

1980

Joyce Shirley Christensen v. J. Clayde Christensen : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Christensen v. Christensen*, No. 17084 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

JOYCE SHIRLEY CHRISTENSEN,)

Plaintiff and Appellant,)

vs.)

Case No. 17084

J. CLAYDE CHRISTENSEN,)

Defendant and Respondent.)

)

BRIEF OF APPELLANT

Appeal from Order Modifying Decree of Divorce of
Third Judicial District Court In and For Salt Lake County
The Honorable Homer F. Wilkinson, Judge

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FILED

AUG 29 1980

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NATURE OF THE CASE

This case involves a Motion to Modify Divorce Decree brought by the defendant (R.84) wherein defendant sought to have the original Decree of Divorce (entered herein on October 5, 1972) (R.24-27) modified by having child support money reduced.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Homer F. Wilkinson in two days of trial, the first on January 23, 1979, and the final day of trial approximately eleven months later on December 4, 1979.

At the conclusion of the trial, after having taken the case under advisement, the trial court ordered that the Decree of Divorce originally entered in this action, together with paragraphs C, D and E or a prior Order Modifying the Decree (which was entered on November 30, 1977, R.60-65) be modified. By the terms of the Decree of Divorce and the aforesaid modification, defendant was, prior to the instant proceeding ordered to pay the plaintiff a fixed amount of child support money of \$1,000 per month (\$166.66 per month for each of six children of the parties), together with an additional amount of child support in the event his income exceeded a certain minimum. The Court modified the aforesaid provisions by requiring defendant to pay to plaintiff \$1,110 per month (\$185 per child), to be reduced to \$1,000 per month when the first of the parties'

children ceased to be entitled to child support (hence \$200 per child per month at that time), and the Court deleted entirely the aforesaid provision providing for supplemental child support in the event defendant's income exceeded said minimum.

In addition, the Court defined the term "fulltime student" as being a child in school and carrying the number of hours that the particular institution defines as a fulltime student, and the Court ordered that the modification date was to be effective on the day it was signed, to-wit, April 18, 1980. (R.130-131)

Plaintiff has appealed from the Order of April 18, 1980. (R.132)

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the aforesaid Order Modifying Decree of Divorce entered April 18, 1980, reversed, and to have child support payments governed as provided in the original Decree of Divorce entered October 5, 1972, as modified by the aforesaid Order and Order Modifying Decree entered November 30, 1977.

STATEMENT OF FACTS

The original Decree of Divorce (R.24-27) was entered pursuant to stipulation (R.10-13) (except as to grounds). It provided, among other things, that a fixed monthly child

support for each of the six children of the parties was to be paid by defendant to plaintiff, and in addition, provided for a supplemental amount of child support which would be variable and which would be determined in accordance with the following formula. We quote from paragraph 9 of the Decree:

"9. It is ordered that in the event defendant's net income from his dental practice exceeds \$24,000 per year (before income taxes, but after professional dues and equipment and other like expenses of his profession), plaintiff is awarded as child support, in addition to the \$12,000 per year hereinabove provided for, one-half of the excess of said net income over \$24,000 after deduction from said net income of an amount equal to the income tax attributable to such increase. Thus, for example, if in a given year, the defendant's net income before income taxes, but after professional dues and equipment and other like expenses of his profession, is \$26,000, the excess over \$24,000 in this instance is \$2,000, from which an amount would be deducted which is equal to the income tax attributable to said \$2,000 (being the income tax on \$26,000 less what the income tax would have been on \$24,000), and the plaintiff shall receive one-half of the remaining balance after said income tax on said excess is deducted from said \$2,000. Defendant is ordered to furnish to plaintiff access at all reasonable times and places to his records. It is ordered that the provisions of this paragraph shall not apply until the expiration of sixteen months after the date of the aforesaid Stipulation and Consent, that date being October 12, 1972."

On April 22, 1977, plaintiff initiated an Order to Show Cause proceeding against the defendant to have the supplemental child support money which had accrued under the aforesaid paragraph 9 of the Decree of Divorce reduced to judgment inasmuch as the same had not yet been paid by the defendant. On June 8, 1977, the defendant filed a Motion to Modify Decree of

Divorce (R.39) supported by a Memorandum of Points and Authorities (R.36-37) and an Affidavit (R.38). Both the Motion to Modify Decree of Divorce (which is referred to hereinafter as the first modification proceeding) and the aforesaid Order to Show Cause were heard by Honorable David K. Winder on the 19th day of September, 1977, and after a hearing on those issues, Judge Winder entered his Order on November 30, 1977 (R.60-64). At that time the Court reduced to judgment the arrears of child support money which had accrued under the aforesaid paragraph 9 in the amount of \$4,455.50 (\$103.50 for 1974; \$1,486.40 for 1975; and \$2,963.50 for 1976). The Court at that time ruled on the constitutional issue raised by the defendant (which is not involved in the present appeal proceeding) and finally in paragraphs C, D and E of that Order (R.62,63,64) modified the aforesaid paragraph 9 by providing that the supplemental child support money was to be computed by reference to the defendant's federal income tax returns as opposed to general records, provided for the mechanics of defendant's furnishing information to the plaintiff in order to compute the supplemental amount of child support money, and provided that the paragraph 9 formula, although it would remain the same for computing the supplemental child support, would be reduced by one-sixth as each of the children of the parties ceased to be entitled to child support money. We set forth paragraphs C, D and E in full for the convenience of the Court:

"C. The first sentence of paragraph 9 of the said Decree of Divorce is modified to read as follows:

"IT IS ORDERED that in the event defendant's net income from his dental practice exceeds \$24,000.00 per year as declared on his federal income tax return (before income taxes, but after professional dues and equipment and other like expenses of his profession), plaintiff is awarded as child support, in addition to the \$12,000.00 per year hereinabove provided for, one-half of the excess of said net income over \$24,000.00 after deduction from said net income of an amount equal to the income tax attributable to such increase.'

