

1953

## Vera T. Callister v. Alfred Cyril Callister : Brief of Respondents

Utah Supreme Court

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Arthur H. Nielsen; Dean E. Conder; Attorneys for Respondent;

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THE STATE OF UTAH**

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MAY 9 - 1963

Clerk Supreme Court, Utah

VERA T. CALLISTER,  
*Plaintiff and Appellant,*  
  
vs.  
  
ALFRED CYRIL CALLISTER,  
*Defendant and Respondent.*

Civil No. 7967

**RESPONDENT'S BRIEF**

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DEAN E. CONDER

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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VERA T. CALLISTER, <i>Plaintiff and Appellant,</i>	}	RESPONDENT'S BRIEF
vs.		
ALFRED CYRIL CALLISTER, <i>Defendant and Respondent.</i>	}	Civil No. 7967

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## STATEMENT OF FACTS

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Inasmuch as one of the points raised in connection with this appeal relates to the interpretation to be given to the Findings of Fact, Conclusions of Law, and Judgment originally entered by the trial court in the above entitled matter, in the light of the agreement executed by the parties, respondent desires to set forth briefly the facts relating to the action and leading up to the instant proceedings in which respondent sought to have the original judgment amended as to the amount of alimony which he had to pay.

The action for divorce was originally commenced by plaintiff against defendant on May 5, 1945. The complaint as filed requested the court to grant to the plaintiff (1) half of the real estate owned by defendant, particularly the home located at 442 "A" Street, and the

property in Cottonwood; (2) one half of the stocks and bonds; (3) cash in the amount of \$10,000.00; (4) alimony in the sum of \$600.00 per month and support money in the sum of \$150.00 per month; (5) certain insurance policies; and (6) household furniture and the 1937 Buick Sedan Automobile (R. 4). Thereafter and while the action was pending the parties executed an agreement entitled "Agreement of Property Settlement and Alimony" which bears the date of July 28, 1945 (Exh. A). Upon the execution of this property settlement, which also provided for payment of alimony by the defendant, the plaintiff went into court on the 30th of July, 1945, where the matter was heard and the court found that said agreement for property division and alimony and support money "is just, fair and reasonable" (R. 8). The court further awarded to the plaintiff, pursuant to the agreement of the parties which the court found to be just and reasonable, all of the items requested in the complaint and enumerated in numbers 1, 2, 3, 5 and 6 above. As to item number 4, however, the court without referring to the agreement between the parties reduced the demand of alimony from \$600.00 to \$400.00 per month and the amount of support money from \$150.00 to \$50.00 per month. The court in its findings, conclusions and decree specifically set out the real property which the plaintiff received and referred to the securities as "one-half of the securities attached in Schedule A of Exhibit A which is attached to the findings of fact and conclusions of law on file herein and by reference made a part hereof" (R. 20). The decree further provided in paragraph 5 thereof that "plaintiff be and she is hereby awarded judgment against the defendant for alimony in the sum of

\$400.00 per month during the life of plaintiff or until she remarries and for support money in the amount of \$50.00 per month for the support of the minor child" (R. 21). The judgment was dated the 30th of July, 1945 (R.23). The defendant complied with the decree and made all payments of alimony coming due under it (R. 46, 47).

Thereafter, on July 14, 1952, defendant, respondent herein, filed a motion to amend the judgment with respect to the alimony payments and requested the court to reduce the amount from \$400.00 to the sum of \$200.00 or such lesser amount as the evidence might justify under the circumstances. Plaintiff appeared and filed an answer requesting the court to increase the amount of alimony from \$400.00 per month to \$500.00 per month on the ground and for the reason that since said decree had been made and entered the circumstances and conditions upon which it had been based were materially changed and that plaintiff was in need of the additional sum as alimony. The matter came on for hearing before the court on the 28th day of November, 1952, on the motion of the defendant and the answer of the plaintiff. Thereafter, and while the matter was still before the court—but following the introduction of respondent's evidence—the plaintiff requested leave to file an amended answer, which request was granted, and the amended answer, omitting the claim for additional alimony, was filed on the 5th of December, 1952 (R. 30, 31, 116). The amended answer, like the first, admitted that the divorce decree provided "that plaintiff was to receive the sum of \$400.00 per month as alimony." (R. 30).

