1982

Diane Walch Reick v. Donald Thomas Reick : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DIANE WALCH REICK, Plaintiff-Respondent, v. DONALD THOMAS REICK, Defendant-Appellant.	SUPREME COURT NO. 18229

RESPONDENT'S BRIEF

Appeal from the Judgment of the
Second Judicial District Court for
Weber County, State of Utah

HONORABLE JOHN F. WAHLQUIST
District Court Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE CITATIONS:

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

DIANE WALCH REICK, Plaintiff-Respondent, v. DONALD THOMAS REICK, Defendant-Appellant.	SUPREME COURT NO. 18229

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

Respondent filed an Order to Show Cause and Affidavit In Re Modification of Decree, seeking, inter alia, an increase in child support, recovery of health and accident insurance not maintained by Appellant in accordance with the order of the Court and recovery of child support withheld unilaterally by Appellant without order of the Court.

DISPOSITION IN LOWER COURT

On a hearing in the lower court, the Court granted an increase in the child support, allowing to be deducted from the child support alimony allegedly wrongfully obtained by Respondent and without granting compensation for additional

insurance expended by Respondent and which was part of the Court ordered obligation in the Decree of Divorce of the Respondent, and recovery of funds expended by Respondent as medical care for the child.

RELIEF SOUGHT ON APPEAL

Respondent seeks an additur by the Court from the amount wrongfully withheld from child support by the Appellant; child support in accordance with the Judgment of the lower court; and costs of insurance and additional care for the handicapped minor child, together with disaffirmance of claim by Appellant making allegation of unclean hands of Respondent as an alleged bar to equitable judgment for Respondent.

STATEMENT OF FACTS

The wife, who was the plaintiff in the lower court, will be referred to herein as the Respondent, and the husband, who was the defendant in the lower court, will be referred to herein as the Appellant.

Objection is made to pages 6A, 6B, 6C, and 6D of Appellant's Brief, that in spite of a trial and full opportunity to introduce all exhibits essential to the trial of the matter in the lower court, the Appellant has included

in the Appellant's Brief pages 6A, 6B, 6C, and 6D as Exhibits, without same having been introduced into the lower court, and without petition for consent of the Supreme Court prior to including extraneous exhibits in the matter before the Court, same being enclosed without knowledge or consent of the Respondent and counsel for the Respondent.

Respondent and Appellant were intermarried on November 18, 1967, and had as issue of the marriage a daughter named Danielle, who at the time of the divorce of the Appellant and Respondent on May 26, 1972, was nine months of age. (R 1) At the time of the divorce, Appellant was steadily employed and making $800.00 per month, and at the time of the instant Show Cause Order and hearing of same, the Appellant was making the sum of $25,776.00 per year or $2,148.00 per month(T 214), which is obviously more than two and one-half times increase in earnings.

The Uniform Child Support Schedule of the Second Judicial District Court shows that for a gross earnings of $2,148.00 per month, a minimal support payment for a single child family would be the sum of $232.00 per month. (Appellant's Brief, p. 6A)

The parties entered into a Stipulation prior to the granting of a Decree of Divorce, and the Stipulation provided for the payment by the Appellant to the Respondent

of $150.00 per month for child support, and $50.00 as and for alimony, for a total monthly payment of $200.00, and further provided that the Appellant maintain a policy of accident and health insurance, with the minor child as the beneficiary thereof. (R 6-7) The Findings of Fact and Conclusions of Law, and the Judgment and Decree of Divorce reiterated the requirements above of the Stipulation (R 8-12), without any statement whatsoever as to a condition subsequent, such as remarriage, terminating or nullifying the payment of child support and alimony upon remarriage of the Respondent.

