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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 RESPONDENT

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

OCT 17 1980

Clerk, Supreme Court, Utah

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NATURE OF THE CASE

This matter involves two Motions to Modify a Decree of Divorce, which Motions were brought by defendant (R.39) and (R.84) wherein defendant sought modificataion of the original Decree of Divorce entered on October 5, 1972 (R.24-27).

DISPOSITION IN THE LOWER COURT

On June 8, 1977 the defendant filed a Motion to Modify Decree of Divorce (R.39), an Affidavit (R.38) and Memorandum of Points and Authorities (R.36-37). On the 19th day of September 1977 the Honorable David K. Winder heard the Motion and entered his Order on November 30, 1977 (R.60-64).

On the 17th day of February 1978 defendant filed a second Motion for Modification of Decree of Divorce (R.84) with supporting Affidavit (R.81-83). On the 5th day of December 1978 defendant filed a Supplemental Affidavit (R.94-99). On the 23rd day of January 1979 and the 4th day of December 1979 the matter was before the Honorable Homer F. Wilkinson. On the 14th day of December 1979 the Court issued a Memorandum Decision (R.117) and entered its Order on the 18th day of April 1980 (R.132). It is from that Order that plaintiff appeals.

STATEMENT OF FACTS

The original Decree of Divorce (R.24-27) provided among other things for the computation, payment and duration of child support. Defendant's Motion of June 8, 1977 (R.39) sought modification of the original Decree of Divorce on the sole basis that the times at which child support was to

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terminate were inconsistent with the United States Supreme Court's statement as set forth in Stanton v. Stanton, 427 U.S. 7, 517 P.2d 1010 and Craig v. Boren, 97 S.Ct. 451. The defendant did not request the Court consider reducing, diminishing or altering his obligation for the payment of child support.

On the 19th day of September 1977 the Honorable David K. Winder heard the matter and issued a Memorandum Decision dated November 15, 1977 and later an Order Modifying Decree of Divorce dated November 30, 1977 (R.60-64). The Court held that the Stanton cases had no application to the instant case. In addition the Court modified paragraph 9 of the original Decree of Divorce. The modification did not change the defendant's obligation for child support, it simply modified the referenced paragraph to provide for the computation of that obligation by reference to Federal Income Tax Returns not general records. The original Decree was left totally intact so far and to the extent that the defendant's obligation for child support was concerned.

On February 17, 1978 the defendant filed a second Motion for Modification, this time requesting that the Court reduce his obligation for child support. Hearing on that Motion was concluded before the Honorable Homer F. Wilkinson on December 4, 1979. Attendant that hearing plaintiff asserted that the doctrine of res judicata precluded a statement or consideration of events or circumstances prior to November 30, 1977 (R.111-114) and the Court ruled that the doctrine of res judicata would preclude

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evidence of events and circumstances existing prior to the hearing of September 17, 1977. The hearing continued through regular conclusion and the Court ordered the Decree modified as set forth in its Order of April 18, 1980 (R.132).

ARGUMENT

POINT I

THE COURT DID NOT ERR IN FAILING TO DISMISS DEFENDANT'S MOTION TO MODIFY DECREE FOR FAILURE TO ALLEGE GROUNDS JUSTIFYING MODIFICATION AND AS BEING BARRED BY THE PRINCIPLES OF RES JUDICATA

Defendant's first Motion to Modify Decree of Divorce (R.39) was brought by the defendant solely for the purpose of ascertaining the validity of the provisions of the original Divorce Decree prescribing the termina-taion of child support at different ages based solely upon sex. The action was brought in light of and spawned as a result of recent decisions of the United States Supreme Court in Stanton 1 and 2. Attendant the hearing before the Honorable David K. Winder on defendant's first Motion to Modify Decree of Divorce, Judge Winder modified portions of the original Decree (R.24-27) prescribing the mechanical steps and computations to be used in ascertaining the quantom of the defendant's child support obligation. Judge Winder's modification did not alter or modify the quantom of defendant's child support obligation. The modification was made to streamline and make more workable the clumsy and ambiguous fashion in which that computation was to be made.

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Subsequent to the hearing on defendant's first Motion to Modify Decree of Divorce the defendant did on the 17th day of February, 1978, file a second Motion for Modification (R.84) on the basis that there had transpired the requisite change of circumstances between the time of entry of the original Decree on October 25, 1972 and February 12, 1978. In addition the defendant filed a Supplemental Affidavit on the 5th day of December, 1979, alleging additional factors upon which the requisite change of circumstances had occurred, those changes occurring from September 1977. Plaintiff claims that the second Motion for Modification was barred by the principles of res judicata as to events prior to the first modification proceedings. Defendant respectfully submits that the sum and substance of the doctrine of res judicata is "that once a matter is officially decided it is finally decided" Massie v. Paul, 92 S.W.2d 1114. A proper application of the doctrine in this matter would require that the matter of a reduction in child support was at one time litigated, which litigation defendant respectfully submits never occurred. The first time a change of circumstance was plead and in fact the subject of judicial consideration was attendant defendant's second Motion to Modify the Decree of Divorce. Counsel for plaintiff cites 18 ALR 2d 18, which citation we believe is absolutely consistent with the correct application of the doctrine and defendant's position in the instant matter. In Hudson v. Hudson, 111 P.2d 573 (1941) the appellant petitioned for an award of alimony. The Court heard the matter and appellant's specific request and acted thereon. Attendant a similar subsequent motion in 1940 the Court held that the issue was

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whether or not there was the requisite change of circumstance since the 1938 Order in that at the 1938 hearing the specific matter of an award of alimony was considered. In the instant case the hearing before the Honorable David K. Winder there was no consideration of a reduction of child support.