"The remainder of paragraph 9 shall remain in full force and effect as presently set forth in the Decree of Divorce. It is thus the intention of the Court that in determining additional child support, if any, pursuant to paragraph 9 of the said Decree of Divorce, the parties shall refer to the items set forth in the federal tax return, and not to extraneous items which have not been incorporated in the return. Nevertheless defendant is not precluded from making bona fide amendments to his tax returns, and in the event of such a bona fide amendment, the defendant shall be entitled to an appropriate adjustment. The Court notes that currently the relevant schedule to be used in determining defendant's liability, if any, under paragraph 9 of the Decree of Divorce as amended is the Federal Schedule C.

"D. IT IS ORDERED that hereafter the defendant furnish to the plaintiff copies of state and federal returns within two weeks after they are filed. Plaintiff will then have two weeks after receipt thereof in which to submit to the defendant the amount of additional child support which plaintiff contends is owing under the Decree of Divorce as modified. Defendant shall have two weeks from receipt of notice of said claimed amount in which to serve notice of objection thereto. If no such notice of objection is served within that two-week period, the sum submitted by plaintiff to defendant shall stand as the amount owing to the plaintiff by the defendant as and for additional child support. However, if the claimed sum is denied, then either party shall have the right to apply to the court for a hearing to determine the proper amount of additional child support money, if any.

"E. IT IS FURTHER ORDERED that increased child support money as provided in paragraph 9 of the Decree of Divorce as amended shall be deemed payable one-sixth (1/6) for each of the children of the parties. Thus, although the method for computing the total additional child support under paragraph 9 of the Decree of Divorce as amended shall remain constant, the amount actually paid by defendant to the plaintiff will be subject to appropriate reduction as the children cease to be entitled to child support in accordance with the other provisions of the Decree of Divorce."

On February 17, 1978, less than three months after entry of the first Order Modifying Decree of Divorce (referred to above), the defendant filed another Motion for Modification of Decree (R.84) supported by an Affidavit (R.81-83). That Affidavit was supplemented by a second Affidavit filed December 5, 1978 (R.94-99).

We will deal with the allegations of this Motion in detail under Point I hereafter. However, for present purposes it will suffice to point out that the thrust of defendant's argument was that, although his gross income had increased from approximately \$55,326 in 1972 to \$92,359 in 1977, his percentage of profit had decreased, although his net income had increased from \$26,808 in 1972 to \$31,324 in 1977.

Plaintiff's answer to defendant's position was set forth in an instrument entitled Motion in Opposition to Defendant's Motion for Modification and was supported by an Affidavit (R.88-91). The thrust of plaintiff's defense was:

1. That the petition was barred by the principles

res judicata;

2. That the petition failed to state a claim against the plaintiff upon which relief could be granted, i.e., failed to allege grounds justifying a modification;

3. That there was no sufficient change of circumstances in any event.

The second Petition for Modification was heard by the Honorable Homer F. Wilkinson, Judge, on January 23, 1979, and testimony was concluded on December 4, 1979. In its modification the Court deleted the provisions for supplemental child support money and substituted in its place an order that the defendant pay to plaintiff \$185 per month child support money for each child, to be increased to \$200 per month per child when one of the children is no longer entitled to support payments. As noted above, the Court also defined the term "fulltime student" and decreed the changes to be effective April 18, 1980 (R.130-131).

The transcript of testimony from the trial on January 23, 1979, is hereinafter referred to as "T" and the testimony from the hearing on December 4, 1979, is hereinafter referred to as "2T".

The defendant testified that he knew of the problem which was the basis for his second Motion for Modification at least as early as 1976 (T.26,T.58).

At the commencement of trial on the second day,

December 4, 1979, the Court ruled in effect that events transpiring prior to the date of the trial of the first Petition for Modification (September 19, 1977) were res judicata and would not be admissible in this proceeding. However, the Court ruled that inasmuch as the defendant's finances for 1977 were not fully known to him at that time, the Court would allow testimony with regard to his financial situation throughout the entire year of 1977 (2T.3;2T.30;2T.52). Thereafter the trial was basically restricted to a consideration of the change of circumstances between 1977 and 1979. In this connection, it should be noted that the Court admitted into evidence defendant's financial records for the first six months of 1979 over plaintiff's objections (2T.57). Objection was made because these records were not part of defendant's pleadings and had not been furnished to plaintiff's counsel prior to the trial.

The Court erred in admitting the same. Also there was no showing that defendant's financial records for the first half of 1977 were not available to defendant as of September 19, 1977.

We desire now to summarize the testimony with regard to the alleged change of circumstances between 1977 and 1979 as follows:

The defendant's financial records (which set forth the facts in this connection) are found in Exhibit P-2, which is defendant's tax records for 1977, Exhibit 8-P, which consists

which consists of defendant's income tax records for 1978, and Exhibit D-4, which consists of a summary of defendant's testimony regarding his income for the first six months of 1979.