At the hearing on the motion no objection was made to the introduction of evidence on the ground that the



court did not have authority to modify the judgment for alimony, nor was the question raised with respect to the right of the court to modify the judgment with respect thereto until after the amended answer had been filed on December 5th. The first intimation that counsel in this matter had that plaintiff relied upon the "Agreement for Property Settlement and Alimony" between the parties as being binding and not subject to modification was when counsel for the plaintiff at or near the conclusion of the entire case stated "the alimony in this case is a matter of contract. We have withdrawn from our answer here, the affirmative relief of increasing this alimony. That is not our contention" (R. 147).

The court after taking the matter under advisement with respect to defendant's motion for amendment of the decree found that the original decree of July 30, 1945, provided in part that "plaintiff be and she is hereby awarded judgment against the defendant for alimony in the sum of \$400.00 per month" (R. 151); that since the entry of said decree defendant's income has materially been reduced and that he has been suffering from a heart condition consistent with coronary artery disease which has become progressively worse, requiring him to abstain from activities producing physical and mental strain or from prolonged exertion (R. 152). Based upon the foregoing findings, the court determined that the defendant was entitled to have the alimony reduced from \$400.00 per month to the sum of \$250.00 per month and entered a decree to that effect, dated December 31, 1952.

## ISSUES

In connection with this appeal, appellant has attacked all of the findings of the court without specifying any

particular finding and has argued the issues under five separate headings. For the purpose of replying to the arguments of appellant, respondent presents the following points to the court for consideration:

1. The monthly payment is alimony and therefore subject to modification.

2. The evidence supports the finding of the Court that the defendant's income has been materially reduced since the original decree.

3. The evidence supports the finding of the Court that defendant's health and his ability to earn have become impaired.

4. The evidence supports the Court's findings that plaintiff is receiving an adequate income and that the attorney fees and costs in the instant proceeding should be borne by the respective parties to this action.

## ARGUMENT

### I

#### THE MONTHLY PAYMENT IS ALIMONY AND THEREFORE SUBJECT TO MODIFICATION.

At the outset there should be no argument with the proposition that if the provision in the original divorce decree to the effect that the plaintiff "be and she is hereby awarded judgment against the defendant for alimony in the sum of \$400.00 per month" (R. 21) is a judgment for alimony, such judgment is subject to subsequent modification or change by the court even though the decree itself does not specifically reserve that right. The provisions of our statute, Utah Code Annotated, 1953, 30-3-5 reserve the right of the court to make such subsequent



modifications as the court shall deem reasonable and proper. See, also, Jones vs. Jones, 104 Utah 275, 139 P. 2d 222. Thus, the sole issue is whether or not the agreement between the parties was an independent contract of the parties or whether it was embodied in the judgment so to be superseded by the judgment and therefore become alimony. An examination of the decree of divorce in this case (R. 19) and an examination of the conclusions of law upon which the court made its original decree does not show that the court merely approved the contract between the parties but rather indicates that the court used this as a basis to aid the court in determining how much alimony should be paid and the court rendered judgment for \$400.00 per month as "alimony." Obviously, from a reading of the decree as well as a reading of the conclusions of law it appears that the court adopted the identical wording found in the agreement between the parties (R. 12).

The courts appear to be in accord in holding that where the contract is not merely approved by the court but is rather adopted and incorporated into the decree, that the agreement thereby becomes merged in the decree awarding alimony and support money. Any such agreement between the parties loses its contractual nature so that the court may thereafter modify the decree as to the amount to be paid. See annotation in 166 A.L.R. 679. In a case heretofore before this court, Jones vs. Jones, supra, the parties had entered into a stipulation to govern the property rights of the parties in the event a divorce was granted. This stipulation was incorporated in the findings and constituted a basis for the decree for alimony and for the support of the children. On appeal the ques-

tion presented to the Supreme Court was whether or not the court had jurisdiction to modify the provisions of the alimony decree which was originally based upon a stipulation between the parties. The court held:

