

1971

Lee C. Felt, aka Lee Craig Felt v. Robert S. Felt : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEE C. FELT, a/k/a
LEE CRAIG FELT,

Plaintiff-Appellant

vs.

ROBERT S. FELT,

Defendant-Respondent.

Case No.
12409

BRIEF OF APPELLANT

Appeal from a Judgment of the
Third Judicial District Court
for Salt Lake County, Utah
The Honorable Gordon R. Hall, Judge

FILED

MAY 28 1971

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEE C. FELT, a/k/a
LEE CRAIG FELT,

Plaintiff-Appellant

vs.

ROBERT S. FELT,

Defendant-Respondent.

} Case No.
12409

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action on an Order to Show Cause why the Respondent should not be held in contempt for failure to make alimony payments awarded to Appellant under a Divorce Decree and on Respondent's motion to modify the Divorce Decree respecting alimony payments.

DISPOSITION IN LOWER COURT

The case was tried to the Court on the Order to Show Cause and Respondent's Motion to Amend Divorce Decree. Judgment in favor of Appellant was entered on the Order to Show Cause and Judgment against Appellant was entered on Respondent's Motion to Amend Divorce

Decree. From the Judgment against Appellant on Respondent's Motion, Appellant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment against her on Respondent's Motion to Amend Divorce Decree and reinstatement of the original Divorce Decree.

STATEMENT OF FACTS

Appellant and Respondent were married at Salt Lake City, Utah, on the 17th day of September, 1949. On or about April 19, 1967, Appellant filed in the District Court of Salt Lake County a Complaint seeking a Decree of Divorce from Respondent on the grounds of mental cruelty. (AR 1)* In said Complaint Appellant also sought to be awarded an equitable portion of the assets accumulated by her and Respondent and sought a reasonable sum as alimony.

Appellant filed a Consent and Waiver on May 17, 1967, whereby she consented that the divorce hearing be held prior to the expiration of the 90-day waiting period. (AR 16) A Stipulation and Motion and an Entry of Appearance, Consent and Waiver were filed on May 17, 1967 for Respondent by and through his attorney, Mr. Grant C. Aadnesen, whereby Respondent acknowledged receipt of the Complaint and consented that the 90-day period be waived if the Court granted Appellant's motion. (AR 17) The hearing on Appellant's Complaint seeking a Decree

*References are to pages of Abstract of Record

of Divorce was set for May 17, 1967, before the Honorable D. Frank Wilkins, District Judge of the Third Judicial District.

Prior to the date set for hearing of Appellant's Complaint, the parties, by and through their respective counsel, negotiated and entered into a detailed Property Settlement Agreement on May 16, 1967. (AR 4) Said Agreement was 13 typewritten pages in length and indicated that the Appellant and Respondent had carefully considered its provisions as all assets of the parties were listed and divided Article II of the Agreement made provision for an alimony settlement. (AR 11) It was agreed that Respondent would pay to Appellant the sum of \$1,000 per month, payable on or before the first day of each month, commencing June 1, 1967. Respondent's obligation to pay was to cease upon his death or upon Appellant's death or remarriage.

It was further agreed in the Property Settlement Agreement that the alimony to be paid Appellant by Respondent was reasonable in view of the efforts made by Appellant in assisting Respondent in his professional education and in view of Appellant's present circumstances and social standing. The likelihood that Appellant would work and that her income would increase following the entry of the decree was expressly contemplated in the Agreement by both Appellant and Respondent and their counsel. The Agreement expressly provided in language not controverted that the alimony payments were not to be adjusted in the event of an increase in Appellant's income. Also, the Agreement provided that the alimony

payments were not to be adjusted notwithstanding increases or decreases in Respondent's income, unless substantial changes occurred such that Respondent was reasonably unable to pay the agreed alimony.

The hearing on Appellant's Complaint was held on May 17, 1967. Respondent did not appear at said hearing, he having previously filed an Entry of Appearance, Consent and Waiver. Appellant testified that she was familiar with the Property Settlement Agreement which had been filed with the Court and that she had read it, consulted counsel and signed the same. (AR 24) She declared her satisfaction with the division of assets and the alimony provisions. The Court inquired about the net worth of the parties after the Property Settlement Agreement and what each party would receive as a result of said Agreement. It was stated by Appellant's counsel that each party would receive between \$10,000.00 and \$15,000.00. (AR 25) The Court was aware of the alimony provisions of the Agreement and questioned Appellant and her counsel about the earnings of Respondent and whether there was a cut-off date on the alimony. (AR 25) The Court wisely inquired into the substance of what is the essence of this appeal, and relating to the Appellant's employment plans, the following exchange took place (AR 25):

“THE COURT: Do you work now, Mrs. Felt, or do you intend to?