In addition, after the Court's ruling that matters prior to 1977 were inadmissible, Exhibit D-1 remained viable only with regard to the information set forth for 1977, and in addition, an exhibit prepared by the plaintiff, Exhibit 11-P, was admitted in evidence with regard to the year 1977 only and shows the defendant's 1977 income, including his percentage of profit as claimed by the defendant and also how those figures would appear if a salary of \$8,000 paid by the defendant to his second wife in 1977 were considered as defendant's own income, and we will discuss that matter further hereafter.

Defendant's Income.

The following is a summary of defendant's earnings for 1977, 1978 and 1979:

	1977	1978	1979 (first six months)	1979 (projected for twelve months)
Gross Income	\$92,359	\$82,395	\$42,104.29	\$84,208.58
Over- head	61,035	55,961	24,890.20	49,780.40
Net Income	31,324	26,434	17,214.09	34,428.18

In addition to his dental practice, the defendant testified that he taught a community education course, from which he had a small income (2T.29). The defendant also testified that

he invested \$25 per month in an investment club (2T.90).

The defendant remarried in 1976 (T.9,10) and has two children by this second marriage (2T.28). Defendant's second wife had earnings of \$12,473 in 1977 (Exhibit P-2) and defendant testified that \$8,000 of that sum was paid by defendant to his wife as a salary for services allegedly rendered by her for (2T.84) him/. Defendant's second wife had income in 1978 of \$9,890 (Exhibit 8-P) and defendant testified that \$8,400 of this sum was paid to her by the defendant for alleged services (2T.84).

Defendant did not testify to the amount he paid his wife in 1979, but stated that it would be less than \$10,000 (2T.45). The salary paid to defendant's second wife by defendant was listed in 1977 in the figure for his general office overhead, but was listed as a separate item in 1978 (2T.81).

Defendant testified that he works as a dentist in a clinic in Granger and that the clinic provides generally for his needs, does the billing for him, and collects his accounts (2T.77-78). He stated that his wife did not work at the clinic, but wrote some checks for him at home, called on some bad accounts, and kept records for him at home, although the exact nature of that record-keeping was not disclosed (T.48).

At 2T.47 the defendant stated that: "I pay my wife a salary so that I can make an end run on the clause that is in the decree." At 2T.84 defendant testified with regard to the services performed by his wife, and we set forth the following

from the transcript:

"Q What services did she render?

A As far as I am concerned it is relative. I have already stated to the Court I pay her so that I can live.

Q Do you consider that, the money you paid your wife, was really income to yourself?

A That is possible.

Q You don't pretend she did any specific things?

A She does do some things. I don't know it is worth \$8,000."

In referring to the employment of his wife, defendant's own counsel in closing argument at 2T.129 referred to defendant as not being "straight arrow" and again on page 2T.130, referred to the arrangement as a "sham."

Plaintiff's Income.

Plaintiff testified that she remarried on May 12, 1979 (2T.5), and with regard to the children of the parties, she testified that five were still at home and one was attending college at Utah State University (2T.142). She stated that her only income was approximately \$200, which she received from sale of an asset she had owned in 1977 (2T.26-27). She testified that she had borrowed \$34,000 in 1975 and that that sum was owing in 1977 (2T.15), and that the said \$200 per month was paid or was available to be applied on the aforesaid indebtedness of \$34,000 (2T.26).

The plaintiff testified that in 1977 she was receiving

church welfare which consisted of food and utility bills, and that the sum of approximately \$1,800 was paid by the Church for her other expenses between April 1977 and November 1977 (2T.17; 2T.19). She stated that she was unemployed in 1977 and also at the time of the trial, but that she had worked briefly from February of 1978 to October 1978 (2T.6). She also testified that her present husband was now paying her expenses and contributed to the home approximately the amount which his presence added to household expenses (2T.8).

Insurance.

Defendant was ordered to maintain for the benefit of the children of the parties the life insurance which he had at the time of the divorce and also health and accident insurance (see paragraph 5 of the Decree of Divorce, R.26). The defendant testified that this life insurance was not a term policy, but rather a policy whereby he was building up an equity for his retirement. He further testified that the cost of the life insurance had not changed at all since the time of the Decree (2T.106), but that his health and accident insurance increased from \$450.84 in 1977 to \$840 in 1979 (2T.33), but it still did not cost him anymore to have his children by his first marriage included in the policy along with his present wife and the two children by his second marriage (2T.76). Thus, even if defendant were not required to provide that benefit to the children of his first marriage, there would be no savings to him thereby.

The defendant testified that he was providing a disability insurance for the benefit of the children of his first marriage, although he testified that the disability insurance runs only to him (T.55). The Decree of Divorce does not require defendant to provide or maintain disability insurance.

Self-Employment Tax.

Defendant's self-employment tax in 1977 was \$1,304, in 1978 was \$1,434, and he testified that in 1979 his self-employment tax would be \$1,700 (2T.52).

The defendant was asked to give his reasons for seeking a modification of the Decree of Divorce. In addition to the aforesaid matters relating to change of circumstances, defendant testified substantially that his reasons for seeking modification of the Decree of Divorce were:

1. That it was inequitable and unworkable and that it required him to have an accountant and plaintiff to have an accountant with a potential for disagreement (2T.38).

2. Defendant stated that under the original Decree of Divorce: "Under this thing I am unable to show that I can't pay that." (T.40)

Defendant's own expert witness, a certified public accountant by the name of James W. Anderson, testified as follows when he was asked whether the formula under the Decree of Divorce as modified was workable. He stated at T.70: "It's workable, but it takes time to make the calculations, but it is a workable

calculation."

Defendant also testified at T.59 when asked whether in each year from 1972 to 1976 a dollar figure had been arrived at under the formula as follows: "Well, it had been arrived at, because her accountant did it, yes."