“The question raised by the first contention can no longer be considered an open question in this State. In the recent case of Barraclough vs. Barraclough, 100 Utah 196, 111 P. 2d 792, 793, this identical point was raised. The parties had entered into a stipulation governing the amount of alimony to be paid. The stipulation was incorporated into the findings and made the basis for the alimony decree. The plaintiff filed a petition to modify the decree. We held in a Per Curiam opinion, that the court had the power to modify such a decree. In so holding, we stated: ‘In a divorce action the trial court should make such provision for alimony as the present circumstances of the parties warrant, and any stipulation of the parties in respect thereto serves only as a recommendation to the court. If the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party based on some change or circumstances warranting such modification.’ ”

The agreement between plaintiff and defendant (Exhibit A attached to the findings (R. 12) and also Exhibit A in this proceeding) indicates that the parties are using the written memorandum for the purpose of settling the differences and claims with respect to “property, alimony, support money, attorneys fees, and court costs.” The stipulation shows that a divorce proceeding was already in process between the parties, the complaint having been filed on April 7, 1945 (R. 6). The agreement between the

parties was made on the 28th day of July, 1945, while the decree of the court was entered on the 30th day of July, 1945. The decree recites throughout that this is for the purpose of settling the differences between the parties as to alimony and property and refers in paragraph three that the second party pay to the first party as "alimony" the sum of \$400.00 per month. This is undoubtedly a compromise between the amount asked for by the plaintiff in her complaint wherein she requested alimony in the sum of \$600.00 per month on both her first cause of action and also on her second cause of action.

In the case of *Alder vs. Alder*, (1940) 373 Ill., 361, 26 N.E. 2d 504, (Writ of Certiorari denied in 1940, 311 U.S. 670, 85 L.ed 430, 61 S.Ct. 29) the court in that case had before it the question of a modification of a decree and held as follows:

"Respondent could rely on the contract for the payment, and in the event of a breach of any of its parts could bring appropriate action for the enforcement of its provisions, or she had the right with the approval of petitioner to have a consent decree entered adopting the provisions of the agreement. The latter action having been taken, the provisions for quarterly payments to respondents as provided in the supplemental trust indenture and trust agreement of December 1, 1922, became merged in the decree. The fact that the decree adopted the terms of the agreement did not destroy or defeat the power of the court to alter such provisions when a change of circumstances justified a modification. *Maginnis vs. Maginnis*, 323 Ill. 113, 153 NE. 654; *Herrich vs. Herrich*, *supra*; *Camp vs. Camp*, 158 Mich. 221, 122 NW. 521."

The case of *Hough vs. Hough* (1945) 26 Cal. 2d

605, 160 P. 2d 15, presented a similar question involving a separation agreement between the parties and a subsequent divorce decree in which this agreement was incorporated. There the court held:

“Turning first to the relation between the separation agreement and the divorce decree, it appears to be well settled that if the agreement is presented to the court in a divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree. . . . In *Holloway vs. Holloway* (1935) 130 Ohio St. 214, 198 NE 579, 154 ALR 439, *supra*, the issue involved was whether a holding for contempt for failure to pay support allowances under a divorce decree which was based upon a separation agreement incorporated therein would be an unlawful imprisonment for debt, and the court held it would not because the obligation was on the decree and not the agreement, stating at page 580: ‘. . . A decree which incorporates an agreement is a decree of court nevertheless, and as soon as incorporated into the decree the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such. *Once the contract is merged into the decree, the value attaching to the separation agreement is only historical.*’ ” (Italics added).

The case of *Barraclough vs. Barraclough*, *supra*, decided by this court in 1941 and also cited by appellant in her brief in which the court has stated:

“However, the law with respect to property settlements not being applicable to situations where alimony is involved, we need not enter into a dis-

cussion of the above rule, which we conclude that the 'stipulation' the substance of which was incorporated by the court in its decree, was not a property settlement but an agreement as to what 'alimony' the court might award appellant in case a divorce was granted. It did not constitute a settlement of property rights between the parties. The agreement was just what it said it was, to wit: a 'stipulation' as to what appellant was willing the court should award her as alimony. And the decree was so treated as an award of alimony by both parties and the court. On two different occasions appellant sought the assistance of the court in compelling respondent to abide by its terms or be punished for contempt. The court willingly exercised its contempt power to enforce the decree; and respondent made no objection to such procedure on the ground that the decree sought to be enforced was not one for alimony.

