay one-half ($\frac{1}{2}$) of the travel expenses of the four (4) minor children for visitation purposes where defendant clearly failed to meet the required burden of proof of showing a change of circumstances which would warrant such order under the rules of equity and justice.

Respectfully Submitted,


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Served two (2) copies of the foregoing Brief Of Appellant on Respondent by delivering the same to Frank J. Gustin at 1610 Walker Bank Building, Salt Lake City, Utah, on this 30 day of September, 1976.