The Respondent remarried on August 29, 1977 (T 4), and divorced shortly thereafter. The Appellant remarried on May 27, 1972 (T 172), and Appellant's wife was employed at a salary of $8,000.00 per year. (T 188)

Appellant dropped insurance on his minor daughter and did not carry it for the period of 1977, 1978, and 1979, and then reinstated it in September, 1980. (T 152)

While the Respondent was remarried from August 29, 1977, to June 21, 1979, for a period of 22 months (R 42), she did not advise the Appellant of the remarriage, in that the Appellant threatened to lower the child support if the Respondent did get married (R 43), and in addition, the

Appellant sold the Opel GT motor vehicle which was awarded to the Respondent by the Decree of Divorce (R 11-12), and the Appellant did not reimburse the Respondent for $815.10, paid by the Respondent for medical care of the daughter (R 44), and for $1,054.00 paid for special remedial teaching of the ten-year old daughter (R 48). The Respondent further had no reason to know or believe that marriage was a condition subsequent to the marriage, in that nothing in the Stipulation, Findings of Fact and Conclusions of Law, and Decree of Divorce made any reference to remarriage as terminating the alimony. (R 8-12)

The Appellant, upon being advised of the remarriage of the Respondent, terminated the payment of alimony of $50.00 per month, and in addition, deducted $50.00 per month from the meager child support awarded to the Respondent (T 153), without seeking an order of the Court, or without any modification of the Judgment and Decree of the Court, either as to alimony or as child support.

The action brought by the Respondent on an Order to Show Cause and Modification of the Decree of Divorce (R 16-20), was a commencement of the instant action before this Court.

ARGUMENT

POINT I.

DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INCREASING CHILD SUPPORT UPON DETERMINATION OF SUBSTANTIAL CHANGE IN EARNINGS OF APPELLANT AND COSTS OF MAINTENANCE AND SUPPORT OF MINOR CHILD.

At the time the Appellant and Respondent were divorced in 1972, the income of the Appellant was $800.00 per month (T 214), and the evidence introduced at the time of trial established the earnings of the Appellant at $2,148.00 per month, for a total gross earnings of $25,776.00 per year. (T 214)

The Appellant had also remarried on May 27, 1972 (T 172), and his new wife continued her employment making $8,000.00 per year (T 188). In spite of the substantial increase in income the Appellant seeks to characterize this more than 250% increase in the Appellant's own salary, as "due to inflation". (Appellant's Brief, p. 11) The Appellant entered into a Stipulation and Agreement at the time of the original divorce on May 26, 1972, to pay $150.00 per month for support of their only child, Danielle, a daughter, and an additional sum of $50.00 per month as and for alimony (T 84), and has brought an Appeal to this Court on an allegation of abuse of discretion of the Court. (Appellant's Brief, p. 9)

The lower court heard testimony as to the earnings and needs of the parties involved, and as to their allegations of costs of living, and made a determination that despite the plea of the Respondent that the sum of not less than $250.00 was necessary for the support of the minor child, who is now ten years of age, and where the family is residing in California, that the sum of $225.00 was, under the circumstances, reasonable child support to award to the Respondent.

This Court, stated in Tsoufakis v. Tsoufakis, 14 Utah 2d 273, 382 P.2d 412 (1963), that it may review the evidence and substitute its judgment for that of the trial court, only where the division and award in the lower court was unjust and inequitable, and was an abuse of discretion based upon the facts and circumstances of the particular case before the Court.

In Kiesel v. Kiesel, 614 P.2d 1374 (Oct., 1980), this court held:

> Trial court is justified in modifying a prior decree of divorce where the parties seeking modification proves a substantial and permanent change of circumstances necessitating the modification. Relevant to such a showing are changes in the income of the supporting spouse, and increased needs on the part of the children.

In the instant matter before the Court, we find that the Respondent moved to Fresno, California, in order to improve her earning ability (T 87), and in addition to the higher costs of living in California, had the care of a minor daughter who had a learning disability, and for so long as the Respondent could afford it, was entered into an educationally handicapped school at Palo Alto, California (T 90), but was forced to withdraw her from the special school as being too expensive (T 91), but utilized every effort to advance the learning disability of the daughter by placing her in tutoring and reading centers. (T 92, 97) The Respondent was able to move to Palo Alto (T 102), by obtaining a job with the U.S. Geological Survey. The Court, in its final Judgment, did not award to the Respondent $250.00 monthly for which the Respondent prayed, nor give the $232.00, as set forth in the Uniform Child Support Schedule, but awarded the sum of $225.00, and the Judgment of the Court, while neither a judgment of joy to either the Respondent or the Appellant, was definitely not a denial of the Appellant's constitutional right to due process of law, nor is there any evidence whatsoever before the Court, and in the record before the Court, evidencing that the Court did anything but use its own discretion deriving at the facts of

the matter presented to the Court, and weighing the credibility of the witnesses and any of their self-serving computations of living expenses, and no endless recitation of citations of other cases can change the actual record before the Court.