"Therefore, the trial court erred in determining that the agreement here constituted a 'complete and final settlement of all alimony between the parties, and that such settlement has become a final judgment as to alimony \* \* \* insofar as a petition to modify is concerned.' In a divorce action the trial court should make such provision for alimony as the present circumstances of the parties warrant, and any stipulation of the parties in respect thereto serves only as a recommendation to the court. If the court adopts the suggestion of the parties it does not thereby lose the right to make such modification or change thereafter as may be requested by either party based on some change in circumstances warranting such modification. And where an appeal is taken from the judgment of the trial court in such case we will review the record to determine whether or not the appli-



cant is entitled to the relief sought in the petition to modify the alimony decree. *Hampton vs. Hampton*, 86 Utah 570, 47 P. 2d 419; *Openshaw vs. Openshaw*, 80 Utah 9, 12 P. 2d 364."

In the instant matter it was conceded by all of the parties to this proceeding that the decree for alimony was subject to modification since both plaintiff and defendant originally requested the court to modify the decree—plaintiff seeking to increase the award while defendant sought to decrease it. In her amended answer plaintiff further admitted "that said decree provided that plaintiff was to receive the sum of \$400.00 per month as alimony." Nor did plaintiff raise any affirmative defense with respect to the purported binding and conclusive nature of the Agreement for Property Settlement and Alimony in the pleadings filed in the case. In view of these facts the court might well say as it did in the *Barraclough Case*, *supra*, "the decree was so treated as an award of alimony by both parties and the court."

Insofar as the agreement of the parties in this case is concerned it treats of the subject of property settlement as well as the subject of alimony. Under the first provision plaintiff was to receive in effect one-half of all of defendant's property — both real and personal. This property settlement was complied with and is not in dispute. The parties also agreed upon the amount of alimony which appellant was to receive, it being the position of the respondent herein that the alimony provision stands in the same position as a stipulation between the parties as to the amount the court could award as alimony. This was in fact adopted by the court in the decree which is referred to herein.



As hereinbefore stated, every divorce decree in this state in which alimony is granted to the party must be deemed to have been made or entered by the court subject to the provisions of our code, Section 30-3-5, Utah Code Annotated, 1953, which authorizes the court to modify or revise the decree in case of a change of circumstances or where the conditions of the parties have been materially altered. See *Buzzo vs. Buzzo* (1915) 45 Utah 625, 148 Pac. 362.

The California court has summarized this position in the case of *Johnson vs. Johnson* (1930) 104 Cal. App. 283, 285 Pac. 902, 904:

“When the court awards alimony to an innocent wife it is not bound by the terms of a contract between the parties, either as to its amount or its duration. The power to make the award is drawn from the terms of the statute and not from the agreement of the husband and wife. It follows that the power to modify the award of alimony, either as to amount, duration, or time and manner of payment, is inherent in the court, unhampered by the terms of any contract which the parties might have entered into providing for the payment of any such alimony, when it is given in the order or decree as maintenance only. *Smith vs. Superior Court*, 89 Cal. App. 177, 264 P. 573; *Soule vs. Soule*, 4 Cal. App. 97, 87 P. 205; *Gates vs. Gates*, 54 Cal. App. 407, 202 P. 151; notes 58 A.L.R. 639.”

See, also, the annotation in 109 A.L.R. 1068.

The Wyoming Supreme Court in the case of *Lonabaugh vs. Lonabaugh*, 46 Wyo. 23, 22 Pac. 2d 199, held that where a divorce decree has adopted in part a contract of the parties relative to property settlement in alimony

payments, the court nevertheless, under the powers of a statute similar to ours authorizing the court to modify or amend its original decree, has the power to modify the decree relating to alimony notwithstanding such contract between the parties. This case was cited and approved and followed in a subsequent case of *Buchler vs. Buchler*, (1949) 65 Wyo. 452, 202 Pac. 2d 670. The Supreme Court of the State of Washington has held in the case of *Heuchan vs. Heuchan*, (1951) 38 Wash. 2d 207, 228 Pac. 2d 470, 476:

“The property settlement agreement is no hurdle, however, because, when appellant stipulated at the time of his first petition for modification that the payment provided for in the property settlement agreement were alimony, the payments ceased to be a matter that could be controlled by contract between the parties and became subject to such modification, alteration, and revision by the court ‘as circumstances may require.’ ”

So in the present case the parties hereto had entered into an agreement whereby the wife was to receive alimony as therein provided and then incorporated this provision as an alimony payment in the decree, thus making it alimony subject to the modification by our court under the provisions of the statute heretofore cited.

