

1955

Laura M. Price v. Edward E. Price : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

FILED

OCT 24 1955

Clerk, Supreme Court, Utah

LAURA M. PRICE,

Plaintiff & Respondent

vs.

EDWARD E. PRICE,

Defendant & Appellant.

Case No. 8342

RESPONDENT'S

BRIEF

Appeal from the District Court of
the First Judicial District of
the State of Utah In and For
the County of Box Elder

Hon. Lewis Jones, Judge

Reuel G. Daines

Attorney for Plaintiff

and Respondent.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LAURA M. PRICE,

Plaintiff & Respondent

vs.

EDWARD E. PRICE,

Defendant & Appellant.

Case No. 3342

RESPONDENT'S

BRIEF

ADDITIONAL STATEMENT OF FACTS

The respondent feels that it is necessary to call to the court's attention the following additional facts.

That in addition to awarding the plaintiff the custody of the children except for Belora Price on the 18th day of October an order was made by the court amending the decree of divorce and requiring that the defendant assume and pay the mortgage indebtedness to the Bear River State Bank in the sum of approximately \$1500.00. (09:30 42).

That the award to the plaintiff of \$60.00 a month and the distribution of the property was not only based upon the defendant's capabilities of

earning \$200.00 a month gross, but was also based upon the facts that the defendant was required to assume and pay an indebtedness to the Bear River State Bank in the sum of approximately \$1500.00, (Ct. Re. 62).

Attempts were made to force the defendant to pay the indebtedness to the Bear River State Bank in the approximate sum of \$1500.00 which was a lien on the property awarded to the plaintiff, and this court found on the 23rd day of July 1947 that the defendant wilfully failed and refused to make the \$200.00 a month payments to help support the minor children and also wilfully failed and refused to make payments on the mortgage indebtedness, and the said defendant on said date was found guilty of contempt of court and was committed to the Box Elder County jail for a period of ten days, (Ct. Re. 54, 55, 57).

That another order to show cause was issued and a satisfaction and release of judgment and a release of lien on real estate was filed in this court on March 22, 1948, which purported to acknowledge payment of the mortgage indebtedness to the Bear River State Bank in the sum of approximately \$1500.00 and

also purported to have satisfied the judgment and decrees pertaining to alimony and support money and payment of the mortgage and to discharge the defendant from both judgments and release the real estate in Tremonton by reason of the said decree and amended decrees (St. No. 64).

The plaintiff again brought the matter into court on order to show cause and a petition for modification of the decrees. Defendant filed a return on Order to Show Cause and also Objections and Answers to the petition for modification, (St. No. 65 to 73). These matters were all tried together and the court on February 1st, 1935, filed its Findings of Fact and Conclusions of Law. The court rightly found among other things that the satisfaction given by plaintiff was not valid as against the interest of the minor children and that the defendant had willfully and unlawfully failed to pay the alimony and support money as required by the said decrees and that there was due and owing under the said decrees the sum of \$4450.00 as of May the 15th, 1934, and that the children's share of the above amount is the sum of

That the said minor children were the age 9 and 11 and they are still dependent on the defendant for support and that the sum of \$25.00 a child per month was a reasonable amount for their support and that the defendant was more or less in constant receipt of wages and income sufficient to pay \$25.00 per month a child for their support. The court further found that the defendant wilfully, unlawfully, and contemptuously failed and refused to make the payments as required by the said decrees. (St. No. 04,04,05).

The defendant made objections to findings and Order and the court reduced the children's share in the said findings and order to \$100.00. (St. No. 07, 08, 09).

The respondent will supply the remainder of the facts during the course of her argument, believing this will be in the interest of clarity as well as to shorten this brief. Respondent will answer the appellant's argument, point by point in the order in which presented.

ARGUMENT

Point No. 1: The lower court made sufficient find-

8.

