

1952

Phyllis K. Stuber v. Harvey T. Stuber : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

PHYLLIS K. STUBER,

Plaintiff and Respondent,

vs.

HARVEY T. STUBER,

Defendant and Appellant.

Case No. 7764

BRIEF OF RESPONDENT

FILED

FEB 8 1952

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In the Supreme Court of the State of Utah

PHYLLIS K. STUBER,

Plaintiff and Respondent,

vs.

HARVEY T. STUBER,

Defendant and Appellant.

Case No. 7764

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent herein concedes that the statement of facts as contained in the brief of Appellant, insofar as the divorce being granted and the provisions of the decree of divorce, together with the affidavit of Respondent for an order to show cause against the Appellant, the answer of Appellant thereto and the reply of Respondent to Appellant's answering affidavit as set forth in the brief of Appellant from pages 1 to 5 are substantially correct and we need not set them forth herein (Tr. 1-15).

Pursuant to the foregoing the matter was transferred to the trial calendar for trial and said matter came on for hearing before the Honorable Judge Martin M. Larson on the 14th day of May 1951, and after a trial being had on the issues raised by the respective pleadings of said parties, the court took the matter under advisement, and thereafter, on or about the 10th day of September 1951 rendered its decision herein (Tr. 88-89-90). Pursuant thereto the court signed and entered its findings of fact and conclusions of law and judgment therein on the 10th day of September 1951 (Tr. 91 to 96 inc.) Thereafter Appellant filed a Motion for Amendment of Findings and Judgment, (Tr. 98-99-100), which motion, after hearing thereon was denied by the court on the 6th day of October 1951, (Tr. 101), from which judgment and denial of motion the Appellant takes this appeal (Tr. 102).

In the abstract of Appellant he raises the following points in which he contends the court erred in its decision:

POINT I

THE COURT ERRED IN ENTERING ITS JUDGMENT AWARDING THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD, BRUCE STUBER, TO THE RESPONDENT AND ERRED IN FAILING TO MODIFY THE DECREE OF DIVORCE SO AS TO AWARD THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD TO THE APPELLANT, SUBJECT TO REASONABLE VISITATION BY THE RESPONDENT.

POINT II

THE COURT ERRED IN ENTERING ITS JUDGMENT IN FAVOR OF RESPONDENT AND AGAINST APPELLANT FOR THE SUM OF \$220.00, BEING THE AMOUNT FOR WHICH RESPONDENT WAS AT SAID TIME INDEBTED TO THE COLLECTOR OF INTERNAL REVENUE ARISING OUT OF THE FACT THAT RESPONDENT FOR A PERIOD OF TWO YEARS CLAIMED THE MINOR CHILD, BRUCE STUBER, AS A DEPENDENT IN HER INCOME TAX RETURN AND ALSO ERRED IN REQUIRING THE APPELLANT TO PAY ANY OTHER SUM OR SUMS FOR WHICH THE RESPONDENT MIGHT BECOME OBLIGATED TO PAY THE COLLECTOR OF INTERNAL REVENUE BY REASON OF RESPONDENT CLAIMING SAID CHILD AS A DEPENDENT.

POINT III

THE COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF APPELLANT AND AGAINST THE RESPONDENT MODIFYING THE DECREE OF DIVORCE SO AS TO RELIEVE THE APPELLANT FROM THE PAYMENT OF FUTURE ALIMONY TO RESPONDENT.

POINT IV

THE COURT ERRED IN AWARDING THE RESPONDENT ATTORNEY'S FEES IN THE SUM OF \$100.00.

ARGUMENT

These joints of error raised by appellant will be taken up in their respective order and replied to by Respondent, in which Respondent contends that the court's decision, findings of fact and conclusions of law and judgment were in accordance with the testimony of the respective parties, and that the court did not err in rendering its decision and judgment in accordance therewith:

POINT I

THE COURT ERRED IN ENTERING ITS JUDGMENT AWARDING THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD, BRUCE STUBER, TO THE RESPONDENT AND ERRED IN FAILING TO MODIFY THE DECREE OF DIVORCE SO AS TO AWARD THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD TO THE APPELLANT, SUBJECT TO REASONABLE VISITATION BY THE RESPONDENT.

As the issue of the marriage between these two people, they had one minor child, Bruce Stuber, who was some 14 months of age at the time of the divorce, and at the time of this hearing said child was 7 years of age (Tr. 20).