Point is made by appellant of the fact the alimony payment is supposed to continue during the lifetime of the wife or until she shall remarry. Thus, it is argued, this is not a proper alimony payment but is based upon a contractual relation between the parties. This court, in the case of *Murphy vs. Moyle*, (1898) 17 Utah 113, 53 Pac. 1010, referred to the laws of Utah, 1888, which read substan-

tially the same as present statute, Section 30-3-5 and stated:

“This statute is broad and comprehensive. Under it the court has power to make such a decree as the circumstances may warrant, and doubtless, if there is danger of the father squandering the estate, or if, from hostility or other cause he is likely to refuse maintenance to his wife, or support to his children awarded to her, and thus leave the children to be supported by the mother without aid from his estate, the court may make such order, respecting the property and the support and maintenance of the wife and children, as is just and equitable, *and such order or decree may be made to continue in force after his decease*; and the court may afterwards, if occasion shall require it, make such change in any decree as ‘will be conducive to the best interest of all parties concerned.’ ” (Italics added).

Thus, it is possible that a decree which provides for alimony payment to the wife may survive the death of the husband. It is within the discretion of the court as to whether or not alimony payments have to be paid by the husband’s estate after his death and until the death of the wife. See the notes in 18 A.L.R. 1050; 101 A.L.R. 326.

Appellant relies upon the case of Ettlinger vs. Ettlinger (California) 44 Pac. 2d 540, to the effect that the property settlement could not be modified in the instant matter. In the Ettlinger Case the property settlement was approved by the court; and the decree provided:

“It is further ordered, adjudged and decreed that *in pursuance of the aforementioned agreement* the plaintiff do have and recover from the defen-

dant the sum of \$250.00 per month.” (Italics added).

In distinguishing the property settlement involved in the Ettlinger Case with a previous case of *Armstrong vs. Armstrong*, 132 Cal. App. 609, 23 Pac. 2d 50, the Supreme Court of California stated:

“The instant case, as distinguished from the one just cited, presents an express confirmation and adoption by the court of the property settlement agreement. The court was therefore without jurisdiction to thereafter modify its provisions.”

The court further stated:

“In our opinion, the contract suggests that such payments were to be made to and received by plaintiff *as part of the property settlement and in lieu of property rights*. This would appear to have been recognized in both the interlocutory and final decrees of divorce for each provides that ‘neither the making of this decree nor anything herein contained shall in any manner modify, restrict, affect or prejudice the provisions or any of them, of said agreement hereinabove mentioned *which agreement and all of its provisions shall remain in full force and effect*.’ Each decree thereupon directs the payment by defendant to plaintiff of \$250.00 a month ‘in pursuance of the aforementioned agreement.’ ” (Italics added).

Thus, in the Ettlinger Case the court had before it an agreement of property settlement only and not one of property settlement with an additional provision with respect to alimony, which the court was required to pass upon. In the instant matter, the court in its decree referred to the agreement when it came to the matter of the division of the property, 1/2 of the real and personal property being

decreed and set aside to the plaintiff in paragraph 3 of the decree. Paragraph 5, however, of the decree, relates to the matter of alimony and makes no reference to the agreement between the parties in awarding to the Plaintiff the sum of \$400.00 per month during her life or until she remarries.

With respect to the provision in the decree to the effect that the alimony shall be paid until plaintiff remarries, such provision itself is an indication that it is alimony and not an award of property in lieu of alimony. In the case of *Rich v. Rich*, 44 Cal. App., 2d 526, 112 Pac. 2d 780, the property settlement agreement and the decree in connection with the divorce each provided that the payments would continue following the remarriage of the plaintiff. In that case after the plaintiff remarried the appellant moved to modify the decree and eliminate further payments accruing after such marriage and the court in refusing to modify the decree stated:

“The further clause that ‘said (monthly) payments to continue even in the event of remarriage’ indicates also that it was the intention of the parties that respondent should receive the full \$2,400.00.”