Appellant argues that there has been no proof of change of circumstances such as to require a change in the terms of the decree. In plaintiff's petition for modification, she alleges that the cost of living has materially increased, that the two minor children are now attending school, and are in need of clothes and support, personal care, dental and medical services, and that they are now of the ages of 9 and 11 years. (Ct. Re. 71,72). At the time of the decree the children were of the ages of 1 and 3 years. Plaintiff further alleges that since the decree of divorce she had remarried and therefore was not entitled to alimony. (Ct. Re. 71,72). The defendant in his objections to modification alleged that there were four minor children at the time of the decree and that there are now two minor children to be supported. (Ct. Re. 73,77). The defendant in his return alleges that the plaintiff had remarried and was divorced and subsequently married again. (Ct. Re. 74) and in his

objections to modification he alleges that there has been a change of circumstances, and also alleges that there has been a release of alimony and support money, that the gross earnings of the defendant have been diminished, that the defendant is remarried and has one child, and many other allegations to show that there has been a change of conditions. (Ct. Re. 7B). Evidence was introduced in the above matters which definitely shows that there should be in fairness and equity a change in the terms of the decree and a modification of the duties of the defendant toward his two minor children establishing the amount due by the terms of the decree, and his case comes squarely within the ruling of the case cited by the defendant of *Osmus v. Osmus*, 114 Utah 233, 198 P2d 233. (Tr. 58 to 62). In paragraph two of the lower court's findings, the court found:

"...That paragraph three of the said Decree awarded to the plaintiff the care, custody, and control of 4 minor children. Two of the said children that were awarded to the plaintiff under said

decree are Owen Price, age 11, and Tamara Price, age 9, who are now in the care, custody and control of the plaintiff. (Ct. Re. 83) (Tr.58)."

The lower court further found as a change of condition that the plaintiff had remarried and was not entitled to any alimony.(Ct. Re. 84). This fact was admitted by the plaintiff in her petition for modification.(Ct. Re. 71) and was admitted by the defendant.(Ct. Re. 75). Thus the plaintiff has shown changed circumstances and according to Anderson v. Anderson, 110 Utah 300, 172 P2d 132, where the changed circumstances were that one child lived with its father (the defendant) and the mother (the plaintiff) had remarried and was no longer entitled to alimony payments the court said at page 135 and 136 of 172 P2d;

"...This (the changed circumstances) does not mean that the defendant will be entitled to have the \$75.00 per month allowance reduced pro rata. The criterion for determination of support money is the need of the persons supported and the defendant's ability to pay."

The court did find in the instant case:

"That the defendant since the time of the decree has been engaged in the house moving business and has been continually in receipt of money and was able to pay the said support money and that he has wilfully, unlawfully and contemptuously failed and refused to make the payments as required by the said decree and that he is now continuously in receipt of money, and well and able to pay the amount awarded for the support of the said minor children."

"The court further finds that the defendant at all times hereinabove mentioned was and still is an able bodied man in more or less constant receipt of wages and income sufficient to pay \$25.00 per month support money for each of the two minor children.(Ct.Re.84)."

It was almost impossible for the court to find a definite amount of earnings of the defendant, because of defendant's own testimony, and furthermore it is not necessary to make a definite finding especially when the defendant makes it impossible by his own testimony. A part of his testimony is as follows:

- Q. How many pieces of property?
- A. I made \$1195.35 last that's in '53.
- Q. What was your gross?
- A. No, the gross was \$2,420.
- Q. \$2420.00?

Q. That's close enough. Now, in all of those years-- first, do you know what you make in 1953?

A. Yes, I know what I made, I made \$2500.00.

POINT No.2.