THE WITNESS: I work part time. I do radio and TV commercials part time, and I hope to work again.

THE COURT: That wouldn't surprise me.

THE WITNESS: Oh, well, you are very kind.

THE COURT: So you can supplement your income, this one thousand, to some extent?

THE WITNESS: Yes.”

A Decree of Divorce was granted to Appellant on May 17, 1967, according to the terms of her Complaint, except where modified by the Property Settlement Agreement. (AR 19) Appellant was awarded certain properties and the sum of \$1,000 per month alimony, as provided in the terms of said Agreement, which was fully incorporated in the Decree of Divorce and declared to be fair and reasonable.

Respondent made the alimony payments required by the Divorce Decree during 1967 and 1968, but became delinquent in 1969. On October 7, 1969, Appellant filed a Petition For Order to Show Cause (AR 26) why Respondent should not be held in contempt of Court which resulted in a Judgment against Respondent in the amount of \$4,600, entered December 9, 1969. (AR 35) On November 14, 1969, Respondent filed a Motion to Amend Divorce Decree (AR 29) accompanied by his affidavit filed November 19, 1969 (AR 30), which alleged the following grounds in support of modification:

(1) He was prevailed upon by Appellant and counsel, both his and Appellant's, to consent to an alimony provision which was unreasonable and unfair.

(2) He had remarried since the divorce.

(3) The work load he had to maintain to meet the alimony payments was professionally inadvisable.

(4) His income had remained approximately the same but his professional and living costs had drastically increased.

(5) He had substantial indebtedness which he had not been able to reduce since the divorce because of the alimony payments.

(6) The Appellant had obtained full time employment whereas she was employed only part time at the time of the divorce.

(7) Appellant had substantial stock and investment plus properties received under the Divorce Decree.

(8) Appellant was in good health, employed and should not be dependent on him for her livelihood. She was well educated and qualified to earn a living.

Appellant filed a Reply to Defendant's Affidavit on November 21, 1969 (AR 32), whereby she opposed Respondent's Affidavit and Motion to Amend Divorce Decree. She contended that the Divorce Decree was entered in contemplation of the likelihood of her future employment and with knowledge of her education and training. Furthermore, Appellant argued that the Property Settlement Agreement which was incorporated in the decree provided that the alimony was not to be adjusted regardless of her income. Appellant denied that Respondent had been prevailed upon to sign the Property Settlement Agreement and generally denied the other allegations of Respondent. Various documents were

thereafter filed by both Appellant and Respondent in support of their respective positions.

Respondent again neglected to meet his obligation to pay alimony and was found to be in contempt of Court by a Judgment entered August 18, 1970 in the amount of \$8,000. (AR 38) Thereafter, by Order of the Court filed August 18, 1970 (AR 38), hearing was set for October 1, 1970 on an Order to Show Cause why Respondent should not be held in contempt for failure to pay alimony and hearing was set for the same date on Respondent's Motion to Amend Divorce Decree.

Following the hearing held October 1, 1970, the Honorable Gordon R. Hall, Judge of the Third Judicial District Court, issued a Memorandum Decision on November 5, 1970 (AR 60), finding Respondent in contempt of Court and modifying the alimony provision of the Divorce Decree by reducing it to \$1.00 per year. On December 3, 1970, Appellant, through her attorney, filed a Motion For a New Trial and To Amend Memorandum Decision. (AR 63) Hearing was held on Appellant's Motion January 18, 1971 and an Order Denying Motion for New Trial was entered on February 2, 1971. (AR 67) Also on February 2, 1971, the Honorable Gordon R. Hall entered an Order Modifying Divorce Decree and Respecting Contempt (AR 67) and filed Findings of Fact and Conclusions of Law. (AR 69) Appellant filed Notice of Appeal the 16th day of February, 1971. (AR 74) The content and grounds for the foregoing motions, orders and decisions will be discussed hereinafter.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RE-EXAMINING THE BASES OF THE DIVORCE COURT'S AWARD OF ALIMONY AND BY MODIFYING SAID AWARD.

- A. THE TRIAL COURT IS REQUIRED TO GIVE THE ALIMONY AWARD OF A DIVORCE DECREE THE FINAL STATUS ACCORDED TO ANY CIVIL JUDGMENT AND HAS THE AUTHORITY TO MODIFY THE DECREE ONLY WHERE THERE HAS BEEN A SUBSTANTIAL OR PERMANENT CHANGE IN THE MATERIAL CIRCUMSTANCES OF THE PARTIES SINCE THE DIVORCE DECREE.