In the *Rich Case* the decree of the court originally provided:

“It is further ordered, adjudged and decreed that defendant shall pay to plaintiff the sum of \$2400.00 as alimony for her support and maintenance, payable as follows.” . . .

The decree set out the time and conditions of the payment and then ended with the provision “said payments to continue even though plaintiff remarries.” Ob-

viously, where the total amount of the money to be paid by the defendant to the plaintiff was specified in the agreement as well as in the decree and further both the agreement and the decree provided that such payments were to continue even though the plaintiff were to remarry, the Appellate Court properly required those payments to continue in the event of the remarriage of the plaintiff.

In the case of Puckett v. Puckett, 21 Cal. 2d 833, 136 Pac. 2d 1, cited by appellant, the court commented on the fact that the agreement between the parties "recites that the parties desire to effect a complete settlement of their property rights, that the provisions in the agreement shall be in full satisfaction of all rights to support and maintenance." After discussing the terms and conditions of the agreement and the settlement therein made, the court further stated:

"Although neither the value nor the character, community or separate, of the property was specified in the agreement, it would seem that the bulk of it was set over to the husband. . . . The court designated the agreement as a 'property settlement' . . . The court found that the divorce decree was made 'pursuant to and as a part of a property settlement agreement.'"

Therefore, because of the facts set out above and because the agreement provided for the payment of \$250.00 per month during such time as the parties remained married and following their divorce, the Supreme Court refused to allow the decree to be modified holding that it was, in fact, a property settlement between the parties and not alimony.



All of the California cases relied upon by appellant are distinguishable on the facts from the instant case but the statements of law set out by the court in the various opinions would indicate that in this particular case the agreement between the plaintiff and defendant, insofar as the provision for alimony is concerned, was only a attribution as to what the parties felt to be fair and reasonable but subject to the discretion of the court. We therefore submit that the evidence supports the determination of the court that the provision for alimony could be modified and that it was not a matter of contract between the parties which the court could not change.

## II

THE EVIDENCE SUPPORTS THE FINDING OF THE COURT THAT THE DEFENDANT'S INCOME HAS BEEN MATERIALLY REDUCED SINCE THE ENTRY OF THE ORIGINAL DECREE.

While not directly attacking the finding of the lower court to the effect that respondent's income has been materially reduced since the entry of the original decree, appellant proceeds on the theory that the evidence shows that Dr. Callister has "voluntarily impoverished" himself and therefore such voluntary impoverishment should not be a grounds for a modification of the divorce decree. We submit that the evidence in this respect does not show any voluntary impoverishment. On the other hand it shows a constructive effort on respondent's part to build up a practice of medicine and to provide adequate and wholesome facilities for the treatment of patients who might come to him. Dr. Callister testified that the oc-

cupancy and use of the clinic has made it possible for him to devote more time to his practice; that he had very few house calls and a great deal of his "work is surgery and plastic surgery and I am able to concentrate all of my efforts in one spot and be able to accomplish quite a little with less effort." That the operation of the clinic and hospital with his private practice made it easier for him because of his physical and mental condition. (R. 111).

The case of *Osmus vs. Osmus*, 114 Utah 216, 198 Pac. 2d 233, cited by appellants is in no way applicable to the facts in the instant matter. There the court specifically stated that the evidence supported the trial court's determination that the defendant had "intentionally deprived himself of the ability to comply with such order." The trial court had found that the defendant was in contempt of court for failing to comply with the order of the court for payment of alimony (the amount of which he had voluntarily consented to in connection with the obtaining of the wife's divorce). The court held that "so long as such decree stands, it is incumbent upon him to comply with it, or at least to exercise every reasonable effort to comply with it. If because cause of change in the circumstances of the parties it appears that the decree is inequitable, or impossible to comply with, he may petition for modification."