Plaintiff's counsel cites 24 Am Jur 2d, Section 676, Divorce and Separation, page 795, with which defendant concurs is an appropriate statement of the doctrine of res judicata.

Defendant contends that if there was err in the lower court the err was that testimony and evidence was limited to events occurring after the hearing on defendant's first motion.

Attendant defendant's secont Motion (R.84) the Affidavit (R.81-83) and Supplemental Affidavit (R.94-95) thereto defendant alleged and set forth seven bases, e.g. grounds, for a change. Those bases, e.g. grounds were clearly set forth and alleged in the pleadings provided counsel and in detail pursued at trial. Judge Wilkinson as a trier of fact and subsequent to a consideration of all the testimony found that there was the requisite change of circumstances and acted thereon. Counsel for plaintiff has attempted to consolidate some 259 pages of testimony in his 35 page brief, which summary after a thorough perusal of the record does not fairly characterize the basis for Judge Wilkinson's determination.

POINT II

THERE WAS A SUFFICIENT CHANGE OF CIRCUMSTANCES BETWEEN THE FIRST MOTION FOR MODIFICATION AND THE SECOND MOTION FOR MODIFICATION TO JUSTIFY GRANTING THE SECOND MOTION

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Plaintiff has attempted in three and one quarter pages to attack Judge Wilkinson's consideration of 259 pages of testimony and attendant Exhibits in which three and one quarter pages of summary plaintiff has failed to overcome the clear changes of circumstance appearing in the record.

POINT III

AN ORDER OF MODIFICATION CAN BE SUPPORTED WITHOUT FINDINGS OF FACT

Rule 52(c) U.R.C.P. provides:

"Findings of Fact and Conclusions of Law are unnecessary on decisions of Motions under Rule 12 or 56 or any other Motions except as provided in Rule 41(b)."

Wright v. Union Pacific Railroad, 22 Utah 338, 63 P 317, wherein the Court ruled that Findings of Fact were required only in a trial on merits, Findings on Motion for a new trial were not only not required but were neither necessary nor usable in the practice.

Counsel for plaintiff has failed to cite any authority for the proposition crusaded in his Point III and the only factual basis upon which he suggests a modification of a very clear rule is that of the duration of the testimony.

POINT IV

IT IS NOT ERR FOR THE COURT TO UNDERTAKE TO DEFINE THE TERM "FULLTIME STUDENT" IN THE PROCEEDING, IN THAT THAT ISSUE AFFECTS THE QUANTOM OF DEFENDANT'S OBLIGATION TO PAY SUPPORT WHICH WAS CLEARLY AND SQUARELY BEFORE THE COURT

Plaintiff contends that the issue of "fulltime student" was not

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before the Court and that by ruling the Court precluded testimony on that issue.

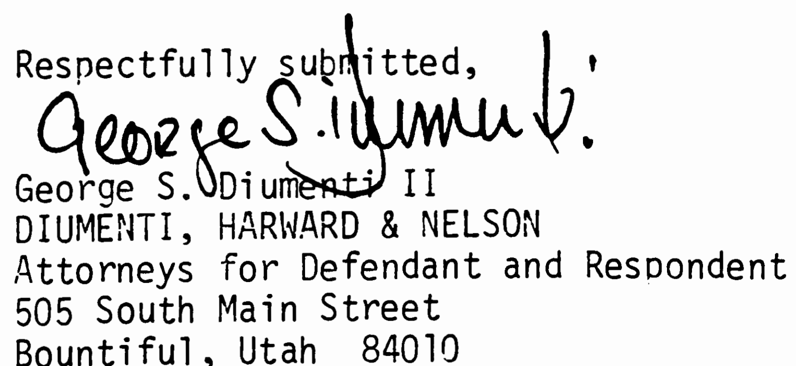
We believe that all issues attendant the defendant's obligation to pay child support, length, duration, term and conditions were before the Court as a result of defendant's Motion. The Court did nothing more nor less than make a determination and prescribe conditions upon which the defendant was to be governed, e.g. required or limited from an obligation to pay sums of moneys (child support) under certain conditions.

Plaintiff suggests that if the parties were unable to resolve their differences, e.g. determine on their own what "fulltime student" means and the obligation attendant thereto, that that issue could be handled attendant a hearing on an Order to Show Cause. We believe that that remedy is inappropriate in that it would require a consideration of what the parties mutual assent was at the time they entered into their Stipulation and Agreement (R.10-13). Those were all matters attendant which Judge Wilkinson heard evidence, considered evidence and entered his Order.

CONCLUSIONS

For the foregoing reasons defendant respectfully requests the Court affirm 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 certify that I mailed two copies of the foregoing Brief to Gordon A. Madsen, attorney for Plaintiff-Appellant, at his address, 320 South Third East Street, Salt Lake City, Utah 84111, this 17 day of October, 1980.

Cheryl P. Green

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