The rules governing modification of the alimony portion of a Divorce Decree grant the Trial Court some discretion but do not permit re-examination of the evidence and modification at will. This Court recognized the foregoing principle in the case of *Sorensen v. Sorensen*, 20 Utah 2d 360, 438 P.2d 180 (1968), where it stated at page 181:

"Generally, the court is required to give such a decree the final status accorded to any civil judgment and to apply the doctrine of *res judicata* thereto. The parties should be entitled to rely on the finality of the alimony award in determining the right to receive and the duty to pay."

Although modification is permitted, as long as the decree stands, the husband must comply with it or make

every reasonable effort to do so, regardless of how the financial situation of his former wife may have improved. *Osmus v. Osmus*, 114 *Utah* 216, 198 P.2d 233 (1948).

With respect to the modification of divorce decrees, *Utah Code Annotated, Section 30-3-5 (Supp. 1969)*, provides:

“When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary.”

This statute has been construed to empower the Courts to modify an alimony award where there has been a substantial or permanent change in the material circumstances of either one or both of the parties since the decree was entered. *Sorensen v. Sorensen, supra; Anderson v. Anderson*, 13 *Utah* 2d 36, 368 P.2d 264 (1963); *Carson v. Carson*, 87 *Utah* 1, 47 P.2d 894 (1935). As more fully discussed hereinafter, however, the Courts may not consider events specifically contemplated by the Divorce Court and which served as the bases for the Divorce Decree and Property Settlement Agreement in determining whether there has been a change of circumstances. The party seeking modification must allege and prove a material and permanent change of conditions

since entry of the decree which would require under the rules of equity and justice, a change in the decree. *Hendricks v. Hendricks*, 91 *Utah* 553, 63 *P.2d* 277 (1936); *Carson v. Carson*, *supra*; *Rockwood v. Rockwood*, 65 *Utah* 261, 236 *P.* 457 (1925).

Where a party is dissatisfied with a divorce decree or feels the alimony award is excessive, his remedy in the absence of a permanent and material change in circumstances is to prosecute a timely appeal. Otherwise, the decree cannot be modified. In commenting upon the procedures available to accomplish modification of a divorce decree, this Court observed in *Cody v. Cody*, 47 *Utah* 456, 154 *P.* 952 (1916) at page 955:

“We do not think the Legislature intended that the courts should review the allowances made by them for alimony in divorce proceedings, but what was intended was that, where material new conditions have arisen after the decrees were made, which conditions were not, and could not have been, considered or passed on by the courts, then, upon proper application and proof, the courts may make ‘subsequent changes or new orders’ respecting the allowance of alimony or the distribution of property or the disposal of children. Where a party is dissatisfied with the original allowance or distribution of property, or the disposal of the children, he must prosecute a timely appeal to review the court’s orders or decrees in that regard, and in such cases the review must be had upon the evidence adduced upon the original hearing. When the conditions have changed, however, as before stated, the changes or new orders must be based upon the allegations of the

changed conditions and the evidence in support thereof.”

The principles espoused in the *Cody* case were subsequently reaffirmed by this Court in *Anderson v. Anderson, supra*. Thus, unless the Trial Court’s modification of the alimony award is founded upon a material and permanent change in the circumstances of the parties which has occurred since the entry of the Divorce Decree, the Trial Court exceeded its authority in modifying the alimony award.

B. THE TRIAL COURT’S MODIFICATION OF THE ALIMONY AWARD IS FOUNDED UPON A RE-EXAMINATION OF THE EVIDENCE UNDERLYING THE ORIGINAL DIVORCE DECREE AND A DETERMINATION THAT SAID DIVORCE DECREE WAS UNFAIR AND UNREASONABLE.

At the hearing on Appellant’s Complaint seeking a decree of divorce, the Court inquired into the pertinent circumstances of the Appellant and Respondent before granting the divorce. Appellant testified concerning her employment during the period of marriage and specifically during the time Respondent was completing his medical training. (AR 24) The Property Settlement Agreement which has previously been executed by the parties was before the Court and Appellant commented that she was satisfied with the division of assets and the alimony provisions. (AR 25) The Court inquired in the amount of assets each party would receive pursuant to the Agreement and asked whether there was a

cut-off date on the alimony provision. It was explained to the Court by Appellant's counsel that the alimony payments would terminate in the event of Appellant's death or remarriage, or if Respondent was unable because of a change in circumstances to earn the amount of money he was then earning, the alimony payments could be reduced. (AR 25) In response to further questions by the Court, Appellant and her counsel stated that Respondent's gross income was in excess of \$60,000 per year. (AR 25)

Following the hearing on Appellant's Complaint, the Court awarded Appellant a Decree of Divorce on May 17, 1967, which incorporated therein and adopted the Property Settlement Agreement as being fair and reasonable. Said Agreement was incorporated by the Court in its decree with full knowledge of the asset division, employment history and prospects of Appellant, alimony payment provisions and earning capacity of Respondent.

