

1951

Winslow C. Cole v. Marguerite D. Cole : Brief of the Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
of the State of Utah

WINSLOW C. COLE,
Plaintiff and Respondent,
Vs.
MARGUERITE D. COLE,
Defendant and Appellant.

} **Case No.**
7717

BRIEF OF THE RESPONDENT

FILED

OCT 8 1951

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BRIEF OF THE RESPONDENT

In addition to the facts presented by Appellant, certain other facts, as appear from the various Findings and Decrees; which make up the record, are pertinent to the issues in this case.

After having been married to the Plaintiff for a comparatively short time, the Defendant, on or about the 24th day of July, 1931, in disregard to the solemnity of her marriage vows, wilfully and without cause, and against the wish and will of the Plaintiff, and without his consent, deserted and abandoned the Plaintiff, and that at all times between the 24th day of July, 1931, and the 19th day of May, 1936, the Defendant did so continue to wilfully and without cause desert and abandon the Plaintiff, and to live separate and apart from him; without any sufficient cause, and against his wish, and without his consent.

That there were no children born the issue of said marriage, so that the alimony awarded was not for the support, and education and maintenance of a minor child.

That despite the fact that the divorce was granted solely because of the fault of the Defendant, the Court, nevertheless, allowed her a full one-half (1-2) of the community property, and in addition required that the Defendant repay to her the sum of \$1,323.00, which represented the amount the Plaintiff had borrowed from the Defendant during their married life. In addition, the Defendant was awarded a total of \$720.00 in alimony, payable at the rate of \$60.00 per month; commencing June 1, 1936, and the sum of \$360.00, payable at the rate of \$30.00 per month; commencing June 1, 1937. The record discloses that all of these sums have been fully paid.

The further fact is evident that the application for modification was made more than fourteen (14) years after the

date of the entry of the Decree, and that the Plaintiff is now of the age of sixty-two (62) years; is married; has a son, age 11 and a daughter, age 10, depending on him for support.

That at the time the Decree was entered, the Plaintiff received a yearly income, as Sevier River Commissioner, of \$2,250.00. That now he receives, as such River Commissioner, a salary of \$350.00 per month, and that his employment is on a yearly basis. That in addition, he receives approximately \$900.00 per year, net income, in the farm property.

In the present proceedings, the Court found that the right to permanent alimony, on the part of the Defendant, was fully adjudicated in the original divorce proceedings, and that the matter should not be reopened in this hearing. (Paragraph VII Findings of Fact on Petition for Modification of Divorce Decree.)

ARGUMENT

Defendant and Appellant listed three (3) points for reversal, as follows:

POINT NO. I. The trial court erred in holding that the original Decree finally adjudicated the right of the right of the Defendant to alimony. The express language of the Decree reserved jurisdiction for a subsequent determination of alimony.

POINT NO. II. The trial court erred in holding that whe-

ther an award of alimony would seem just and equitable to the present dependents of the Plaintiff was a legal ground to be considered in making an award.

POINT NO. III. The findings of fact of the court show

that a substantial change in the material circumstances of the Plaintiff and Defendant had taken place justifying an award of alimony as prayed, and the decision of the court that the evidence did not justify an order for alimony was contrary to the undisputed facts and to the courts own findings.

Each of these Points will be treated in the order given.

DEFENDANT APPELLANT'S FIRST POINT

It is true, as stated by counsel in their Brief, that the Plaintiff Respondent in question did not raise the question with respect to the right of the Defendant to receive an award of alimony, as granted under the original Decree. Had the question been raised, it would have not made any difference, one way or the other, since the amount awarded in the original Decree was actually paid, and there is no way that it could have been recovered from the Defendant Appellant.

In their argument on this point, counsel for Defendant Appellant are entirely overlooking the issue in this case, and that question is: If the right to permanent alimony

was put in issue fully and adjudicated adversely in the original proceedings, may the former wife in a later proceedings, more than fourteen (14) years after, seek a Modification of the Decree, so as to award her permanent alimony, after the same was denied in the original findings? We believe that this question is fully settled in the case of *Cody vs. Cody*, 47 Ut. 556, 154 Pac. 952; *Hamilton vs. Hamilton*, 89 Ut. 554, 58 Pac. 2d. 11.