The lower court did not err in its findings of fact No.5 and the said findings is overwhelmingly supported by the evidence in this case. The defendant argues that because he has suffered heart trouble that he should not pay any support money for his children. Dr. Viko stated that the defendant has rheumatic heart disease with probably some arteriosclerotic myocardial change in addition and he recommends that he should do no heavy manual labor, but he goes on to recommend that he reduce his weight twenty pounds (Defendant's Ex.1). Even in his present condition of carrying around an extra twenty pounds, the defendant is still able and has been ever since the time of the divorce to conduct a moving business in which he is associated with two others. The defendant testified

had been in the moving business since 1948 (Tr. 20). At the time the decree of divorce was granted in 1946 the court found that the defendant was a trucker by trade and capable of grossing \$250.00 per month. (Ct. Re. 20). The plaintiff testified that the defendant was engaged in the moving business in 1946 and that he is still in the moving business, and that he makes money all the time. (Tr. 60). There is also other evidence to support the finding. The balance of defendant's point no. 2 will be answered in point no. 3.

POINT NO. 3

THE LOWER COURT PLAINLY DID NOT ERR IN FINDING JUDGMENT TO THE PLAINTIFF IN THE SUM OF \$1880.00 AND FINDING THAT THERE WAS DUE UNDER THE DECREE THE SUM OF \$4450.00.

The only error committed here was that the court failed to make a finding and decree giving the plaintiff judgment for the sum of \$4450.00. The judgment of the lower court awarding the plaintiff the sum of

\$1500.00 and determining that \$4450.00 was due under the decree is sustained by the following evidence. The divorce decree of 10 August 1946 requires the defendant to pay \$50.00 for alimony and support money. The amended decree of divorce requires the defendant to assume and pay the mortgage indebtedness to the Bear River State Bank in the sum of approximately \$1500.00. (Ct. Re. 42). This is no doubt the same \$1500.00 referred to in the lower court's finding No. 1 dated the 23rd day of July 1947. (Ct. Re. 53), and also the \$1500 referred to in the purported Satisfaction and Release of Judgment and Release of Lien on Real Property. (Ct. Re. 64).

The release which the plaintiff signed (Ct. Re. 64) and referred to in appellant's brief page 11 was invalid. The Satisfaction and Release of Judgment was invalid and never did purport to release the defendant from paying the alimony and support money,

12.

the date of the said release, (Ct. Re. 64) and appears to be releasing certain property from a lien imposed on the real estate by reason of the said decree and the amended decree. This was at the time the money was turned over to Mr. Shumway no doubt to pay the \$1500.00 mortgage indebtedness that the defendant was already required to pay. The plaintiff did not receive any money at the time the release was given or at any time subsequent. (Tr. 56, 68). She did not want to release the defendant from any payments (Tr. 56). Mr. Shumway testified that the plaintiff would get a \$1500.00 credit on her mortgage (Tr. 7). This credit is no doubt the same obligation that was referred to in the amended decree of divorce. (Ct. Re. 42). It does not appear that there was any consideration for the purported release, because the plaintiff already was required to pay the \$1500.00 mortgage indebtedness to the Bear River State Bank.

13.

points involved in this case have been decided by this Supreme Court in Smith vs. Smith, 117 Utah 523, 218 Pac.2d 270, and Anderson vs. Anderson, 120 Utah 300, 172 Pac.2d 132. In Anderson vs. Anderson, supra, the Supreme Court of this State held that the mother of minor children could not waive the provisions of a decree providing for support of a child, as the award was for the benefit of the child. The Court said:

"We see no reason why the court could not likewise require him to pay a sum equal to the installments which had been unpaid. The court was doubtless reluctant to specifically hold defendant in contempt when the plaintiff had told him she did not want any more money from him when she remarried. She could not waive the right of the two children who did remain with her to be supported by defendant as required by the decree."

However, in Smith vs. Smith, supra, this Court held that after the parties entered into a settlement and the court made an order which recited that the settlement was to full satisfaction

alimony and support money due or to become due, the settlement satisfied only the alimony and support money then due and owing rather than alimony and support money which would thereafter become due under the decree of divorce. However, in the plaintiff's case there was no order of the court approving the settlement and the release should not be valid as to the children's portion due as of the signing of the release even though the court should hold that the release was valid as to the plaintiff. Also there was no recital in the purported release which the plaintiff signed that the purported release was in settlement of alimony and support money to become due.