On or about November 14, 1969, Respondent filed a Motion to Amend Divorce Decree, accompanied by his affidavit setting forth eight grounds for modification. (AR 29) Although seven of the reasons set forth, which will be discussed hereinafter, may arguably be classified as alleging changed circumstances, the first reason calls for a re-examination of the original decree. Respondent alleged that at the time of the divorce, he was prevailed upon by Appellant, her counsel and his counsel to consent to an alimony award that was unreasonable and unfair at the time. (AR 30)

At the trial held on Respondent's Motion to Amend Divorce Decree, it is evident that the Court permitted the premises and fairness of the Divorce Decree itself to be examined. Respondent's counsel declared in his opening statement that he did not intend the Court to be confined to the matter of whether there had been a change of circumstances on the part of either party, but intended to show that the decree itself prescribed an unreasonable burden on the Respondent and was basically unfair and founded upon erroneous premises that should be examined. (AR 40) Appellant's counsel objected to any attempt to broaden the proceeding into an inquiry into the basic fairness of the decree, however, the Court indicated it did not intend to unnecessarily restrict Respondent. (AR 40) The Court admitted having some reservations about whether the scope of the hearing could be as broad as Respondent's counsel argued since there was a Property Settlement Agreement signed by the parties which had been adopted and approved by the Divorce Court. (AR 40) Nevertheless, the Court permitted Respondent's counsel to proceed as he had indicated.

Appellant was examined by Respondent's counsel, Mr. Hunt, and over objection of Mr. Burton, Appellant's counsel, Mr. Hunt questioned Appellant at length concerning her present earnings, living expenses, health and education. (AR 41) Appellant was also asked about her employment at the time of the divorce. (AR 42) On redirect examination by Mr. Hunt, Appellant further testified concerning her employment during her marriage

to Respondent. (AR 46) The Trial Court in permitting inquiry into Appellant's employment history prior to divorce, education, earnings and health, abused its discretion since these factors were before the Divorce Court and taken into account in entering the Divorce Decree.

Mr. Hunt next examined the Respondent and asked why he signed the Property Settlement Agreement which provided that the alimony payments were being made "in view of the efforts made by plaintiff in assisting defendant in his professional education." (AR 47) Mr. Burton objected on the grounds that the inquiry was entering the area of impeaching the Divorce Decree. (AR 47) In overruling Mr. Burton's objection, the Court again indicated its intention to be flexible as to the scope of questioning and admitted Mr. Burton's position may be correct. (AR 47) Respondent then testified as to the reasons why he signed the Agreement.

On cross-examination Respondent was questioned by Mr. Burton in regards to his allegation that he was prevailed upon by Appellant, her counsel and his counsel to sign the Property Settlement Agreement. Respondent admitted that he had discussed the terms of the Agreement with his counsel and specifically the alimony provision, and following said discussions had signed the same. (AR 51-54) He further declared that he had never discussed said Agreement directly with Appellant or her counsel and did not know what was meant by the statement in his affidavit that he was prevailed upon by appellant and her counsel to sign the Agreement. (AR 54-55)

Again, during cross-examination of the Appellant by Mr. Hunt, questions were directed to Appellant's employment and earnings in the initial years of marriage. She was also questioned concerning the sources of Appellant's and Respondent's support following his graduation from medical school. (AR 58) Further inquiry was made into the issue of who furnished the costs of Respondent's medical schooling. (AR 58)

At the conclusion of the testimony, Mr. Hunt reiterated Respondent's position in his closing argument that the Divorce Decree was unfair, that the Property Settlement Agreement should be re-examined, and the alimony reduced. (AR 60) Although Mr. Hunt included allegations that there had been a change of circumstances, the thrust of his argument was that the decree was unfair and almost a fraud upon the Court. (AR 60)

On November 5, 1970, the Trial Court entered its original Memorandum Decision in which Respondent was found in contempt of Court and the alimony award of the Divorce Decree was reduced from \$1,000 per month to \$1.00 per year. (AR 60) To support its modification of the alimony award, the Trial Court concluded that the Appellant was well qualified from an educational and experience standpoint in her chosen field of endeavor to adequately maintain herself, particularly in view of the fact that Appellant had changed from part-time to full time employment since the divorce. The Court stated further that the Property Settlement Agreement and the alimony award were based in part

on a recognition of Appellant's efforts to assist Respondent in obtaining his medical education and found her efforts to be substantial in this regard. The Memorandum Decision then stated:

"4. That the plaintiff is reasonably entitled to alimony for a given period of time sufficient to permit her to properly adjust to single life; however, to allow permanent alimony in the amount provided for in the Decree is unjust, unnecessary, and not equitable and the Decree is consequently modified to provide for the payment of said amounts of alimony through the month of May, 1971, a period of four years in all, said payments to cease thereafter, except for the payment of the nominal sum of \$1.00 per year necessary to preserve the right of plaintiff to future assistance should a true need arise." (AR 62)

Noticeably absent from the Trial Court's Memorandum Decision is any finding that there had been a permanent or substantial change in the material circumstances of the parties since entry of the Divorce Decree. Instead, the decision speaks in terms of the Decree being unjust and inequitable. The factors relief upon by the Court to substantiate its modification were considered by the parties prior to signing the Property Settlement Agreement and were before the Divorce Court. The reasons set forth by the Court do not justify a modification of the alimony award.

Appellant filed a Motion For A New Trial And To Amend Memorandum Decision on December 3, 1970. The main reason asserted in support of Appellant's motion was that the reporter's notes of the divorce hearing

had recently been found and transcribed and that such transcript would clarify which factors had been considered by the Court in entering its Divorce Decree. (AR 63) At the hearing held on Appellant's motion, January 18, 1971, the deficiencies discussed in the immediately preceding paragraph were brought to the attention of the Trial Court. The Court commented that in modifying the alimony award it did not intend to imply that the decision rendered by the Divorce Court was unjust or inequitable. (AR 66) It stated that by reason of a change in circumstances the decree had become unjust and unreasonable. Appellant's motion was denied on February 2, 1971, and the Trial Court entered an Order Modifying Divorce Decree and Respecting Contempt the same date and adopted Findings of Fact and Conclusions of Law.

In upholding its prior decision which modified the alimony award, the Court adopted Findings of Fact in an attempt to correct the deficiencies existing in its original Memorandum Decision. The facts therein stated, however, along with the statements by the Court that it did not intend to imply that the Divorce Decree was unjust or inequitable, fail to justify modification of the decree and do not disguise the fact that the Court undertook a re-examination of the basis of the original Divorce Decree. Said Findings state that Appellant is well qualified to adequately maintain herself, that Appellant is now employed full time, that Appellant is in good health, that the alimony award was based in part on recognition of Appellant's efforts, which were substantial, in assisting Respondent in his medical education.

(AR 69) All of these factors were properly before the Court in the divorce hearing and considered by the parties in drafting the Property Settlement Agreement. The Court has, in effect, reviewed the basis of the original Divorce Decree and adopted Findings of Fact to support a contrary decision on the alimony issue.

The Findings of Fact alter paragraph 4 of the original Memorandum Decision by adding the italicized portion as follows:

“8. That the plaintiff was reasonably entitled to alimony for a given period of time sufficient to permit her to properly adjust to single life; *as to the award and amount thereof at the time of the divorce decree, this court makes no finding; however, to continue to allow permanent alimony in the amount provided for in the Decree in light of the present situation and circumstances of parties is unjust, unnecessary, and not equitable. . . .*” (AR 71)

Thus, by the addition of a few words, the Court seeks to correct the deficiencies inherent in its original Memorandum Decision.

Said Findings of Fact further state that Appellant's income from employment and investments is suitable to maintain her and is higher than at the time of divorce, that Respondent has remarried since the divorce, that Respondent's income has increased but not commensurate with his cost of doing business and that substantial changes in the circumstances and situations of the parties hereto have occurred since the date of the Divorce Decree. (AR 71-72) Again, the matters of Appellant's in-

come and Respondent's income were properly considered by the Court at the divorce hearing and by the parties themselves in entering into the Property Settlement Agreement. The Findings also noticeably neglect to specify what substantial changes in the circumstances and situations of the parties have occurred.

It is evident from the foregoing that at the hearing on Respondent's Motion to Amend Divorce Decree, the Court re-examined the factual basis underlying the original Divorce Decree and determined that the alimony award of the Decree was unfair and inequitable. The statements of Respondent's counsel plus the testimony adduced at the hearing on the motion to amend, clearly indicate that there was an inquiry into the basic fairness of the Divorce Decree. The original Memorandum Decision of the Court was premised upon factors which were properly contemplated by the Court at the divorce hearing and considered by the parties in establishing the Property Settlement Agreement. Said decision made no reference to permanent or substantial changes in the material circumstances of the parties as is required before modification of an alimony award can be ordered, but was phrased in terms of an unjust, unnecessary and inequitable alimony award.