At the time of the divorce, the respondent had no home to go to, and could not live with her parents because of the crowded condition of their home (Tr. 43-44), nor did the Respondent have anything upon which to live and she had to go to work to support herself (Tr. 21). She, however,

made an attempt to take said child and care for it, but she stated that she lived with another girl who had a child of her own and she was not well and she could not care for the child of the respondent, nor could the respondent leave the child with her mother because of the inability of her mother at that time to care for the child (Tr. 21).

Respondent testified as follows:

“He, (Appellant), told me that, when we were separated, that he wouldn’t pay any money for the child nor myself if he had to rot in jail, so I let Bruce go down there to live.’

Under the circumstances there was nothing the Respondent could do, but take the matter up with Appellant as to the care of the child.

Respondent testified further as follows:

“So I talked with Mr. Stuber about it; as a matter of fact he approached me or Bruce of coming to live with him, saying his mother could watch him. I agreed to that proposition; for one thing, I didn’t have the money to take care of him myself, nor no place to put him, and I agreed to it, with the understanding that when I got where I could take him back, I wanted him back. We made an understanding that he wouldn’t pay me . . . (Tr. 21).

She further testified as follows:

“So I let Bruce go down there to live. We also talked about who would claim Bruce as a dependent. I said I would, and he agreed to it.” (Tr. 22).

Q. Now "as a dependent" for what purpose?

A. For the purpose of claiming him on the income tax. He wouldn't pay me any money other than that; that was our agreement.

Q. So, pursuant to that, you let him take the child?

A. Yes, I did." (Tr. 22).

Since that time the respondent testified she has not been in a position to take said child or care for it until now, as follows (Tr. 23):

Q. Now, have you been in a position financially, or otherwise, to take this child and support the child—provide a place for it since that time?

A. Not until right now.

Q. And will you tell the court now what your position is with relation to taking care of the child?

A. My mother has agreed to take care of Bruce, keep him with her all the time and take care of him until I remarry so that I can take care of him myself."

On cross-examination of respondent about her remarriage, she testified as follows (Tr. 34):

Q. Have you never remarried, Mrs. Stuber?

A. No, I haven't.

Q. And, so far as you know, at the present time you don't expect to marry in the near future?

A. I wouldn't say when, but I am going to get married.

Q. Well, you mean you have a prospect now?

A. Yes.

A. —of contracting marriage. Are you acquainted with Mr. Fred E. Bacon?

A. Yes.

Q. Is he the man you expect to marry?

A. Yes.

Under the Statute of the State of Utah, and generally everywhere, the mother of a child has the paramount right to the custody of a minor child, other matters being equal.

Section 40-3-10 U.C.A. 1943:

"In any case of separation of husband and wife having minor children, the mother shall be entitled to the care, control and custody of all child children, etc."

Cook vs. Cook, U. 371, 248 Pac. 83:

"In case of separation of husband and wife, the wife usually has no separate income apart from that of the husband. Such, however, is no legal reason to deny her the custody of the minor child." 183 S. W. 215 Ky.

Respondent has no contention with the assertion of Appellant in his argument and citation of the case of Walton V. Coffman, 110 Utah 1, 169, Pac. 2nd 97, that:

"Child custody proceedings are equitable in the highest degree, and this court has consistently held that the best interest and welfare of the minor child is the controlling factor in every case."

and we agree with this doctrine, and it is the contention of the Respondent that the best interest of said child will be with her

and under her care, and in support of this contention we submit and refer to the evidence in this case.

The only reason that Respondent ever let go of this child was because of financial inability to take and care for the child as appears from the evidence she introduced at the trial and referred to hereinabove. She stated that she has never been in a position to take said child until now, but was now in a position to take and properly care for the child. Appellant argues that because of the fact that Respondent did not visit with the child for the first two years after she let the Appellant have the child, that the Respondent has any interest in the child. We think the Respondent answers that question very well in her testimony as follows (Tr. 29-30):

Q. For the first two years after Mr. Stuber took him, you hardly seen him, did you?

A. That's true.

Q. About two years, you didn't see him at all?

A. No, I felt like that, if Bruce was going to stay there like he was, and I couldn't see any outlet as to how I was going to take care of him, I just felt it was for his own good that he had but very few people to take care of him and interfere as possible. I wanted very much to see him, but I just couldn't see how I could make it, and I figured that it would just be better if he was left there like it was. I thought at the time he was better taken care of than he might have been, and I really couldn't say because I didn't see him in that long period of time."