In the instant case the defendant has complied with the order of the court and made reasonable effort to comply but has sought relief from the order on the grounds of change of conditions and circumstances which the trial court found to have occurred, and therefore such deter-

mination of the trial court should be affirmed on appeal.

This court has on numerous occasions had before it appeals involving the question of whether the evidence was sufficient to show a change of circumstances justifying a reduction in alimony. In the case of *Hampton vs. Hampton*, 86 Utah 570, 47 P. (2d) 419, the lower court refused to modify the decree as to alimony and support money. This judgment was reversed on appeal by the Supreme Court on the grounds that the evidence showed that defendant's salary had been reduced from about \$2,100 to \$1,500. Since the original divorce he had remarried and had one child by his second wife, who were dependant upon him for support.

Respondent, in this case, testified that in the year 1944 his gross professional income was \$26,069.08 and that after deduction of expenses and depreciation he had a net income from his practice of \$12,686.91. At that time respondent was occupying quarters in the Medical Arts Building (R. 92). He testified it was necessary in the interests of his profession that he move to the new location and have a clinic and hospital available in order to render better service to his patients—many of whom came to him for plastic surgery where it required that they be hospitalized only a short time (R. 93-95). As a result of operating the clinic in connection with his medical practice the respondent's gross income materially increased—but likewise the expenses of maintaining his office, the clinic, and expenses for nurses, professional assistants, and upkeep have increased so that in 1951 he had a net income (before payment to Mrs. Callister of \$4800.00 alimony) of \$6699.64. (R. 52). The preceding year (1950) when the clinic was operating separately as a non-profit corpora-

decree was originally entered (Exh. F). In neither 1950 nor 1951 did he have to pay any Federal income tax. For the first six months of 1952, respondent's net income (after interest, depreciation and taxes) was \$3653.25 out of which he paid appellant \$2400.00 alimony. (R. 53).

Appellant argues that respondent should not be allowed depreciation as an item of expense. It is noted that in calculating his income as of the time of the original divorce decree, depreciation was an item considered in arriving at his net income. Too, in lieu of payment of rent for office space (which was required when Dr. Callister had offices in the Medical Arts Building) depreciation on the building is taken at the rate of \$2500.00 per year (Exh. G). Certainly this is not exorbitant rent to pay for the use of his quarters and for the clinic. The balance of the depreciation is for the equipment used in his profession—much of it being instruments which have to be replaced frequently in order to keep up with the standards of the profession — particularly in the field of plastic surgery. Likewise, in calculating appellant's income from her apartment house operations, such net income was determined *after* a generous allowance for depreciation.

### III

THE EVIDENCE SUPPORTS THE FINDING OF THE COURT THAT THE DEFENDANT'S HEALTH AND HIS ABILITY TO EARN HAVE BECOME IMPAIRED.

Very little is said by appellant in respect to the matter of respondent's health. Dr. Viko, eminent in the field of heart diseases, testified that he was long acquainted with both of the parties to this action (R. 34); that in April, 1949, he gave respondent a physical check-up,

tion, Dr. Callister had a gross income from his practice of only \$22,717.97, considerably less than when the divorce which included an electrocardiogram; that the purpose of taking an electrocardiogram is to determine whether there has been any heart muscle change; that he then found "nothing abnormal about the heart, and the electrocardiogram was normal." (R. 35-36). Since that time he has examined respondent on January 27, 1951, and again on May 28, 1952, on both of which occasions he found heart muscle change—there being additional change occurring between January, 1951 and May, 1952 (R. 37). He finally examined the respondent just a few days before the hearing in the instant matter and found that in some respects the electrocardiogram was better and in another way worse (R. 38). "It showed quite marked irregularity of a kind known as auricular premature beats." (R. 38). As to the future condition of respondent Dr. Viko testified that "this is one of the most unpredictable types of heart disease there is. There is very great variation from case to case in the rate of progress of the disease. Often it will stand still without progress for long periods; there may be a period of improvement; there may be a sudden episode that markedly changes the course for the worse." (R. 38, 39). As a result of his findings the witness testified that he had advised respondent to curtail his nervous and physical activities; to avoid night work as far as possible; to avoid long hours of work in his practice; and to avoid strain of any kind. (R. 39).