The statements by the Court at the hearing on Appellant's motion for a new trial to the effect that it did not intend to imply that the original Divorce Decree was inequitable do not correct the error. The issues examined and the testimony presented at the modifica-

tion hearing plainly indicate an examination into those factors relied upon by the Court at the divorce hearing in entering its decree. Neither do the Findings of Fact adopted by the Court disguise the fact that the Court exceeded its authority in re-examining the premises underlying the Divorce Decree. The facts set forth in the Court's findings show that its modification of the alimony award was not based upon a substantial change in the material circumstances of the parties.

As was pointed out in the *Cody* case, *supra*, where a party is dissatisfied with the alimony award, he must prosecute a timely appeal to review the Court's order and in such cases a review may be had upon the evidence adduced at the original hearing. At the hearing on Respondent's motion to modify the Divorce Decree, the Court acted in the capacity of an Appellate Court in reviewing the Divorce Court's decree and thus exceeded its proper authority. Appellant urges that this Court find that the Trial Court failed to apply the doctrine of *res judicata* to the Divorce Decree but instead abused its authority by re-examining the basis of the Divorce Decree and modifying the alimony award absent a finding that there had been a permanent or substantial change in the material circumstances of the parties.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY CONCLUDING THAT APPELLANT'S EMPLOYMENT, EDUCATION, EARNING CAPACITY AND HEALTH, PLUS RESPONDENT'S REMARRIAGE ARE SUFFICIENT GROUNDS TO JUSTIFY MODIFICATION OF A DIVORCE DECREE.

- A. EVENTS SPECIFICALLY CONTEMPLATED BY THE PARTIES AND THE DIVORCE COURT AT THE TIME OF THE DIVORCE AND WHICH SERVED AS THE BASES FOR THE DIVORCE AND PROPERTY SETTLEMENT AS A MATTER OF LAW DO NOT CONSTITUTE A CHANGE OF CIRCUMSTANCES UPON THEIR SUBSEQUENT OCCURRENCE.

The general rule regarding changes contemplated when the Divorce Decree was entered is stated in *Annotation, 18 A.L.R.2d 10, 21 (1951)*:

"Where the alleged change in the circumstances of the parties is one that the trial court expected and probably made allowances for when entering the original decree, the change is not a ground for a modification of the decree."

Thus, where it was contemplated by the Court at the divorce hearing that Appellant would obtain employment and the parties agreed in the Property Settlement Agreement that an increase in Appellant's income would not be reason for reducing the alimony payments, Appellant's full time employment is not a ground for modification of the decree.

The foregoing principle was applied by this Court in the early case of *Cody v. Cody, supra*. In construing the forerunner to *Section 30-3-5* of the present *Utah Code Annotated* which authorizes subsequent changes in a decree granting alimony, the Court stated:

“We do not think the Legislature intended that the courts should review the allowances made by them for alimony in divorce proceedings, but what was intended was that, where material new conditions have arisen after the decrees were made, *which conditions were not, and could not have been, considered or passed on by the courts*, then, upon proper application and proof, the courts may make ‘subsequent changes or new orders’ respecting the allowance of alimony or the distribution of property or the disposal of children.” (emphasis added)

Applying the rationale of *Cody* to the instant case, the Trial Court did not have the authority to modify the alimony award on the basis of conditions which were considered and passed on by the Court at the divorce hearing.

In the case of *Allen v. Allen, 25 Utah 2d 87, 475 P.2d 1021 (1970)*, this Court again applied the rule governing modification in the light of the occurrence of events contemplated by the Divorce Court. The plaintiff in *Allen* was granted a decree of divorce and awarded alimony of \$200 per month. At the date of the granting of divorce, plaintiff was not employed but contemplated securing employment within six months. The divorce hearing was conducted as a default matter but the defendant was present and in effect stipulated to the terms of the settlement as decreed by the Court. Shortly following

the divorce hearing, plaintiff secured employment and at the time the petition for modification of the decree was heard she was earning approximately \$210 per month, net. The defendant's petition for modification was predicated upon a substantial change in the material circumstances of either one or both of the parties since the entry of the decree. In commencing upon defendant's contentions, the Court stated at page 1022:

"He bases his contention on several facts, one of which is that the plaintiff has permanent employment, and he seeks a discontinuance of the alimony allowance of \$200 per month. *However, the decree of divorce, when granted, contemplated that the plaintiff would secure employment and contribute to her own support.* The defendant further contends that since the former residence of the parties was sold, and the proceeds divided, this fact constitutes a material change in the plaintiff's financial circumstances. *However, here again, there is a development that was contemplated at the time of the trial court's decree.*" (emphasis added)

Subsequent to the *Allen* case, this Court rendered its decision in *Short v. Short*, *Utah 2d* , 481, P.2d 54 (1971). In that case, Mrs. Short, who was unemployed at the time, was granted a divorce and awarded \$75 per month for alimony and a like amount for child support. Mrs. Short, who had been employed in the past, obtained employment after the decree and Mr. Short filed a petition to eliminate the alimony on the ground of changed circumstances. Relief was denied Mr. Short by the Trial Court on three different occasions and he appealed. In upholding the Trial Court's dismissal of Mr. Short's petition, this Court observed at page 55:

“It appears obvious to us that the award in the decree was consistent with and based upon the assumption that Mrs. S. again would be able to obtain employment, — otherwise the trial court’s socio-economic philosophy would have been superficially inane.

. . . .

In the instant case, we must and do assume that the court did not intend that the \$75 alimony award would be eliminated if Mrs. S. obtained a job paying \$75 per month, — or even \$175 per month, — or even \$389 per month, the income of Mrs. S. at her job at time of the third petition to eliminate the alimony.”

As is apparent from the foregoing discussion of the *Cody*, *Allen* and *Short* cases, where the alleged change in circumstances is one that the Trial Court contemplated and probably made allowance for when entering its divorce decree, the subsequent change is not a ground for modification of the decree. This is especially true in the case of a wife’s contemplated employment following the decree.

The Trial Court at the divorce hearing was fully aware of Appellant’s employment history and her intention to obtain full time employment after the divorce. As more fully set forth in the Statement of Facts herein, the Court specifically asked the Appellant if she worked or intended to, and she replied that she worked part time and hoped to work again. (AR 25) The Property Settlement Agreement was also before the Court in which the parties had agreed that changes in Appellant’s income would not be grounds for reducing the alimony payment

provision. The Divorce Decree was entered by the Court with full knowledge of Appellant's intention to seek full time employment. Therefore, as a matter of law, Appellant's return to full time employment and the ensuing increase in her income is not a change of circumstances. Thus, paragraphs 6, 7, 8, 9, and 12 of the Trial Court's Findings of Fact (AR 70-72) adopted after the hearing on modification do not constitute changed circumstances upon which modification of an alimony award can be based.

The *Cody*, *Allen* and *Short* decisions are based upon excellent reasoning, sound logic and fairness to the parties. Where the parties in a divorce action and their counsel all contemplate that a wife may become employed or her income may be augmented by additional working effort after the decree has been entered, and the trial judge considers such circumstances and bases his decree thereon, there is strong reason for giving effect to the agreement and understanding of the parties, as approved by the trial judge. It is manifestly unfair, where the wife in reliance upon such agreement and the Trial Court's decision with respect thereto, seeks additional employment upon the understanding that it will not affect her alimony or property settlement arrangements, only to find out later that another judge can re-evaluate the circumstances and enter a new order dictating the exactly opposite effect of the decree of the trial judge. If *Cody*, *Allen* and *Short* were not correct decisions, the divorced wife in these circumstances, who avoids work and efforts to contribute to her own support, may be better off economically than the

wife who in reliance upon the Trial Court's decision attempts to improve her lot in life by seeking self-employment.

B. RESPONDENT'S VOLUNTARY ACT OF REMARRIAGE SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER THERE HAS BEEN A PERMANENT AND MATERIAL CHANGE OF CIRCUMSTANCES.

The law is clear that the remarriage of a party following a divorce and the assumption by him of the obligation to support a new wife and child is not a basis for modification of an alimony award. In *Sorensen v. Sorensen, supra*, the defendant alleged six grounds for modification of the alimony decree, one of which was his remarriage and assumption of the obligation to support a wife and to assist her in caring for her handicapped child. The Trial Court reduced the alimony from \$1,250 per month to \$1,000 per month. This Court reinstated the original alimony award on appeal and stated that defendant's act of remarriage "involved voluntary action on the part of the defendant and, under the circumstances, [was] not available to him in justification for reducing the alimony." Application of the *Sorensen* case necessitates the conclusion that paragraph 10 of the Trial Court's Findings of Fact does not constitute a change of circumstances upon which modification of an alimony award can be predicated.

POINT III

THE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT THERE HAS BEEN A PERMANENT AND MATERIAL CHANGE OF CIRCUMSTANCES SUFFICIENT TO WARRANT A REDUCTION IN ALIMONY.