Fulltime Student Issue.

The plaintiff testified that since August 1979 defendant had reduced her child support money by the sum of \$166 per month, claiming that one of the children was not a fulltime student (2T20-21). With regard to that issue the Court ruled that the propriety of defendant's deducting \$166 per month from the plaintiff's child support would not be ruled on in this proceeding as it was not before the Court/. By reason of the Court's ruling, no evidence was introduced on that issue.

Notwithstanding the foregoing, the Court in its final Order defined "fulltime student" and ruled in paragraph 2 (R.131) as follows:

"It is further ordered that a child shall be considered a fulltime student when such child is in school and carrying the number of hours that the institution defines as a fulltime student. The foregoing provision is intended to apply to a normal school year of approximately nine months. If a child complies with the foregoing provisions, the child support money shall be paid for such child during the normal summer vacation of three months, even though such child is not in school during the said summer vacation."

ARGUMENT

POINT I. THE COURT ERRED IN FAILING TO DISMISS DEFENDANT'S MOTION TO MODIFY DIVORCE DECREE FOR FAILURE TO ALLEGE GROUNDS JUSTIFYING MODIFICATION AND AS BEING BARRED BY THE PRINCIPLES OF RES JUDICATA.

Defendant's Motion to Modify Divorce Decree (R.84), which is the subject of the present proceeding, sought to achieve a modification of the original Decree of Divorce by showing an alleged change of circumstances between the time of the entry of the original Decree on October 25, 1972, and the time of the filing of the said Motion, to-wit, February 17, 1978, notwithstanding that a prior Motion for Modification brought by the defendant had just been disposed of by Order of the District Court of Salt Lake County entered November 30, 1977 (R.60-64). The plaintiff claims that the second Motion for Modification was barred by the principles of res judicata as to events prior to the first modification proceeding. Res judicata would of necessity preclude the second Motion for Modification from stating a claim with regard to events prior to November 30, 1977. The sufficiency of the allegations of said Motion would thus have to be tested with regard to the period beginning November 30, 1977, and ending on the date the second Motion was filed, which was February 17, 1978, or at most to December 5, 1978, when a Supplemental Affidavit was filed by the defendant. (R.94-95).

The defenses of res judicata and failure to state a claim were raised by the plaintiff in her answer to defendant's

second Motion for Modification [which answer was actually entitled Motion in Opposition to Defendant's Motion for Modification (R.88), which was supported by an Affidavit (R.90-91).]

In asserting the aforesaid defenses, plaintiff sought to dismiss defendant's Motion for Modification at the outset. These Motions were incorporated in a Memorandum which was served upon defendant's counsel on the first day of trial, January 23, 1979, at which time it was filed with the court/. (R.111-114) (The Memorandum was apparently not placed in the file by the Court until October 26, 1979.) At the conclusion of these arguments, the Court took that matter under advisement and gave the defendant ten days to reply. (It was anticipated by the Court and the parties that the case could not be finished as to the evidence in one day and would have to be concluded on a separate day in the event further evidence was required. The case was set for further hearing on April 13, 1979, and notice thereof was served February 5, 1979, but the actual concluding day of trial was not held until December 4, 1979.) In any event defendant never did file a response to said Memorandum within ten days, or otherwise. (See Minute entry R.100 regarding these events.)

It is plaintiff's contention that the said Motion to Dismiss should have been granted, both on the merits and for failure of the defendant to respond on January 23, 1979, or at least ten days (approximately) thereafter.

As to the matter of res judicata, it should be noted

that the Decree of Divorce in this action was entered on the 25th day of October, 1972 (R.24-28). It was entered pursuant to stipulation signed by the parties and their counsel (R.10-13). As noted in the Statement of Facts the Decree contains a provision with respect to child support fixing an amount certain and also providing for a supplemental amount in the event that the defendant's income should increase above a specified minimum as set forth in the Statement of Facts. Those provisions of the Decree are set forth in the Statement of Facts at page 3 of this brief, so we will not repeat them at this point.

A careful reading of those provisions shows that the clause providing for a supplemental amount of child support was before the Court in 1977 and was, in fact, modified in at least three respects: Federal tax records were to be used as opposed to general records; mechanics of ascertaining the additional amount were spelled out; and provision for handling that clause as the children ceased one by one to be entitled to child support were set forth.

It thus appears clear that the first modification hearing fully considered the matter of the supplemental child support clause and amended it extensively. Although defendant did not at that time raise the matters contained in his second Motion for Modification, those items could, and should, have been raised (except perhaps for the three-month period between

November 30, 1977, and February 17, 1978, when the second Motion for Modification was filed).

By reason of the failure of the Court to grant plaintiff's Motion to Dismiss, substantially all of the testimony of the first day of trial on January 21, 1979, was irrelevant as it was devoted to testimony relating to the exhibit which was attached to defendant's Supplemental Affidavit (R.94-99), which exhibit was introduced in evidence as Exhibit D-2 over plaintiff's objection. That exhibit dealt with events transpiring between the years of 1972 and 1977. Only 1977 was relevant.

At the commencement of the second day of trial on December 4, 1979, the Court in effect granted plaintiff's Motion on the matter of res judicata by ruling that evidence prior to the hearing in the first modification proceedings (September 17, 1977, was irrelevant and would be precluded, except the Court allowed testimony of the defendant's income for the entire year of 1977 on the theory that as of the hearing on September 19, 1977, all of the information relating to the defendant's 1977 income was not known.