I am of the opinion this was a very reasonable and logical explanation on the part of Respondent why she did not see

the child during this period. She had confidence in the ability of the Appellant's mother to see that the child was taken care of properly, as she knew the qualities of the Appellant's mother. That to interfere with the child, by way of frequent visits, would endear the child to the mother, (Respondent), and would have a disturbing effect upon the child. Respondent, under her financial and home condition, just could not take the child for the present or could not see her way clear in this respect for some time ahead. I think her wisdom in not seeing the child, (although she stated she wanted very much to see him), was good judgment on her part and should not detract from her interest in the child. After this period of time she stated that she visited with the child at least twice a month, (Tr. 30), and has continued to do so. That she would have liked to have seen him more often had conditions been more favorable. There was an undercurrent feeling existing between the Appellant and Respondent, which apparently prevented this as stated by Respondent in the following testimony (Tr. 30):

- Q. And when you did start seeing him, how often would you say you have seen him, about once a month?
- A. I have seen him more often than that, but, as I said, I would go down more often if I was treated like I was a human being. (Tr. 31).
- Q. What is it you object to because we want to make it pleasant for you when you go to see the child?
- A. Well, I don't see why I have to stand outside, not that I really care to go in, that isn't the point, but at least people can treat you civil when you go to get your own child.
- Q. Well, you mean they didn't invite you in the house?

A. No, they never have since I and Harvey have been divorced.

Q. In other words, you go there to get the child, then you knock and wait until they bring—

A. I knock and stand there, or he looks out the door.

Q. Is that what you mean when you say you haven't been treated with proper courtesy?

A. Well, then I have to call up to get Bruce, and Mr. Stuber himself raised a big commotion. The child pleaded, cried to go with me. Mr. Stuber wouldn't let him go at first, then he would call me up, say he could go because Bruce wanted to go, and, in the first place, I don't see why he wouldn't let him go when he wanted to go with me. (Tr. 23).

Q. Well, by reason of what?

A. When I go down to see him, I am never asked into their home. I am treated like an outsider. I have even had the door slammed in my face.

From the foregoing and other testimony of the Respondent (Tr. 39) it is made plain why the Respondent felt she was not free to see her child as often as she liked and rather than have such difficulties as she complained of she did not see the child. She used good judgment in this respect.

As to the question of the welfare of the child, Appellant states in his brief (p. 18), "The Respondent, herself, was unable to disclose any want of care and consideration for the child." I ask the court to consider the following (Tr. 24):

Q. What is the relationship between you and the child; in other words, how does he feel towards you and you toward him, from your observations?

A. We get along very well. He seems to enjoy being

with me. I enjoy being with him very much. (Tr. 27-28).

Q. Yes, and there has never been any time you know of when Bruce hasn't been well taken care of?

A. I don't think he has been so well taken care of.

Q. Well, since when?

A. Since all the family went to work.

Q. Well, put it this way then: So far as you observed the situation, he wasn't as well taken care of after Mrs. Stuber—that is Mr. Stuber's mother—went to work?

A. Well, he was quite well taken care of, but I still don't think they gave him the love and affection that he needs. It is quite hard, I imagine, for people working to take interest in what goes on, I imagine it would be. I know that, at times, I have got him when he hasn't been as clean as I would liked to see him be.

Q. Well, that's the only thing you noticed?

A. He is very thin and very nervous, and I imagine it is hard on him, as well as everyone concerned, to have so many bosses. He is very emotional, he runs constantly. He isn't much interested in very many things. I have asked him about things; he doesn't like school. I have asked him how he—oh, what he does with his time, and he never gives me an answer. He doesn't have any interest in anything, as far as I can understand, just what he has told me. He has colds constantly. He is always sick, it seems like.

Q. Now, from your observation and what you know, Mrs. Stuber, is Mr. Stuber and his present wife and his mother, with whom the child lives, are all working?

A. Yes, they are.

Q. And how long has that been?

A. Oh, it has been quite sometime. I wouldn't say for sure.

A. Harvey's present wife has been working ever since she had her baby, as far as I know.

Q. When they are working, what becomes of your child?

A. He is put in the hands of a baby-tender.

Q. Has that been over a period, to your own knowledge?

A. Quite some time, I imagine. I know this one woman who is going to testify in court was there, from what she told me, for almost a year.