Eliminating paragraphs 6, 7, 8, 9, 10 and 12 from the Trial Court's Findings as not stating sufficient changed circumstances for the reasons previously discussed, leaves only paragraphs 11 and 14 plus portions of the foregoing paragraphs which allege an increase in Appellant's income from investments as possible bases for the Court's modification of the alimony award. It is asserted in part of paragraph 12 that Appellant's income from investments is substantially higher than at the time of the Divorce Decree, however, there is no finding as to the amount of the alleged increase in investment income. In fact, the only evidence before the Court as to the amount of Appellant's income from investments was her uncontroverted testimony that her income from stocks and bonds amounted to \$100.00 per year or less. (AR 42)

Paragraph 14 of said Findings merely states: "Substantial changes in the circumstances and situations of parties hereto have occurred since the date of the Divorce Decree." There is no indication whatsoever as to what changes in circumstances the Court is referring to in the foregoing finding. If said changes are those alleged in the preceding paragraphs of the Findings, paragraph 14 adds nothing, since the preceding paragraphs fail to re-

cite any amounts, facts or other evidence to substantiate the conclusions that there have been changes in Appellant's income, education or health since the decree. If said paragraph 14 was intended to refer to other changes, the Court has failed to so specify. Thus paragraph 14 of the Findings is not a proper basis for the Trial Court's modification of the alimony award.

Paragraph 11 of the Findings declares:

“Since the Divorce Decree herein, defendant's costs of doing business has substantially increased; his income has increased but not commensurate with the increase in cost of doing business.” (AR 72)

Once again, the Trial Court has failed to specify the particular changes in circumstances it relied upon to support modification of the alimony award. No amounts are set forth and no other evidence is referred to which indicates that the Respondent's cost of doing business has substantially increased. Appellant contends that even viewing the evidence most favorably for Respondent, said paragraph 11 does not state a change of circumstance sufficient to permit a reduction in alimony from \$1,000 per month to \$1.00 per year. Respondent's Exhibit 14-D admitted as evidence at the trial shows that the business expenses of his medical practice were \$38,973.00 in 1967, \$38,490.00 in 1968, and \$43,213.00 in 1969, an increase of \$4,240.00, or approximately 10 to 12 percent. Appellant contends that this increase is not a substantial change and is not

a sufficient basis for reducing or in fact completely eliminating the original alimony award.

It is evident from the foregoing that the Trial Court's Findings of Fact are not findings but merely conclusions. The failure to make proper findings further illustrates that the Trial Court's decision to modify the alimony award is not based upon evidence presented at trial but upon the conclusion that the alimony award of the original Divorce Decree was unreasonable and inequitable. Appellant submits that the evidence does not support the Trial Court's alleged Findings and therefore does not support its conclusions and decision to modify.

CONCLUSION

Upon a petition for modification of the alimony award of a divorce decree, the Court may modify the alimony award only where there has been a substantial or permanent change in the material circumstances of the parties since the divorce decree. The Court may not re-examine the basis for the divorce decree and modify the alimony award upon a finding that said alimony was unreasonable or inequitable when awarded. The Memorandum Decision of the Trial Court, the Findings of Fact and the testimony adduced at the hearing on Respondent's Motion to Amend Divorce Decree all indicate that the Trial Court's reduction of the alimony award was premised on the conclusion that the original alimony award was unfair and unreasonable.

In determining whether there has been a substantial change in the material circumstances of the parties since entry of the divorce decree, the courts may not rely upon changes in circumstances, which were expected, contemplated or considered by the Divorce Court when entering its decree. Such changes, as a matter of law, are not grounds for the modification of an alimony award. Since the Trial Court's Findings of Fact which relate to Appellant's employment, earning capacity and education involve matters which were contemplated by the Divorce Court. Respondent has failed to sustain his burden of proof that there has been a substantial change in the material circumstances of the parties. The Trial Court therefore committed error in granting Respondent's Motion to Amend Divorce Decree.

On the basis of the foregoing argument, Appellant respectfully prays that this Court reverse the Trial Court's action in granting Respondent's Motion to Amend Divorce Decree and reinstate the alimony provisions of the original Divorce Decree:

1. By determining that the Trial Court modified The Divorce Decree upon a finding that the original Decree was inequitable and thus exceeded its authority.
2. By determining that there has been no substantial or permanent change in the material circumstances of the parties since entry of the Divorce Decree.

3. By awarding to Appellant her costs incurred herein together with a reasonable attorney's fee.

Respectfully submitted,

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