Justice Frick in the case of *Cody vs. Cody*, supra, set forth this rule in very concise language. Quoting from page 957 of the Pacific Reporter, as follows:

"I know there are authorities which hold that a final judgment for alimony in gross is, even after the judgment becomes irreversible, subject to modification on averments and proof of changed conditions and circumstances. But I believe the better rule and weight of authority to be against such a holding. The cases bearing on the question may be found in 7 Standard Ency. of Procedure, 842; 17 Century Digest, Divorce, Sec. 692; 7 Decennial Digest, Divorce, Sec. 245; 2 Nelson on Divorce, Secs. 933a and 934. Except dicta stated in them, there is nothing in *Read v. Read*, 28 Utah, 297, 78 Pac. 675, or *Buzzo v. Buzzo*, 148 Pac. 362, to make against this. If an order allowing alimony in gross, or specific property in lieu of all rights in and to the husband's property, is final and res adjudicata, and not open to modification, except upon averments and proof of fraud, deceit or misrepresentation in procuring the order, for just as cogent reasons do I think an adjudication upon issues and evidence awarding no alimony is likewise final and set at rest, and not subject to modification, except on averments and proof of fraud, deceit, or misrepresentation in procuring it."

The rule as laid down in the above cases has never been

modified by the Laws of the State of Utah.

The cases of *Doe vs. Doe*, 48 Ut. 200, 158 Pac. 781, and *Schuster vs. Schuster*, 88 Ut. 257, 53 Pac. 2d. 428, cited by counsel, have no bearing on this case, as the facts and circumstances in each case are entirely different. Those cases merely held that the misconduct of the wife alone was not sufficient grounds for the denial of alimony to her, if the facts and circumstances of the particular case justified it.

The case of *Alldridge vs. Alldridge*, 229 Pac. 2d., 681 Ut., cited by counsel, has no bearing on the present case. The Alldridge case merely held that under the facts and circumstances of that particular case, the Court abused its discretion in denying permanent alimony. The Alldridge case was a direct appeal from the original Order denying alimony in the Decree of Divorce.

We have no quarrel with the rule of law, that under certain circumstances a wife may be entitled to alimony, even though it is her fault that the marriage failed. The rule is well-stated in 1 R.C.L. Sec. 83, page 936 of the volume as follows:

“83. Divorce Granted for Wife’s Fault. - According to the rule of the common law, where a divorce was granted for the misconduct of the wife, she was not entitled to alimony. This was productive of so much hardship, however, and so frequently left her a prey to starvation or a life of shame, especially where her own property had become vested in her husband by reason of the marriage, that statutes have been enacted in England and a number in the United States authorizing the courts to make such an allowance of alimony in favor of a guilty wife as the surrounding circumstances may justify. In some in-

stances, although not allowed in express terms, the language of the statute is sufficiently broad to grant by implication such authority. Obviously she is never entitled to it as a matter of course, and it is entirely discretionary with the court to allow her such alimony as, under the circumstances, is reasonable, just, and right, taking into consideration the amount of the husband's property, and the extent to which she contributed to the accumulation thereof, the ability of each to earn money in the future, and their conduct in the past. The allowance is based not so much on the obligation to support, which has been terminated, as on what would be a just division of the community property, taking into consideration the extent to which the wife assisted in its accumulation. If there are not mitigating circumstances and it would be inequitable to award her permanent alimony, none should be decreed. Thus where she is solely to blame, and neither brought property to her husband on marriage nor thereafter contributed to its acquisition by her industry and thrift, she is not entitled to an allowance of alimony. But where property has been jointly acquired largely through her efforts, alimony should be awarded even though her conduct has been highly improper, especially where the husband himself has not been entirely free from blame. In a few jurisdictions, however, the law forbids the award of alimony where the divorce has been decreed because of the wife's adultery."

The grounds of the Modification of the Decree of Divorce, with respect to alimony, in 1 R.C.L., Alimony, Sec. 94, at page 948, are as follows:

"94. Grounds for Modification. - The application for an alteration or modification of the decree is always addressed to the judicial discretion of the chancellor, and ordinarily, in the absence of fraud in its procurement, the only inquiry is whether sufficient cause has intervened since the decree to authorize or require the court, applying equitable rules and principles, to change the allowance. Authority to

modify the allowance, however, does not include the right to alter the award upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal if the decree was deemed erroneous, and it cannot be supposed that it was intended that the court should sit in review of its own decree, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter, or modify a decree for alimony upon the facts existing at the time of its entry. After divorce, a husband should be free to act in reliance on the finality of the award determining the extent of his obligation,

..... As an allowance of alimony in gross is in full discharge and satisfaction for all claim for future support of the wife, it cannot be subsequently altered, for the power of modification is not applicable under such circumstances, though the contrary has been held in at least one jurisdiction."