The evidence before the Court is competent and relevant as to the current earnings of both the Appellant and the Respondent, and no amount of rhetoric, huffing or puffing can alter the fact that a stipulated and agreed $150.00 per month child support for a nine-month of daughter in 1972, at a time when the Appellant was earning $800.00 per month is still a viable amount of support for a ten-year old daughter, living with her mother in California, and where the Appellant is now making $2,148.00 per month (T 214) (without consideration of the Appellant's new spouse adding to his family's support and maintenance of his household and earning substantial annual income) (T 188), is not a reasonable basis upon which the Court could find a modification of the child support with an increase of only $75.00 per month.

If the Court would accept the logic of the Appellant to consider the increase of 250%, as being based purely upon inflationary costs (Appellant's Brief, p. 11), then this Court must find that it is also equitable to multiply the

original support of the $150.00 per month by the same 250%, which would compute child support at more than $375.00 per month.

POINT II.

RESPONDENT IS ENTITLED TO AN ADDITUR FOR REDUCTION OF CHILD SUPPORT BY APPELLANT.

The Stipulation and subsequent Decree of Divorce between the Appellant and the Respondent provided for the Appellant to pay $150.00 per month child support, and $50.00 per month alimony. (T 84) No provision in the Stipulation, nor the Decree of Divorce provided for the termination of the alimony upon remarriage of the Respondent.

Nothing in the Utah Statutes, at the time of the remarriage of the Respondent, and up to the time of the divorce of the Respondent from her marriage to a Mr. Cooper, provided for automatic termination of alimony upon remarriage. Even the Supreme Court of the State of Utah, in the case of Myers v. Myers, 62 Utah 90, 218 P. 128, had ruled that alimony was not necessarily terminated on remarriage of the wife, and it was not until the case of Austad v. Austad, 2 Utah 2d 49, 269 P.2d 284, (1954) that the Supreme Court of Utah reversed its position, and provided by judicial fiat that alimony would terminate upon remarriage. The Utah Legislature did not, until 1979,

revise the statutes to reflect the decisions of this Court under Title 30-3-5, U.C.A., as amended in 1979, by the additions of (2) and (3) thereto.

The allegation that the Respondent committed willful fraud against the Appellant, by not revealing her remarriage, is not borne out by the testimony, in that the Respondent had no knowledge or reason to believe that marriage had any effect whatsoever as to alimony, by reason of the failure of the Stipulation and the Decree of Divorce to make any reference whatsoever to a basis for termination of alimony. While Utah Case Law provided for termination of alimony on remarriage, except for certain other circumstances, it cannot be presumed that the Respondent had actual knowledge of court decisions of the Supreme Court of Utah, particularly by the fact that she had moved to and was residing in the State of California.

The basis for the Respondent not advising the Appellant of the remarriage is best reflected in the record, wherein the Respondent testified in reference to the $150.00 per month child support and the $50.00 alimony, as follows:

> Q. Now in reference to the $200.00 figure, could you briefly state to the court why you did not advise your husband, former husband, of the remarriage, and why you continued to accept the $200.00?

A. Yes. From the time when we got divorced, Don would pay me sporadically. He frequently paid me with checks that bounced. He a -- this was most frequent at the beginning. Right after our divorce for about four months, he didn't pay me anything at all. At that time I made very little money, and I was totally dependent on the money from him. We informally worked out where he would say to me, like he wasn't working, and so if I would take what he gave me, or I could take nothing, he would take me to court and have this lowered to nothing, and so I always worked under this threat. As the years went on, he became less irregular, and the last check that bounced I believe was in 1978. We never followed the Divorce Decree.

Q. What do you mean you never followed that?

A. Well, he was suppose to pay me before the 1st and before the 15th. He would never do that. He paid me sometimes more, sometimes less. I just took anything he would give me, and we never talked about the Divorce Decree. He paid me anything he felt like paying me, and I was very happy to get it. (T 85)

There can be no scienter upon which to establish fraud, when the sole basis upon which the Respondent did not reveal the remarriage to the Appellant was not upon the basis of termination of alimony, but upon the basis of the threat of the Appellant to terminate child support upon remarriage of the Respondent.