Q. Now, have you made inquiry with relation to Bruce's attendance at school? (Objection).

Q. What have you found out, Mrs. Stuber—not a conversation you have had, but what are the facts you have found?

A. When Bruce was first put in school, he wasn't even in school for almost a month. The teacher contacted the home and tried to get hold of the parents or his stepmother or father, and they got no reaction whatsoever from them. He was absent an awful lot. He was back in his school work. Then they took him deer hunting or somewhere for a couple of weeks. She said it was—he was in and out of school so much—they seemed to take no interest in it at all. She even wrote notes home and got no reply.

From further testimony of Respondent, and from information she obtained from the school, the child has been playing

truant; that no one took enough interest in him to help him along with reading etc. (Tr. 38).

have quoted at some length from the transcript, but this I have done for the purpose of apprising the court in detail as to the neglect and conduct of this child.

This child is and has been in the home of the father and his mother. The Appellant remarried and has one child. They all live in the same home. Mr. Stuber is a railroad man and is away from home a good portion of his time. His wife has been working most of her married life. His mother likewise has to work and the child is left with a baby tender during their absence from the home. The child cannot, under the circumstances, receive the care and attention he justly deserves and from these facts it is apparent we can account for the conduct of the child, and if continued, we cannot see that it is going to be for the best interest of the child.

While it is true these facts as testified to by Respondent were controversial in many respects by the Appellant, but who was in a better position to judge the truth of these things than the judge hearing the case, as he states in his decision (Tr. 88-89-90):

"The foregoing statement is the background facts as found by the court from the evidence adduced at the hearing, which findings are, in the court's mind, the only consistent findings one could make after seeing the witnesses and hearing the testimony in regard to those matters.

... finds that the best interests of the minor child, Bruce, requires that he be returned to the custody and control of the plaintiff, his mother, where the

original decree of divorce placed him; that the plaintiff is a most fit and suitable person to have the care and custody of said minor child; and concludes from all the evidence in the case and the attitude of the parties at the hearing, and matters which don't appear upon the printed page, that the interests of the minor child would not be observed, but would be endangered, by awarding its custody to the defendant."

In support of this proposition we quote from the decision of this court in the case of *Walton v. Coffman et ux*, 169 P 2d 97:

"As before stated this is an equity case. *Harrison v. Harker*, Supra; *Jones v. Moore*, Supra; *Jensen v. Earley*, Supra *Wallick v. Vance*, Supra *In re Barry*, Supra. It is therefore our duty to carefully examine the record and make an independent determination of what the facts are. In so doing we should keep in mind that the trial judge saw and heard the witnesses and observed their demeanor and was acquainted with the circumstances surrounding the giving of their testimony, and therefor was in a better position than we are to weigh and evaluate their evidence. *Stanley v. Stanley*, 97 Utah 520, 94 Pac. 2d 465, concurring opinion of Mr. Justice Wolfe commencing at page 527 of 97 Utah, 94 P. 2d 465."

Appellant sets forth the fact that if the child is to go with Respondent, its mother, she will have no better home to take it to than he has at present. It is true that temporarily the child will be taken to the home of the mother of Respondent, but I respectfully request the court to examine the testimony of Mrs. Ethel Kalian, the mother of Respondent as contained in (Tr. 41 to 48 inc.), in which she testifies to the condition of her home and the care that will be given to this child and

the love she has for him and the love he has for her, which will be until the Respondent remarries, which she expects to do in the near future. The child will be at least under the control of its mother, where it will be under her direction, without confusing the child as to having "too many bosses." I respectfully request the court to determine this from her testimony and the testimony of Respondent in this respect.

Appellant has attempted to show, in a weak manner, that the Respondent is not a fit and proper person to take care of her child, because she was then and had been going out with a married man, (Tr. 34-35) (Tr. 84) and that Respondent was living at No. 234 North Main Street in Salt Lake City, and was registered there during all of that period as Mr. and Mrs. Fred Bacon, which Respondent admitted, but for some unknown reason counsel for Appellant did not press this issue, and there is no further testimony as to why Respondent was registered under the name of Mr. and Mrs. Fred Bacon at that address. Had he pressed this the true and proper reason would have been brought out, which would have its explanation from an economic basis and no other.

The foregoing is all that was attempted to be proven by the Appellant of the unfitness of the Respondent to have her child. The mere fact of her going with a married man, whose divorce from his former wife was then pending, and she intended to marry him in due time, is certainly no evidence of her unfitness to have her child.