DEFENDANT APPELLANT'S SECOND POINT

There is absolutely no merit to Defendant Appellant's contention that the present dependents of the Plaintiff Respondent cannot be taken into consideration in an application for modification of a decree awarding alimony. This rule is clearly stated in 27 C.J.S. at page 995 under the subtitle, "*Remarriage of Husband*", as follows:

"The remarriage of the husband to another does not preclude modification of the amount of alimony decreed to his wife. On the contrary, such remarriage is a circumstance to be considered on an application for modification, and may warrant a reduction to enable him to fulfill his obligation to support his second wife and his children by his second wife."

Counsel cites the annotations contained in 30 A.L.R. 79; 64 A. L. R. 1269, and 12 A. L. R. 246, as supporting their contention that a remarriage and contraction of new obligations does not constitute a fact to be considered in an application for modification of the divorce decree, with respect to alimony, is not born out by the annotations cited in those cases.

Typical of the cases cited under the annotation of 30 A.L.R., at pages 80 and 81, are the following two cases:

"Thus, in *Buckminster v. Buckminster*, (1865) 38 Vt. 248, 88 Am. Dec. 652, where additional alimony was refused on the application of the divorced wife, some of the grounds stated where that the husband had remarried and had children by his second wife, which were young; that what property he had, had been acquired since his second marriage; and that he was getting old. The court said that as a matter of sound policy, where husband and wife are divorced, the wife should not be encouraged to think she has a continuing lien on her divorced husband for support, but that, on the contrary, the divorce and decree of alimony should be understood, as between them, to end their relations and obligations to each other."

"In *Herrett v. Herrett* (1914) 80 Wash. 474, 141 Pac. 1158, the court recognized the rule down in State ex rel. *Brown v. Brown* (1903) 31 Wash. 397, 62 L.R. A. 974, 72 Pac. 86, that a husband is bound to pay alimony to a former wife, notwithstanding the fact that he has remarried, but said that the court had never intended to go so far as to hold that a divorced all his earnings must go to his first wife, and reversed an order increasing the alimony of the first wife person has no right to remarry, or that, if he does, where the circumstances made such increase inequitable."

One of the most fundamental principles involved in a matter of this kind concerns the obligation of a husband to support his wife. That obligation is terminated the moment that a wife deserts her husband, without cause. This matter is thoroughly annotated at 6 A.L.R. 9. The rule is also amply stated in the case of *Nelson v. Nelson*, decided in the Supreme Court of Utah in 1919, and reported in 182 Pac. at page 386. Therefore, when the Defendant deserted the Plaintiff on the 24th day of July, 1931, without his consent; wilfully, and without cause, and against the will and wish of the Plaintiff, the obligation to support her, then and there, ceased. Any obligation after that date to pay the Defendant anything on the part of the Defendant, must arise out of the terms and conditions of the Decree of Divorce, the obligation to support having been terminated. Then the property rights, whether in the form of alimony, or otherwise, would have to be determined on what would be a just division of the community property, taking into consideration the extent to which the wife had assisted in its accumulation. Under the general rule, where the wife is solely to blame and neither brought property to her husband on marriage, or thereafter contributed to its acquisition by her industry and thrift, she is not entitled to alimony. In the present case, the facts disclose that any property, which the wife paid to the husband at the time of the marriage, was repaid in full, and that in addition, she received one-half (1-2) of the full value of the property of the husband, as well as a settlement of alimony in gross, even though the same were payable in installments. Under the facts and circumstances of the case, this certainly fulfilled the full obligation of the Plaintiff to his former wife.

In addition, the matter of alimony, as well as any rule for modification for an order of alimony, rests in the sound discretion of the court, and in the absence of the clear abuse of discretion, the ruling of the trial court will not be disturbed on appeal. This matter is clearly stated in 27 C.J.S. at pages 1107 to 1109, under sub-section C of section 288, in the following language:

“Discretionary orders as to alimony or allowances in divorce actions are reviewable, but unless the trial court has abused its discretion, the appellate court will not disturb a decision as to temporary alimony, permanent alimony, modification of alimony, or counsel fees and expenses.”

