

1981

Hope H. Openshaw v. Richard Creed Openshaw : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HOPE H. OPENSHAW (WALLACE), :
Plaintiff-Appellant :
-vs- : CASE NO. 17369
RICHARD CREED OPENSHAW, :
Defendant-Respondent :

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COURT, THE HONORABLE KENNETH RIGTRUP,
JUDGE, GRANTING AN ORDER MODIFYING A
DECREE OF DIVORCE

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OTHER AUTHORITY

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- - - - -

APPELLANT'S BRIEF

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NATURE OF THE CASE

Defendant-Respondent petitioned below for a Modification of the Support and Income Tax Deduction Provisions of a Divorce Decree.

DISPOSITION BELOW

The Honorable Kenneth Rigtrup, District Judge, granted Defendant a reduction in the support requirements for his two sons, and allowed Defendant one child as a deduction for tax purposes.

RELIEF SOUGHT

Plaintiff-Appellant seeks a reversal of the Order of Modification and re-instatement of the Divorce Decree Provisions.

STATEMENT OF FACTS

The parties are referred to as they appeared below.

As evidenced by the Transcript herein, the "Hearing" of Defendant's Petition to Modify the Decree was limited by the Honorable Judge Rigtrup to an informal conference with the Attorneys, followed by a reported argument of Counsel, with the parties present. No sworn testimony was taken.

The only evidence was the introduction of a Monthly Expense and Income Statement from each party. Based on the foregoing, Judge Rigtrup reduced Defendant's support obligation for his two minor sons, age 11 and 8 at the time the divorce Complaint was filed (September 20, 1976 R-4), and ages 15 and 11 at the Modification Hearing (March 14, 1980).

The Defendant's income at the time of the Decree was \$475.00 take-home pay (R-28, Par. 7, Findings of Fact). He was ordered to pay \$100.00 per child support until his income increased to \$800.00 per month take-home, at which time he was ordered to pay \$200.00 per child, or \$400.00 per month.

In October, 1978, Defendant secured employment paying \$1,209.46 net (R-73), but did not so report to Plaintiff's Attorney (required by the Decree (R-32, Par. F.)), and Plaintiff secured a Judgment for support in arrears in the amount of \$1200.00 (R-79), for the six months Defendant had secreted his income from Plaintiff.

The Plaintiff was awarded \$1.00 per year alimony in the Decree. She had not worked outside the home for several years.

and was therefore forced to seek and secure employment to

She worked her way up the ladder by securing employment, through successive employers, until at the time of the Modification Hearing, she was employed by a medical clinic (Answers to Interrogatories R-69).

Although the Defendant was ordered in the Decree to hold Plaintiff harmless from a Third Mortgage on her home to Murray First Thrift & Loan Co, (R-32 Pag. D), she was forced to sell that home to avoid foreclosure proceedings by them (R-70, Pag. 10, Answers to Interrogatories). As a result of Defendant's failure to so hold her harmless, Plaintiff was required to secure another dwelling, with increased monthly payments.

The Defendant had re-married and assigned his increased expenses of that marriage, including the costs of support for a step-daughter, as the change of circumstances entitling him to a reduction in support, with which the Honorable Judge Rigtrup agreed.

Plaintiff's Motions for Amendment for Modification Order (Rule 52 (b), to open the Judgment for a formal hearing (Rule 59 (e), and for relief from the Modification Order (Rule 60 (b), after oral argument, were denied, excepting that the Court's Order granting Defendant both children as income tax deductions, was amended to one deduction for each party.

ARGUMENT

POINT ONE

THE LOWER COURT'S MODIFICATION ORDER IS BASED

ON A MISAPPLICATION OF LAW RESULTING IN PRE-

JUDICIAL ERROR AND REPRESENTS A CLEAR ABUSE OF

DISCRETION.

We have searched in vain for a precedent where any Court has upheld a reduction in support payments on the grounds of circumstances based on the father's re-marriage, plus his three-fold increase in income.

24 Am. Jur. 2d Divorce, Sec. 849-Remarriage of Parent.

"The fact that the father has remarried, thus increasing his expenses, is not a ground in itself for reducing child support...."

In the Annotation is a quote from Gamblin -vs- Gamblin (Ky) 354 SW 2d 504:

"A father's first duty is the support of his children. They are to be given preference over new automobiles and new wives."

But we need not go to other jurisdictions as this Court has consistently followed the above rule.

Garmer -vs- Garmer (66) 17 Ut.2d 393, 412 P.2d 922, this Court refused to reduce support payments where the father had re-married and had two children by that marriage.

Heltman -vs- Heltman, 29 Ut.2d 444, 511 P.2d 720 again holds that re-marriage, and the additional financial burden, does not qualify as a change of circumstances.

