

1980

Owen Ray Knuteson v. Jacqueline A. Knuteson : Appellant'S Brief

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Knuteson v. Knuteson*, No. 16924 (Utah Supreme Court, 1980).

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IN THE SUPREME COURT OF THE STATE OF UTAH

OWEN RAY KNUTESON

Plaintiff and
Appellant

vs.

JACQUELINE A. KNUTESON

Defendant and
Respondent

Case No. ¹⁶⁹²⁴~~16615~~

APPELLANT'S BRIEF

Appeal from the Order and Judgment
of the Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Christine M. Durham, Judge

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FILED

APR 29 1980

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Case No. 16615

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is plaintiff's appeal from the court's finding that defendant was not residing with a person of the opposite sex, as provided for under Section 30-3-5(3), Utah Code Annotated 1953, as amended, and from the order of the court denying plaintiff's motion to terminate alimony.

DISPOSITION IN LOWER COURT

Plaintiff filed his affidavit in support of an Order to

Show Cause, upon which the court entered its order requiring defendant to show cause why the alimony awarded to defendant under a Decree of Divorce should not be terminated because defendant was residing with a person of the opposite sex. The hearing was held by the court on December 19, 1979, whereupon the court found that defendant had not been living with a person of the opposite sex, as referred to in Section 30-3-5(3), Utah Code Annotated 1953, as amended, and extended its order denying plaintiff's claim that alimony should be terminated. From this Order and Judgment plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the order of the lower court reversed, and for an order terminating alimony.

STATEMENT OF FACTS

A contested divorce was heard by the trial court on the 13th of August 1979, with the Findings of Fact, Conclusions of Law and Decree of Divorce being entered by the court on September 10, 1979 (R pg After the trial of the divorce matter, but before the

decree was signed and entered by the court, defendant, on about August 27, 1979 (Tr 26), moved from the home awarded to her, moving a part of her furniture (Tr 24), and most of her personal items, and moved into the house of a male friend, Gay Conder, where she resided until approximately November 7, 1979 (Tr 29). During this period of time, she occupied the bed and bedroom with Conder (Tr 30), and engaged in regular sexual intercourse (Tr 20), living, as it were, like husband and wife. Plaintiff learned of defendant's conduct and filed his motion for termination of alimony. Before defendant was served with the court's Order to Show Cause, she moved from Conder's home and returned to her own home, but continued to have sexual relations with Conder (Tr 21). The conduct and sexual relations between the defendant and Conder were admitted by both in their testimony before the court (Tr 20, 30).

ARGUMENT

POINT I

PLAINTIFF WAS ENTITLED TO AN ORDER
TERMINATING ALIMONY REQUIRED TO BE PAID
TO DEFENDANT BY REASON OF DEFENDANT'S

CONDUCT, AND IN ACCORDANCE WITH
SECTION 30-3-5(3), UTAH CODE ANNOTATED
1953, AS AMENDED.

This matter is primarily one of fact and definition of the law, and appears to be one of first impression before the court.

Plaintiff maintains that the undisputed facts before the court show that even prior to the entry of the Decree of Divorce, and continuing after its entry, that defendant was residing with a person of the opposite sex, with an admitted conduct of regular sexual contact.

In filing his motion for termination of alimony, plaintiff relied upon Section 30-3-5(3), Utah Code Annotated 1953, as amended, which provides:

"(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party 'establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact. '"
(Emphasis mine).

The wording of this section of the statute appears to be mandatory, since it says that the alimony order "shall be terminated"

upon establishing that the former spouse is residing with a person of the opposite sex. Here, not only did plaintiff establish that defendant was residing with a person of the opposite sex, but he established that the defendant had moved in with furniture, personal property, and with her minor children, and lived as husband and wife, occupying the same bed and enjoying regular sexual "contact;" all of this while plaintiff was under an order of the court to support her by the payment of alimony. All of the provisions of Section 30-3-5(3) have been met and, clearly, the intent of the legislature, to prevent the injustice of alimony being paid to a former spouse who chooses to live with another partner, has been established.