A like rule is stated in 1 R.C.L., at page 929, in the following manner:

“77. Amount of Allowance. - The determination of the amount of permanent alimony is controlled by no fixed standard, but rests rather, in the sound discretion of the court.”

In addition, there is a presumption of the correctness of the order. The rule in that respect being stated in 27 C.J.S. at page 1110, in the following language:

“The general rule is that every intendment will be made in favor of the order appealed from. It will be presumed that the proper procedural steps were taken, that the court acted after due consideration, that the court considered all the evidence to warrant the court's findings or order, particularly where the record does not contain the evidence.”

The same rule is supported by the Utah cases. Particularly

the case of *Read v. Read*, 28 Ut. 297 78 Pac. 673, was quoted and approved in the case of *Blair v. Blair*, 40 Ut. 306 121 Pac. 19; at page 21 of the Pacific Recorder, as follows:

"The awarding of alimony and fixing the amount thereof are questions the determination of which rests within the sound discretion of the trial court; and, unless it is made to appear that there has been an abuse of discretion on the part of the court in dealing with one or both of these questions, its judgment and orders granting and fixing the alimony will not be disturbed."

The Blair case also lays down clearly the rules by which alimony is determined. In the Blair case, the Court, after quoting the general rules with respect to the determination of the amount of alimony, went on to say:

"To the foregoing statement we can add nothing except to say that the courts, under certain circumstances, may also take into consideration the character of the husband's property; that is, whether it is productive or not, and whether the wife has assisted him in its accumulation or otherwise."

The trial court, in his discretion, found that it would be unjust and inequitable to make an Order requiring the Plaintiff, who is sixty-two (62) years of age, to contribute to the support of a former wife, who was divorced from him because of her desertion more than fourteen (14) years prior to her application for modification of the Decree. Such an order was not an abuse of discretion. Had the rule of the Court been that the Plaintiff be required, at this time, to contribute to the support of his former wife, under the facts and circumstances as disclosed by the record, such an order

would have been, clearly, an abuse of discretion, and contrary to public policy.

DEFENDANT APPELLANT'S THIRD POINT

The is nothing disclosed in the record as to the changed condition of the parties, which would now require the Plaintiff to pay Defendant additional alimony, if there were no other circumstances affecting her right thereto. It has been shown under the facts and circumstances of this case that the Defendant is not entitled to alimony for her support at this time, and the changed conditions of the parties are not such as would justify such support.

It is true that the Defendant now finds herself in distressing circumstances, but none of this is the fault of the Plaintiff. Furthermore, the alleged improvement in the condition of the Plaintiff actually is not very great. In fact, he is less able to respond in alimony than he was at the time the Decree was entered. The Court must, of necessity, know of th increased Federal and State taxes that are levied against the income of an individual, and must know of the decline in the purchasing power of the dollar, so that it is now extremely doubtful whether a salary of \$350.00 per month, which is the amount of the salary now received by the Plaintiff, would come as near providing a living as the salary of \$187.50, which he received at the time the divorce was granted. The Court found that the Plaintiff has farming lands and water stock of the value of \$37,857.00, but the net income therefrom is only \$900.00 per year. In addition, the Plaintiff is now more than sixty-two (62) years of age; is soon approaching the age when he will be

forced into retirement, and will no longer receive the salary, which he is now receiving. Under these circumstances, to take from him the small accumulation of property, which he has acquired without the help or assistance from his former wife, and deprive his present wife, who has assisted in the acquirement of this property, of her just support, and deprive his minor children of the necessities of life in order to award the same to a former wife, who lived with the Plaintiff but a short time, and then deserted him without cause, and at the time of the divorce received a full one-half (1-2) of the property acquired during the marriage, would constitute a situation, which would shock the conscience of any fair-minded person. If anyone is required to seek public assistance under the Welfare Laws of the State of Utah for support, it should be the former wife, who was the guilty party, and not the present wife and children of the Plaintiff, or the Plaintiff himself.

The Plaintiff submits that the order of the trial court, refusing the Petition of the Defendant for modification of the Decree of Divorce, should be sustained.

Respectfully submitted,
DUDLEY CRAFTS,
*Attorney for Plaintiff
and Respondent.*