Thus, although the Trial Court upheld plaintiff's contention of res judicata as of January 1, 1977, we believe that the Court should have upheld the defense of res judicata as of the time of the Court's Order of November 30, 1977, or at least as of September 19, 1977, for all purposes. First of all, since defendant was permitted to introduce testimony of the first one-

half of 1979, he should have been held to the same standard in 1977, as there was no showing that his financial records for at least the first one-half of 1977 were not available to him. Second, it is the date of the Order of Modification that appears to be controlling.

At 18 ALR 2d, page 18, the following statement is set forth:

"Where there have been one or more previous decisions on motions for modification of a decree, the question whether there has been a substantial change in the circumstances of the parties is determined with respect to the period commencing with the date of the most recent order on a motion for modification and not with respect to the time since the original decree was entered." (Emphasis added)

In Hudson v. Hudson, 8 Wash 2d 114, 111 P2d 573 (1941), the appellant in 1938 petitioned for an award of alimony (the court having reserved jurisdiction on that matter). At that hearing the court held that there was not sufficient change of circumstances and denied the application. The appellant again brought a similar motion in 1940, which was denied, and the appellant appealed from that 1940 order. The court held that the issue was whether or not there was a change of circumstances since the 1938 order, not since the entry of the original decree. At page 574 the court said:

"The order made preceding the one which is now before us not having been appealed from is res judicata, unless there has been, since that order was entered, a material change in the circumstances of the parties." (Emphasis added)

In 24 Am Jur 2d §676, Divorce and Separation, the following statement is found at page 795:

"Where the court has entertained and decided one petition for modification, the order entered in that proceeding is res judicata, so that one cannot maintain a second petition for modification unless he can show that since the entry of the order on the first petition for modification there has been a substantial change of circumstances." (Emphasis added)

In Osmus v. Osmus, 114 Ut 216, 198 P2d 233 (1948), this court considered the same question. In that case the defendant claimed that he entered into a stipulation prior to the decree of divorce regarding alimony based upon the representation of his attorney that he could later get it reduced. The court held that the defendant was in effect seeking to have the original decree modified because it was claimed to be unfair and not because of any change of circumstances. The court held that the defendant was precluded from obtaining a change in the decree since there was no change of circumstances which would warrant that relief. The court stated at page 224:

"What defendant is really contending is that the alimony awarded by the interlocutory divorce decree was excessive. His proper remedy would have been to appeal from that decree. A petition for modification is not the proper way to have changed the terms of an erroneous alimony decree.

In point of fact, defendant is in a poor position to complain. He stipulated to an alimony decree of \$250 per month, apparently without any expectation of ever complying with it. He is hardly in a favorable position now to assert that the alimony awarded is excessive."

It seems clear that the instant case is almost

identical with Osmus. The defendant's principal contention is that the original divorce provision is not fair to him and not really that there has been any change of circumstances. We do not believe that the facts support either contention.

Defendant has not appealed the Court's ruling on the question of res judicata, and we take it therefor that at the very least, events prior to January 1, 1977, are precluded from consideration. Events prior to November 30, 1977, are likewise barred, we believe, and urge this court to so hold.

Further, we therefore take it that in canvassing the pleadings of the defendant to determine whether they state grounds for modification, they will be tested by the period from November 30, 1977, (or September 19, 1977, to December 5, 1978, or at most from January 1, 1977, to December 4, 1979). We do not believe that in either time period the defendant's pleadings state grounds for modification.

Prior to actual examination of defendant's pleadings, we desire to observe the following: It has long been the law in this state that a modification of a decree of divorce cannot be granted unless there is a material and permanent change of circumstances since the preceding order. In Carson v. Carson, 87 Ut 1, 47 P2d 894 (1935), the court stated at page 4:

"In a proper case the amount of alimony awarded in a decree of divorce may be changed. R.S.Utah 1933, 40-3-5. The party to a divorce proceeding, however, is not entitled to a modification of the decree of divorce in the absence of a showing that there has

been a material and permanent change of conditions since the entry of the decree." (Emphasis added)

The Supreme Court has consistently held that the petition seeking modification must allege grounds for change. In Hampton v. Hampton, 86 Ut 570, 47 P2d 419 (1935), at page 420 this court stated:

"It is well settled in this court that in order to secure a change in a decree for alimony the moving party must allege and prove changed conditions arising since the entry of the decree which require, under rules of equity and justice, a change in the decree." (Emphasis added)

And again in Jones v. Jones, 104 Ut 274, 139 P2d 222, (1943), the defendant husband sought modification of a decree with respect to alimony, and the court held at page 278:

"In the instant case there is no pleading which would justify the finding made by the court 'that the sum of \$50 a month is necessary for the proper maintenance and support of the plaintiff, Fuxia E. Jones.'" (Emphasis added)

In the light of the foregoing principles, we desire to briefly review the allegations of defendant's pleadings in connection with the Motion to Modify Divorce Decree. The said Motion itself (R.84) states as follows:

"Comes now the defendant by and through his attorney and moves the Court for an Order modifying the Decree of Divorce entered herein on October 25, 1972. This motion is based upon the Affidavit attached hereto."

There is not even an allegation there with regard to material or permanent change of circumstances.

We turn next to the Affidavit filed in support of the

aforesaid Motion found in the record at pages 81 to 83. In that Affidavit at page 3 the defendant alleges a "substantial change of circumstances," and in seven subparagraphs numbered "a" to "g" the defendant sets forth the alleged changes. We will quote the relevant parts of each subparagraph:

"a. At the time the Decree of Divorce was entered the parties reasonably contemplated an increase in income resulting from the defendant's practice of dentistry. The parties did not, however, contemplate that the defendant's income would increase 100% over a period of six years. Defendant's income in fact has increased approximately 100%. It was the contemplation of the parties that in the event the defendant's income did increase substantially, unpredictably and unforeseeably that an adjustment in the method of computation would be appropriate."