On cross-examination counsel for appellant asked Dr. Viko if it would not have been possible for Dr. Callister to have been suffering anginal pain in March, 1945, when he apparently indicated in a letter (Exh. B) that he had



suffered from such pain. Dr. Viko stated that when he examined Dr. Callister in 1945 the latter advised the witness that he had been suffering from a pain over the heart "which he wondered about as being anginal and at that time, in my opinion, it was not heart pain." The witness testified that he diagnosed the pain as being an "intercostal neuritis." (R. 43).

In addition to the testimony of Dr. Viko, which stands uncontradicted, we also have the testimony of respondent as to his general physical condition, his inability to work long hours; the nervous strain he is required to work under at times in order to keep up the payments necessitated by the divorce decree. Certainly the evidence in this case is much stronger than that in the case of Openshaw vs. Openshaw, 80 Utah 9, 12 P. 2d 364, where the Supreme Court reversed the trial court and modified the decree as to the payment of alimony, reducing the same, stating:

"The real question in controversy is: Can the husband pay an allowance of \$175 per month? He says he cannot and that the decree is oppressive for that reason. The evidence seems to bear out his contention to some extent. His health is failing. Unless he slows up in his work, according to the testimony of his physicians, who seem to be disinterested witnesses, he will suffer a breakdown. His income in recent years from the practice of his profession has been falling off and will fall off more when he reduces the extent of his practice."

#### IV

THE EVIDENCE SUPPORTS THE COURT'S FINDINGS THAT PLAINTIFF IS RECEIVING AN ADEQUATE INCOME AND THAT THE ATTORNEY



## FEES AND COSTS IN THE INSTANT PROCEEDING SHOULD BE BORNE BY THE RESPECTIVE PARTIES TO THIS ACTION.

Appellant argues that her income (which, together with the present alimony payments of \$250 per month is greater than respondent's) is a result of "prudent management of capital assets received at the time of the divorce." We readily concede that appellant has done well with the property which she received in the divorce. In 1951 she received from rentals (after allowance of interest, taxes and depreciation—the latter being a bookkeeping entry only) the sum of \$4,255.85. In addition, she received dividends from stocks, interest from loans and investments, and capital gains from sale of properties. Certainly this is just another circumstance justifying the modification of the decree. It shows that Mrs. Callister is competent to care for herself and provide an income sufficient for all her needs, thus making her independent of respondent. The award of alimony is not a "penalty" which should be enforced against respondent. Under the provisions of Sec. 30-3-5, U.C.A. 1953, the court may make such order with respect to alimony or expenses "as may be equitable." We submit that the determination of the court in the instant matter requiring the parties each to bear his own costs was equitable and justified under the evidence. There is no evidence that appellant is in financial need or that she does not have adequate income or finances to pay her attorneys. No request was made for an allowance of costs or attorney fees pending the action, as is frequently done where the divorced wife has no independent income and the husband has failed to comply with the order of the court.

The sole claim which appellant seems to have to be allowed attorney fees and costs is that the property settlement agreement so provides. However, since the court already has discretion to allow attorney fees and costs under the statute, the provision is of no effect. Too, this was a proceeding to modify the divorce decree—not to change or modify the Property Settlement Agreement. Appellant did not plead a violation of such agreement and hence there is nothing in this case which would justify a determination that attorney fees should be awarded.

## CONCLUSION

By way of summary, and in conclusion we respectfully submit:

1. The decree awarding plaintiff-appellant the sum of \$400.00 per month as alimony was subject to modification upon a showing of a change of conditions and circumstances. The parties have at all times treated the decree as one for alimony and so treated it in the lower court. No issue was raised by the pleadings to the contrary; and the fair and reasonable interpretation to be given to the agreement and the decree of the lower court is that the provision is one for alimony and not a contractual obligation between the parties arising solely from the written memorandum.

2. The evidence sustains the findings of the trial court as to the change of conditions and circumstances justifying a reduction of alimony from \$400 to \$250 per month and requiring each party to bear his own costs. As we view the matter the evidence is such that the low-

er court might well have reduced the alimony more than it did so that appellant should not be heard to complain.

3. The judgment of the lower court should be affirmed, appellant to pay the costs incurred in connection with this appeal.

Respectfully submitted,

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