It is conceded that a single incident of sexual misconduct was not the concern of the legislature but, in the case before the court, defendant's conduct is no mere single incident. Here, she moved in, brought her furniture, personal property and children, and children, and gave her new partner all of the benefits of marriage, without the legality of marriage. The fact that she was not living in Mr. Conder's home at the time the matter was finally heard by the

court, should not alter the truth of the fact that she had been, and was, living with him when the plaintiff requested the court's assistance. These are the facts that exist, notwithstanding the court's conclusion that defendant was not residing with a member of the opposite sex, as defined by Section 30-3-5(3).

Webster's New Twentieth Century Dictionary, 2nd Edition, defines the word "reside" as:

"To dwell permanently or for a length of time;
to have a settled abode for a time; to abide;
to live in or at."

From this definition, and from the facts, it seems clear that the defendant, by living with Mr. Conder from August 27 to November 7, certainly did reside with him.

The issue here is purely one of statutory construction. The courts of this state have no common-law jurisdiction over divorce or its incidents. The power to modify a provision for alimony is only such as is conferred by statute.

Prior to the enactment of 30-3-5(3) in 1979, remarriage of the former wife was generally necessary before alimony could be

terminated. In 1979, the legislature, recognizing the great change in personal relationships brought about by the era of "new morality", enacted Section 30-5-5(3), in order to allow the courts to consider the effect of newly formed relationships upon the requirement to pay alimony. The language is unequivocal in its position, and it is clear that the legislature intended the courts to recognize current socio-realities in applying the statute.

Unlike the provisions of the California laws which, prior to 1976, required proof that a former spouse was living with a person of the opposite sex, and holding himself or herself out as the spouse of the person for a total of 30 days, and which now only provides that there is a rebuttable presumption affecting the burden of proof of decreased need for support in the event of cohabitation with the opposite sex (California Civil Code, Sec. 4801.5); Section 30-3-5(3) requires only that the former spouse resides with a person of the opposite sex.

Therefore, the fact that defendant elected to enter into a meretricious relationship should be sufficient to justify the

termination of alimony.

POINT II

THE COURT SHOULD REQUIRE DEFENDANT TO REPAY ALL ALIMONY RECEIVED BY HER.

Since defendant, as established by her own testimony, moved into the Conder home and began to reside with him even before the Decree of Divorce was entered, it seems only proper that all monies paid to her as alimony should be returned to the plaintiff.

While this subject has not been addressed by this court, it was considered by the California court in the matter in In re Marriage of Ludwig, 130 Cal Rptr 234. There, the court held:

"Upon receipt of support money after January, 1975, where a spouse is holding himself or herself out in the manner operative under 4801.5, the receiving spouse is no more than an involuntary trustee of the funds received. Upon proper motion to the court, and proof of the operative facts to the satisfaction of the court, its order properly shall issue requiring return of those funds."

The trial court did not consider this question, having determined that defendant was not residing with a person of the opposite sex, as contemplated by Section 30-3-5(3). It is the

prerogative of this court, acting in equity to consider this question and to enter its order requiring repayment of the alimony paid by plaintiff to defendant. King v. King, 478 P2 492; 25 Ut2 163.

CONCLUSION

Based upon the facts before the court, plaintiff respectfully submits that the provisions of Section 30-3-5(3) are applicable, and that the conduct of the defendant was exactly that contemplated by the legislature in enacting that provision. Thus, the trial court committed error in failing to grant plaintiff's motion for termination of alimony. This court should therefore reverse the trial court and enter an order terminating the provisions of the Decree of Divorce requiring plaintiff to pay to defendant alimony in the sum of \$150 per month. Additionally, the court should enter its order requiring defendant to repay all sums paid to her as alimony.

Respectfully submitted this

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