Comment: The foregoing paragraph deals with a six-year period beginning at the time of the Decree of Divorce and is thus barred by the principles of res judicata. Even aside from that, it is difficult to imagine how an increase of income over 100% can result in grounds for reduction of child support. Furthermore, it is clear that the parties contemplated that the defendant's income would increase; otherwise there would have been no point in stipulating to an additional amount as child support in the event defendant's income increased.

"b. The costs of operation of the defendant's dentistry practice has increased substantially since the Decree of Divorce was entered, while the profit that he realizes has not increased in a like fashion. That the increase in the defendant's income was substantial and unforeseeable and has in fact not provided defendant with the same margin of profit heretofore realized."

Comment: Paragraph b deals with the same period of time, 1972 to 1977, and is thus barred by res judicata. Furthermore, it is not the defendant's profit margin that is relevant, but rather his income. Paragraph b alleges an increase in income, and that appears to preclude further inquiry into that subject. In the case of Felt v. Felt, 27 Utah 2d 103, 493 P2d 620 (1972) the trial court made a finding:

"That since the divorce Mr. F's costs of doing business has substantially increased, as has his income, but not commensurate therewith."

The Supreme Court rejected that finding as a basis for a modification of the decree and stated:

"Nothing is reflected in this finding that would indicate that Mr. F's income had decreased so that he was reasonably unable to pay what he agreed or to justify the wiping out of a \$12,000 per year alimony award, and we are unimpressed with such generalized, unspecific finding in this case." (p. 108)

"c. That it reasonably was contemplated by the parties that the plaintiff would on the expiration of a reasonable time seek gainful employment to assist and participate in the monetary aspects of rearing the parties minor children. The plaintiff has never attempted to seek gainful employment and has in fact relied on child support as her sole and singular source of income, said income for her own support and the support of the parties children. That the plaintiff's failure to seek and secure gainful employment is a substantial change in circumstances as those circumstances were fairly and reasonably contemplated by the parties at the time the Decree of Divorce was entered."

Comment: The foregoing allegations are likewise barred by res judicata. It should further be noted that plaintiff was unemployed at the time of the divorce and unemployed

at the time of the first modification hearing and at the time of the second modification hearing, which would appear to be a circumstance which would not help the defendant in any event.

During the trial the Trial Court properly ruled that what was contemplated by the parties prior to the Decree of Divorce was irrelevant and that the case was governed by the written agreement (Stipulation), and for the same reasons, allegations as to what was contemplated are irrelevant (T.22)

"d. At the time the Decree was entered it was fairly contemplated that either or both plaintiff and defendant might re-marry. Subsequent to the divorce plaintiff did re-marry and then subsequently divorce her second husband, realizing from the second divorce a very substantial award of the second marital estate, the quantum of which award was not contemplated fairly by either plaintiff or defendant at the time of the 1972 Decree and plaintiff's interest as prescribed by the Court attendant her second divorce represents a very substantial change in her circumstances.

"That the defendant has re-married and is presently 42 years of age. That the defendant's re-marriage was contemplated, however, the defendant's wife is pregnant and will give birth to a child on or about June 12, 1978. The birth of the child was not contemplated by either plaintiff or defendant the time the Decree was entered in view of the fact that the plaintiff and defendant had six children of their marriage and additionally in view of the parties ages. The defendant's expected child constitutes a substantial change in circumstances."

Comment: To begin with, the fact of defendant's remarriage is irrelevant. Felt v. Felt, supra, held at page 108:

"The fact of remarriage cannot be used in determining modification of an alimony award, although in some conceivable rare case it might, and we are at

a loss to know why the trial court so found, unless it was on account of what was said in Callister v. Callister, supra, which recited the fact of remarriage, which we disaffirm if it is urged that such fact is admissible for the purposes of reducing the alimony award in the instant case."

Furthermore, the aforesaid paragraph d is barred by res judicata and there is no allegation of any change of circumstances since the prior hearing of November 30, 1977, or for that matter September 19, 1977. The fact of plaintiff's remarriage is likewise irrelevant on the question of child support inasmuch as the second husband has no obligation for the support of the defendant's children. The allegations that no other children of a subsequent marriage was contemplated is not only irrelevant, but unbelievable.

"e. That the 1972 Decree provided for generous and reasonable rights of visitation, which visitation was contemplated by both parties to include overnight and uninterrupted summer visitation. That the plaintiff has constantly, consistently and intentionally since the parties divorce denied the defendant reasonable rights of visitation and plaintiff's conduct constitutes a substantial change in circumstances."

Comment: The said paragraph is barred by res judicata. Furthermore, visitation problems, even if they exist, have no relevancy as to reasonable child support, particularly where there is no issue of custody or change thereof.

"f. That the 1972 Decree provided that defendant provide health and accident insurance for the benefit of the minor children, it was not contemplated by the parties that health and accident insurance would increase to a substantial sum said health insurance now represents and that that increase in insurance is significant and a substantial change in circumstances."

Comment: This allegation is barred by res judicata. What was "contemplated" is barred by the written Stipulation and Decree entered pursuant thereto.