If the court should find the purported release valid on the date of execution as to alimony and support money, there would still be due the sum of \$3700.00 approximately, as of the date of the release was signed, because according to Anderson vs.

pro rate the amount due under the decree of divorce especially where the children's needs require the full amount as in the instant case.

The defendant's argument that the plaintiff became a femme sole upon the granting of the divorce in 1946, and was capable of contracting with the defendant to release all claims against the defendant is patently incorrect in view of the holdings of the Smith and Anderson cases, supra. The court did not expressly determine that the release was valid as contended by the defendant on page 11 of his brief, but that the release was not valid as against the interest of the minor children. (Ct. Re. 84).

The defendant's contentions on the balance of page 11 of his brief and pages 12, 13, 14, 15, 16, 17, are all completely disproved by the decision of this court in the Anderson and Smith cases, supra. However, the defendant contends on page 15 of his appellate brief that the New York rule appears

the mother is valid and binding until set aside. Even if the law on waiver were not governed by the Smith and Anderson cases, *supra*, the New York rule is not as the defendant contends. In fact the New York courts and other courts of this country are now in harmony with the Anderson and Smith cases, *supra*, for in the case of *Thomson v. Thomson*, 82 N.Y.2d 533, the court held that the mother of a minor child could not waive the requirements of payment of support money. The Court said:

"The claim of waiver is likewise of no effect. An oral modification of the provisions of a final judgment or divorce respecting alimony and support money may not be had without jurisdiction sanction."

and the court entered judgment for the back support money and refusing to punish for contempt.

That the rule of the Anderson and Smith cases, *supra*, is in harmony with the law of the other states is apparent not only from the cases of *Thomson v.*

Thomson, supra, and *Corbridge v. Corbridge*,

17.

Glazer v. Strength (Ga)199 SE 721; Herzog v. Herzog (Nash)151 F2d 142; Peters v. Weber (Kan) 207 P.2d 431; and Armstrong v. Green (Ala) 68 S2d 434.

In Glazer v. Strength, supra, in an action for failure to pay support money the defendant pleaded a release based upon consideration releasing him from all obligations to pay support money. The decree of the Court provided for payments of \$25.00 a month and the Court held that the mother could not contract away with the consent of the court the right of support of a minor child.

In Herzog v. Herzog, supra, the Court held that the mother could not waive the provision of the decree for a minor child's support.

The defendant cites Openshaw v. Openshaw, 105 Utah 374, 144 P2d 528. on page 18 of his brief. In the Openshaw case, supra, the question of an estoppel was not before the court, and the statement relied upon

12.

event the Supreme Court in the Anderson and Smith cases, supra, refused to follow the dicta asserting that a waiver was not available in an action for the recovery of delinquent support money unless it was judicially confirmed and in no event could a person waive future support payments.

On page 18 of the defendants appellate brief, the defendant contends that he remarried in reliance upon the said release obtained from the plaintiff. The said release does not in any way purport to release the defendant from further responsibility as far as alimony was concerned. (Tr8). The plaintiff can see no reason for answering the defendant's contentions on pages twenty and twenty-one.

POINTS NO. 4 255.

The court plainly did not err in awarding judgment for \$25.00 per month for each child, because there is ample

10.
evidence to sustain the findings of
fact No.5 entered by the lower court
on February 1, 1955 which is answered
in plaintiff's point No.2.

CONCLUSION

The plaintiff feels that she has
amply answered all of the material matters
presented by the defendant and not desir-
ing to extend this brief longer, it is
submitted that the lower court's decree
is supported in the law and in the facts
and entitled in equity to be affirmed by
this court together with respondent's
cost herein.

Respectfully submitted,

Howel G. Daines,

Attorney for the Plaintiff
and Respondent.