Harris -vs- Harris (1963) 14 Ut.2d 96, 377 P.2d 1007, this Court states at P2d 1010:

"We deem it appropriate to observe that the various excuses offered by the Defendant for failure to contribute to the support of his children; that he has remarried and has numerous expenses, including the operation of a car; the repayment of a loan to his sister; his clothing, laundry and barber expenses, however necessary they may be, are not more so than the needs of his children; and were to considerable extent taken on subsequent to that responsibility." (Emphasis added.)

Callister -vs- Callister (1953) 1 Ut.2d 34, 261 P.2d

"Plaintiff's Counsel (asserts) that voluntary impoverishment is not a ground for reduction in alimony. With the latter statement we agree. ..."

Scott -vs- Scott (1943) 142 Pac. 2d 198, this Court refused to accept, as a change of circumstances, the fact that the Defendant had remarried, and had a child by that marriage as well as stepchildren to support.

King -vs- King (1970) 25 Ut.2d 163, 478 P2d 492, wherein the Defendant had remarried a woman with four children, this Court states:

"It is not disputed that this taking on of a new family obligation is subordinate to his prior obligation to the Plaintiff."

In the case at bar, the Defendant, at the time of the divorce, anticipated that his earnings would increase. They did. The Decree, to which he had previously stipulated, provided that he would pay support for his two children of \$200.00 per child when his take-home earnings reached \$800.00. He voluntarily remarried, and attempted to place his "new family" above his obligation to his sons, and became \$1,200 delinquent in support payments, for which Judgment was rendered.

The Lower Court erred as a matter of law, in granting a modification in favor of Defendant.

POINT TWO

DEFENDANT MAY NOT BENEFIT FROM PLAINTIFF'S
INDUSTRY IN HER EFFORTS TO SUPPORT HERSELF AND
THE CHILDREN.

Plaintiff, who was age 50 at the time of the divorce, and had not been employed during the marriage of 17 years, deserves considerable credit for seeking and securing employ-

\$900.00 at the time of the Modification "Hearing". Her take-home pay, however, was a meager \$769.00. (R-64,78)

Judge Rigtrup disallowed as a deduction, however, the \$10.00 per pay period for savings -- and this, despite the fact that she had no alimony, no social security, or retirement benefits built up from the marriage.

Osmus -vs- Osmus (1948) 198 P.2d 233, this Court states at Page 235.

"The fact that Plaintiff received \$5,000.00 for the equity in the home did not excuse the Defendant from complying with the order of the court. The existence of independent means might be a factor to be considered by the court in fixing alimony, or in considering a petition for modification of a decree, or perhaps, under certain circumstances, in mitigation of punishment for contempt. But no discretion is left, to a divorced husband, to determine whether he should or will comply with an alimony decree. So long as such decree stands, it is incumbent upon him to comply with it, or at least to exercise every reasonable effort to comply with it. If because of change in the circumstances of the parties it appears that the decree is inequitable, or impossible to comply with, he may petition for modification. But so long as that decree stands, the husband must comply with it, or make every reasonable effort to do so, and this is true regardless of how the financial situation of his former wife may have improved.

In Holbrook -vs- Holbrook (Utah) 308 P.2d 1113, this Court States at (Pg. 1115):

"It would seem strange to permit the husband and father to force her into such a situation, then take advantage of it to escape his liabilities without some change for the worse in his ability to meet his obligations." (Emphasis added)

POINT THREE

THE LOWER COURTS ALLOWANCE TO DEFENDANT OF ONE DEDUCTION FOR INCOME TAX PURPOSES, WAS WITHOUT ANY BASIS IN THE EVIDENCE AND CONTRARY TO THE COURT'S OWN FINDINGS OF FACT.

Paragraph 4 of the Findings states: (R-88)

"The Plaintiff's current monthly expenses for her support and that of the two minor children of the parties is \$896.35."

Paragraph 7 further finds:

"The sum of \$175.00 per month per child, plus maintaining health and accident insurance for the minor children, plus paying for drugs and medication for the minor child, Thomas, constitutes more than 50% of the necessary monthly support for the minor children."

There was no sworn testimony, or any other evidence as to the cost of the insurance, or the amount paid for drugs and medication, and the Lower Court made those Findings without any evidence whatsoever. Aside from that, the Court's Findings in Paragraph 7, is not supported by simple arithmetic.

Certainly, it is only logical and equitable to find that if the Plaintiff must pay \$900.00 per month to maintain a home for herself and two children, plus utilities, food, clothing, and the like, that one-third of that sum should be allocated to each, or \$300.00 per child. That, obviously, is double the amount the Court found exceeded 50% of the monthly support for each child.

CONCLUSION

The Modification Order, reducing child support payments, should be reversed, and the terms of the Decree reinstated.

The Order allowing one deduction to Defendant for income tax purposes should also be reversed, and the provisions of the Decree, as amended, allowing Plaintiff both deductions should also be reinstated.

Respectfully submitted,

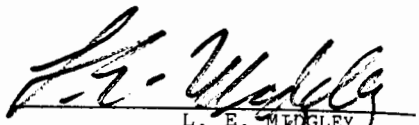
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