"g. That subsequent to the Decree the defendant purchased policies of disability insurance to provide for the support of his children in the event he was disabled and thus unable to earn a living. That this additional expense to defendant is substantial, for the benefit of the minor children and constitutes a significant change of circumstances."

Comment: This allegation is not only barred by res judicata, but the Decree of Divorce nowhere requires defendant to provide disability insurance, and if he does so, it is voluntary on his part and constitutes no basis for a modification of the Decree.

On December 5, 1978, defendant filed a Supplemental Affidavit in support of his Motion for Modification, and we will review the allegations thereof briefly. The substance of those allegations is contained in paragraphs 1, 2 and 3 thereof, which we set forth verbatim:

"1. That since February 1978, the date of defendant's last Affidavit, there has transpired and taken place additional changes which in fact are significant and substantial, which further reflect a substantial change of circumstances as required and contemplated by 30-3-5 Utah Code Annotated.

"2. That subsequent to the determination of the defendant's 1977 tax situation, defendant has learned that his gross profit has been significantly reduced from that which existed at the time of the divorce and all years subsequent.

"3. That during the year 1977 the proportion of the defendant's net income which he realizes has

decreased substantially since the date of divorce and all years thereafter, which was not contemplated by the parties."

Comment: It appears that defendant is saying that since he filed his petition he has found out that his net income between 1972 and 1977 has decreased. That is irrelevant in view of the principle of res judicata. Furthermore, it is not correct because the defendant alleges in the petition filed February 17, 1978, that his net income decreased between 1972 and 1977. (See paragraph b set forth on page 23 of this brief.)

Furthermore, as noted above, the defendant's gross profit is irrelevant; it is any material and permanent increase or decrease in his income which is relevant. There is no allegation that the defendant's income has decreased and that he is thereby no longer able to pay the support money as originally ordered by the Court.

Attached to the Affidavit is a four-page exhibit which was introduced into evidence over plaintiff's objection at the trial as Exhibit 1-D. Even considering that exhibit as a pleading, it does not state a cause of action for amendment of the Decree because it constitutes a comparison of income between 1972 and 1977 and the intervening years, and all of the years prior to 1977 are precluded from such consideration. If one is to consider the material alleged as to 1977 as being relevant, since there is no other year with which to compare that data in the pleadings, it is meaningless and cannot be the basis for

alleging a change of circumstances.

Thus, all of the aforesaid allegations as they relate to the period 1972 to November 1, 1977, (or at least January 1, 1977, are barred from consideration, and since the pleadings therefor only allege matters relating to 1977, there are no allegations in this case which could possibly constitute a valid grounds for modification, and the Motion for Modification should have been dismissed at the outset.

POINT II. THERE HAS BEEN NO SUFFICIENT CHANGE OF CIRCUMSTANCES BETWEEN THE FIRST MOTION FOR MODIFICATION AND THE SECOND MOTION FOR MODIFICATION TO JUSTIFY GRANTING THE SECOND MOTION.

A summary of the evidence in this regard reveals that the defendant's net income went from \$31,324 in 1977 up to the sum of \$34,428 in 1979, (if we project his income for the first half of the year for the entire year, and there appears to be no other reasonable way of comparing incomes in those two years.) It is true that defendant's net income went down to \$26,434 in 1978, but that was obviously only a temporary reduction in income and was by no means a permanent reduction. In addition, if we disregard the "sham" of defendant's paying his own wife a salary for substantially no services rendered, the defendant's net income in 1977 is increased to \$39,324, and in 1978 it is increased to \$34,834, and in 1979, would be increased by a sum less than \$10,000, but presumably at least equal to the 1978 figure of \$8,400, which would increase defendant's net

income in 1979 to at least \$42,828.

In addition, at the time of trial, the defendant was receiving an additional income from a teaching position, although the amount thereof was not disclosed.

On the other hand, plaintiff had no income except the sum of approximately \$200 which she was receiving monthly from the sale of an asset which she owned in 1977, which sum was used (or at least available) to liquidate a \$34,000 debt incurred by her in 1975 and existing in 1977. Plaintiff's second husband was supporting her and contributing to the household only enough to cover his own expenses. Plaintiff's second husband was not supporting the children of plaintiff and defendant, and indeed had no obligation to do so.

The only other relevant items were (1) the life insurance, the annual cost of which had not changed at all since 1972; (2) the health and accident insurance which, although it had increased from \$450.84 in 1977 to \$840 in 1979, did not result in any additional cost to the defendant by reason of the children of his first marriage inasmuch as defendant would have to pay the same premium exactly for coverage for himself, his second wife and his two children by his second marriage; (3) the disability insurance which defendant claimed he was carrying was a voluntary act and he was not, and is not now, required to carry that insurance, and it cannot therefore be the basis of a change of circumstances; and (4) the final item is the defendant's

self-employment insurance, which has increased according to the defendant's testimony to the sum of \$1,700 in 1979 from a figure of \$1,304 in 1977, an increase of \$396. We respectfully submit that this is not a change of circumstances significant enough to warrant a modification of the Decree. It should further be noted that everyone who is self-employed has had a similar increase in their self-employment tax, and we believe that it is not a valid ground for modification of the Decree anymore than a general increase in the cost of living constitutes grounds therefor.

It appears that the real reason defendant seeks a modification of the provision for additional child support money is that he believes it is inequitable. We respectfully submit that it is not inequitable, and that the additional amount of child support calculated for 1977 as set forth in defendant's own exhibit D-1 (page 3 thereof) showing a supplemental child support of \$1,980 is not unreasonable considering his gross income of \$92,359. Although the defendant only shows a net income that year of \$31,324, if we add his wife's "sham" income thereto, he had a net income of \$39,324.