The Appellant, upon learning of the remarriage of the Respondent, commenced in July, 1980, to terminate payment of alimony, and also deduct without any order or petition through any court, the sum of $50.00 per month from the meager child support, paying only $100.00 per month to the Respondent. (T 85) The Appellant was also made aware of the fact that the minor daughter in the custody of the Respondent had a learning disability, and that the Respondent was substantially burdened in expenditures in an attempt to assist the child in overcoming her learning disability. (T 97) The Appellant also further refused to assist in paying any of the costs for orthodontic care necessitated for the ten-year old daughter (T 97), and as has been previously stated even dropped the health insurance required by the court to be maintained by the Appellant in accordance with the terms of the Decree of Divorce, requiring the Respondent to pay medical costs incurred during the period of non-insurability, and further requiring the Respondent to purchase health insurance for the minor daughter. (T 131, 152)

It is submitted that only upon proper application to the court, can the Appellant reduce the amount of child support previously set forth by the Judgment of the court in regards to the payment of same. (Austad v. Austad, supra)

It is further submitted to the Court that having found that the Appellant's salary having increased from $800.00 to $2,148.00 per month, and the necessity and needs of a ten-year old child as against the amount awarded when the child was nine months of age, and in consideration of the increased costs of living, learning disabilities, health problems, necessity for orthodontic care, and the costs of living in Palo Alto, California, all would negate the court granting an increase of $75.00 per month, and then allowing the deduction of $50.00 per month from the child support to be paid back to the Appellant for alimony which was paid following the marriage of the Respondent, is totally inequitable without also granting to the Respondent the amount of monies which the Respondent was compelled to expend upon the minor child because of the failure of the Appellant to carry medical insurance for the minor daughter, as well as costs expended in overcoming learning disability of the child, and other costs and expenses resulting from the necessities for the minor daughter.

The previous withholding by the Appellant of $50.00 per month for the child, and a subsequent order of the court finding that $225.00 per month is reasonable and fair support for the child, the deduction by the Appellant in the first instance of $50.00 per month from the $150.00 per

month child support without any legal process whatsoever, and the allowance by the lower court of a continued deduction from reasonable child support of $50.00 per month until the amount paid by the Appellant to the Respondent as and for alimony during the period of time in which the Respondent had become married, is improper, in that the Respondent is entitled to be paid the reasonable fair support of the child, as determined in the first instance by a stipulation and in the second instance by the finding of the lower court of a necessity for increase.

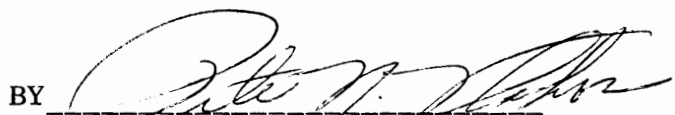
CONCLUSION

It is submitted to this Honorable Court that the Respondent did not, under any statement of the facts set forth in the record, commit fraud or deceit upon the Appellant, by continuing to receive $50.00 per month alimony, following the marriage of the Respondent. There is no evidence before the Court to arrive at a conclusion that the Court automatically used a schedule of any kind in determining the reasonable amount of child support due and owing by the Appellant for the support of the ten-year old daughter, and that the increase of $75.00 per month was minimal under the Statement of Earnings at the time of trial, compared to the earnings as of the time of stipula-

tion in the original divorce proceedings, and as against the necessities of support of the minor daughter. Further, that the previous deduction of $50.00 per month unilaterally by the Appellant, and the continued deduction of $50.00 per month from the basic support deemed essential and minimum for the care of the minor daughter should be added by this court as a remitter, and that the Respondent should be compensated for the reasonable attorney fees and costs and filing of a Respondent's Brief to the Appeal of the Appellant, in that there was no substantial basis for the Appeal by the Appellant, and that it was in fact a frivolous Appeal for which the Respondent should not be compelled to pay additional attorney fees and costs based upon the superior income and wealth of the Appellant as against the financial status of the Respondent.

RESPECTFULLY SUBMITTED this 26 day of May, 1982.

VLAHOS, PERKINS & SHARP

BY 

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26 day of May, 1982, I mailed a true and correct copy of the above and foregoing Respondent's Brief, by placing same in the United States Mail, postage prepaid and addressed to the following:

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