The court said in *Cooke v. Cooke et al*, 248 P. 83, at page 108:

"Then too, the unfitness which deprives a parent of the right to the custody of the child must be positive, and not merely comparative, or merely speculative. And too, as heretofore observed, the referee with respect to this matter had before him the witnesses and heard their testimony and found that there was 'no evidence or even a suspicion of improper relations between the defendant and Welch.' Thus a finding that the defendant is unfit to have the custody of the child is not, on the record demanded or justified."

We think we need not go further into this, as the evidence is entirely lacking as to the unfitness of Respondent to have and take care of her child.

POINT II

THE COURT ERRED IN ENTERING ITS JUDGMENT IN FAVOR OF RESPONDENT AND AGAINST APPELLANT FOR THE SUM OF \$220.00, BEING THE AMOUNT FOR WHICH RESPONDENT WAS AT SAID TIME INDEBTED TO THE COLLECTOR OF INTERNAL REVENUE ARISING OUT OF THE FACT THAT RESPONDENT FOR A PERIOD OF TWO YEARS CLAIMED THE MINOR CHILD, BRUCE STUBER, AS A DEPENDENT IN HER INCOME TAX RETURN AND ALSO ERRED IN REQUIRING THE APPELLANT TO PAY ANY OTHER SUM OR SUMS FOR WHICH THE RESPONDENT MIGHT BECOME OBLIGATED TO PAY THE COLLECTOR OF INTERNAL REVENUE BY REASON OF RESPONDENT CLAIMING SAID CHILD AS A DEPENDENT.

As outlined hereinabove, upon the granting of the divorce in favor of the Respondent and against the Appellant, the Respondent was not in a financial condition to care for the child, and that she had to go to work to support herself. The child was temporarily placed with her mother some two months. (Tr. 20). The mother of Respondent, because of her crowded condition at her home was not able to care for the child further and it was necessary for Respondent to find a suitable place for the child. She testified that the Appellant told her:

“When we were separated, that he wouldn’t pay me any money for the child nor myself if he had to rot in jail, so I let Bruce go down there to live (T-22). “We also talked about who would claim Bruce as a dependent. I said I would, and he agreed to it.” (Tr. 22). That was for the purpose of her income tax. She further stated on cross-examination as follows:

Q. Now, are you sure—positive—there was anything in the agreement about his, about your taking the child as a dependent?

A. We talked about it very definitely (Tr. 33).

In view of the statement of the Appellant, that he would not give to Respondent any money for the child or herself and that he would rather rot in jail, and her inability to take care of the child, the Respondent was placed in a position where she had to do the best she could under the circumstances. She stated definitely that if the Appellant would take the child, she would not expect to receive anything for the support of the child, but at no time did she release the Appellant from

the payment of alimony. She testified in response to a question of Appellant's counsel, that the agreement was to relieve Appellant from the payment of alimony, that "I told him if Bruce was well taken care of, there wouldn't be any trouble (Tr. 27). Again the question was put to Respondent by counsel and she testified: "I didn't say he should be released." (Tr. 33).

The Appellant denies that anything was said about permitting Respondent to take the child as a dependent on her income tax, but the court found that such an agreement was made and in accordance therewith held that she had waived her right to alimony in any sum in excess of that which plaintiff shall be required to pay to the Federal Government, but in accordance with such an agreement that she should be entitled to the amounts she would be compelled to pay the Collector of Internal Revenue by reason of taking the child as a dependent.

It is the contention of Respondent that until such time as the court modifies a decree for the payment of alimony, that the decree stands and the unpaid alimony accrues, unless by circumstances, the party entitled to it in some manner waives it, which the court in this case found Respondent had done except as stipulated in their agreement and in place thereof substituted the agreement between said parties to permit the Respondent to take the child as a dependent, and that the Appellant had breached this agreement with the Respondent. Respondent has not been mercenary regarding this matter and has not certainly imposed any unreasonable hardship on Appellant by giving up something far more substantial than she was to receive.

I feel reasonably certain that unless said agreement was actually made between these two parties, Respondent would not have taken or continued to take the child as a dependent on her income tax as a means to get something out of the Appellant in an indirect manner. What prompted her to take the child as a dependent if it wasn't the agreement?