For the years 1972 through 1976, the total supplemental child support amounted to the sum of \$4,455.50 [as reduced to judgment by Judge Winder (R.61)]. We do not believe that those figures constitute an unconscionable result. The Decree of Divorce was stipulated to by the defendant with the advice of

counsel. It was entered into by the parties to enable the children of the parties to participate in any increased earnings of the defendant, and, although the children would not be living in the defendant's home, the children would thereby be enabled to enjoy some of the fruits of defendant's dental practice, and would therefore in a very real sense be raised as the children of a successful dentist, a status which the parties felt the children were entitled to enjoy.

Now defendant appears to be dissatisfied with that arrangement; but we respectfully submit that that is not ground for modification. As was pointed out in Osmus v. Osmus, supra, the defendant is not permitted to renege on a stipulation just because he later feels dissatisfied therewith. As noted above, the court there stated:

"A petition for modification is not a proper way to have changed the terms of an erroneous alimony decree . . . "

and in like fashion, it is not a proper way to change the terms of the Decree of Divorce with respect to child support.

POINT III. THE ORDER OF MODIFICATION CANNOT BE SUPPORTED WITHOUT FINDINGS OF FACT, OR AT LEAST A SUFFICIENT INDICATION BY THE TRIAL COURT OF THE BASIS FOR ITS DECISION.

The decision of the Court in this case is found in an Order Modifying Decree of Divorce found at R.130-131. Prior thereto, the Court entered a Memorandum Decision on December 14, 1979 (R.117). Neither of these documents contains any findings

of fact, nor do they reveal any basis for the Court's decision.

The case of Felt v. Felt, 27 Ut 2d 103, 493 P2d 620 (1972), held at page 108:

"We think the written findings in this case are so fragmentary and unspecific as not to justify the drastic elimination of any annual \$12,000 award except for a dollar and we so hold."

It appears to us that this court has thus held in effect that sufficient findings of fact are necessary to support a modification of a decree of divorce. If this were not so, it would be irrelevant whether the findings were "fragmentary and unspecific" inasmuch as no findings would be required--fragmentary or otherwise.

It is true that Rule 52 (U.R.C.P.) provides that findings are not necessary on motions, and that defendant has denominated his pleading a motion. We believe, however, that rule 52 was not intended to apply to cases which involve a prolonged and lengthy trial of contested issues, whether it is technically denominated a "motion," "petition," or "complaint." We believe that as it is used in that rule, a "motion" contemplates a proceeding which will be basically heard on matters of law, or if facts are involved, will be largely handled by affidavit or minor evidentiary proceedings.

The instant case has all of the earmarks of a full-fledged trial: It lasted two days and involved approximately 225 pages of testimony.

We believe, under the circumstances, the present

proceeding was a trial, not a motion, and that findings of fact were indeed necessary, or at the very least, some reasonable indication by the Court of the basis for his decision.

POINT IV. IT WAS ERROR FOR THE COURT TO UNDERTAKE TO DEFINE THE TERM "FULLTIME STUDENT" IN THIS PROCEEDING.

The Court ruled that on the question of whether or not the defendant was justified in withholding \$166 per month child support for the oldest child of the parties (on the alleged basis that she was not a fulltime student) was not before the Court. By so ruling, the Court precluded testimony on that issue.

We believe it was error for the Court to modify the Decree by defining the term "fulltime student" without permitting the parties an opportunity to address that question--both factually and in argument. The issue of whether any of the children of the parties are fulltime students under the Decree should be resolved in the light of the facts and circumstances of this case, which can only be developed at a proper proceeding therefor. To define that phrase in the abstract without testimony or argument is unfair to the parties. It is in the nature of an "ex post facto law" when it is decreed without reference to the facts of the case. Even if it were fair to the parties in the future to be governed by that definition (as the parties can govern themselves accordingly), it is not fair to have that definition stated in the abstract and

then applied without an opportunity to be heard.

If the parties are unable to resolve their differences in that regard, an order to show cause hearing can be held to determine the facts and circumstances, and the judge at that hearing should apply the original Decree to the facts as they are there developed. At present we have a situation where a judge defined a "term" without hearing the facts, and that definition will presumably be binding upon a judge who, at a later time, is in a far better position to apply the Decree to those facts, and that judge should not be bound in advance of the evidence.

CONCLUSION

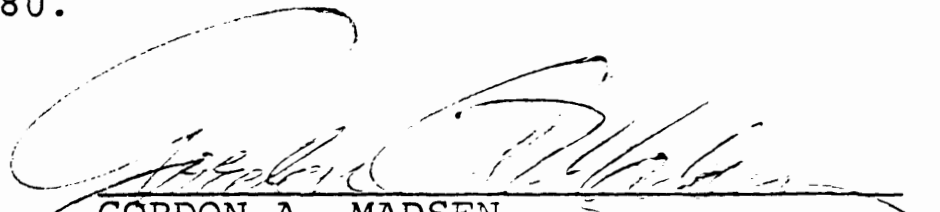
For the foregoing reasons, plaintiff respectfully requests the court to reverse the Order Modifying Decree of Divorce entered by Judge Wilkinson on April 18, 1980.

Respectfully submitted:

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CERTIFICATE OF MAILING

I hereby certifiy that I mailed two copies of
the foregoing Brief of Appellant to George S. Diument, II,
attorney for defendant-respondent, at his address, 505 South
Main Street, Bountiful, Utah 84010, postage prepaid, this
29th day of August, 1980.



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