Appellant contends that it was her duty at least to notify him of this—that he knew nothing about it until before Christmas, 1950. I cannot see where this makes any difference. Respondent is in a like condition with Appellant as he contends for. She did not know that he was taking the child as a dependent during this time and he never notified her. Had she known this, she would have in all probability taken some action against the Appellant to straighten this out. She certainly knew that both of them could not take the child as a dependent and she would not have continued to take the child and get herself into difficulties with the Internal Revenue Department, which must inevitably come, and did come. Because of the delay on the part of the Internal Revenue Department in discovering these things, she was not notified by them until some three years after she had been taking the child as a dependent. This question resolves itself on a question of fact, and the court so found that such an agreement was made and Appellant certainly cannot complain in getting off as easily as he did in this decision. If such an agreement was not made, then the Respondent would be entitled to all accrued alimony, unless otherwise waived through the laches of Respondent, or from some other sufficient cause, which we do not think she did in this case. Respondent never remarried, never waived or released the Appellant from the alimony, nor did he at any time petition

the court to modify the decree in relation thereto, and just because he took care of the child this certainly does not relieve him from the alimony judgment for the Respondent. I think the complaint should come from the Respondent, rather than the Appellant, with relation to the finding of the court.

We think nothing further need be said about this and let the matter be submitted on the testimony of said parties as to who was correct in this.

POINT III

THE COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF APPELLANT AND AGAINST THE RESPONDENT MODIFYING THE DECREE OF DIVORCE SO AS TO RELIEVE THE APPELLANT FROM THE PAYMENT OF FUTURE ALIMONY TO RESPONDENT.

Under Section 40-3-5 U. C. A. 1943, the court always retains jurisdiction of divorce action so as to modify the decree entered to fit the circumstances of the parties where there is changed conditions which would justify a modification, such as the disposition of the children, support of children, and alimony.

We respectfully submit that the Appellant in his answer (Tr. 9 to 15) has made no allegations with respect to changed conditions of said parties since the decree was entered which would entitle him to a modification of the decree. It is true that temporary arrangements were made between said parties, themselves with relation to the custody of the child and its support until such time as Respondent was in a position to again take care of the child. She is now in a position to properly

care for the child and under the evidence the court has seen fit, in its discretion, to grant her the right to take the child into her custody according to the provisions of the original decree, and the court did not see fit to disturb the provisions of the original decree. Had the court seen fit to deprive the Respondent of the custody of the child in this hearing and award the custody of the child to Appellant, then the question of support money and alimony should probably have been modified to fit the circumstances, but inasmuch as the court did not see fit to change the provisions of the original decree, the Appellant has shown no grounds of changed circumstances which would justify a modification of the decree.

The Respondent has never remarried, nor has her financial condition changed sufficiently to justify a reduction of alimony or support money. She testified she was earning about \$130.00 per month, (Tr. 41) and has been supporting herself with this. Her earnings are not sufficient for her to properly take care of and educate this child without the assistance on the part of the Appellant, in view of the increased cost of living since this divorce has been granted. \$30.00 a month is not sufficient to care for this child, nor the sum of \$50.00 a month as alimony is certainly not excessive to further aid her in this duty.

The only changed circumstances that the Appellant has shown is that he has remarried. In fact, that has enhanced his financial condition as both he and his wife have been working and are working. His income as testified to by him is \$400.00 per month with a take home pay of approximately \$350.00 per month (Tr. 49). His present wife testified she

is earning \$90.00 every two weeks, without deductions (Tr. 73). They have only one child to support. Mr. Stuber, the Appellant, testified that he has been paying to his mother the sum of \$60.00 per month for the care of the child in question without objection, but now he wants the court to modify the decree, cutting down the alimony to Respondent. With his income and the income of the Appellant, with the increased cost of living, and the increasing cost of caring for and educating this child, we are firmly of the opinion that Appellant has shown no changed circumstances to justify this.

Our courts have repeatedly held that unless sufficient changed circumstances are shown, the court has no authority to modify a decree in this respect.

This is well supported in the case of *Hamilton v. Hamilton*, 58 P. 2d, 11, wherein the court said:

“The power of a court to make amendments in particulars authorized by the statute just quoted is not without limits. Thus, in the absence of changed conditions or circumstances, a modification of a decree may not be had. *Cody v. Cody*, 47 Utah 456, 154 Pac. 952; *Sandall v. Sandall*, 57 Utah, 150, 193 P. 1093, 15 A. L. R. 620; *Tribe v. Tribe*, 59 Utah, 112, 202 P. 213; *Chaffee v. Chaffee*, 63 Utah, 261, 225 Pac. 76; *Carson v. Carson*, (Utah) 47 P. 2d 894.

We think we need not argue this question further, as it is a matter of fact which is based on the evidence and showing here, that the Appellant has neither alleged or proven any changed circumstances which would justify the court, in its discretion, to modify the decree with relation to alimony.

POINT IV

THE COURT ERRED IN AWARDING THE RESPONDENT ATTORNEY'S FEES IN THE SUM OF \$100.00.

Appellant argues that because of the holding of the court that the Respondent was not entitled to recover from the Appellant the amount she sued for in arrears on alimony, to-wit: \$3,500.00, she was not entitled to an award of attorney's fees.

She was compelled to bring her action against the Appellant to force him to do anything by way of paying alimony or the recovery of the custody of the said child.

The court in its decision (Tr. 89) states as follows:

" . . . and that defendant should not be held liable for any arrearages of support money, nor in the payment of alimony in any sum in excess of that which plaintiff shall be required to pay to the Federal Government, as indicated above in this memorandum, but that defendant should pay to the plaintiff or for her use and benefit such sums as plaintiff may be compelled to pay the Federal Government as deficiencies on her income tax."

In accordance with the court's decision the court made and entered in its findings of fact regarding this matter the following (Tr. 93):

"The plaintiff has waived her right to receive from the defendant any amount as alimony payments in arrears in excess of the amount or amounts she will be compelled to pay the Collector of Internal Revenue as herein set forth."

While it is true the court found that the plaintiff was not entitled to recover the full amount she asked for as unpaid alimony, but the amount the court did allow her, which was the amount she would have to pay to the Collector of Internal Revenue, was designated as alimony in the decision of the court and in the findings. If this amount was designated as alimony, which I construe it to be by the wording of the decision of the court and in its findings, then the argument of the Appellant fails. The fact that Respondent did not recover a judgment against the Appellant for the full amount she asked for does not change the fact that the amount awarded to her was for alimony, and she had to bring the action to enforce it. In accordance with the law made and provided in such cases, she was certainly entitled to recover an attorney's fee for the use and benefit of her attorney in this matter.

Appellant further contends that because the Respondent was working and earning the sum of \$130.00 per month, that this should relieve the Appellant of paying her attorney's fees.

Herzog v. Bramel, 23 P. 2nd, 345:

"Under statutes and codes similar to ours, we think it is generally recognized that the enforcement by citation or an order to show cause or by contempt proceedings, or orders or decrees with respect to the payment of monthly or other specific periods of alimony and counsel fees, for a failure and a willful refusal to pay the same, is one of the inherent equity powers of the court. Such has been everyday's practice in this jurisdiction for many years."

We think it will not be questioned that the court has the

right to award attorney's fees and costs in contempt proceedings or orders to show cause, and we need not cite further cases.

The courts have repeatedly held that such awards are within the sound discretion of the court hearing the matter. *Openshaw v. Openshaw*, 80 Utah 9, 12 Pac. 364. While this may be based upon necessity, we think the court from the evidence adduced can readily determine the necessity from the facts. A wife does not have to be destitute in order to receive such an award. This court has made such awards in cases where no testimony was introduced with relation to such necessities, and we quote the following:

Weis v. Weis, 179 Pac. 2nd 1005 at 1010 (Utah):

"This appeal is on the judgment roll. We do not have the testimony on the question of the defendant's necessity before us, so we must assume that the evidence supported the awards. The statute does not contemplate the awards for expenses of suit or for temporary alimony should be made only in those cases where the 'adverse party' (usually the wife) is destitute or practically so. It contemplates such awards when in the sound discretion of the court, the circumstances of the parties are such that in fairness to the wife she should be given financial assistance by her husband in her prosecution or defense of the divorce action, and for her support during its pendency. *Keeaer, Marriage and Divorce* (3rd 7d.) Section 604, page 679."

The testimony was that Respondent was earning \$130.00 per month, and in comparison with the income of the Appellant and his present wife, she was entitled to attorney's fees to help her prosecute this action in the sound discretion of

the court and she should be allowed additional attorney's fees to defray her expenses and counsel fees in this appeal in accordance with the decision of this court in *Dahlberg v. Dahlberg*, 292 Pac. 214.

There is much more that could be said in this matter and many more decisions that could be produced, but we think sufficient has been set forth herein to entitle the Respondent to have the decision of the trial court sustained in this matter.

Respectfully submitted,

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