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

Utah Supreme Court

Gayle Dean Hunt; Attorney for Defendant and RespondentClifford L. Ashton and Richard H. Stahle; Attorneys for Plaintiff and Appellant

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 RESPONDENT

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

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Gayle Dean Hunt
Attorney for Defendant-Respondent
Continental Bank Building
Salt Lake City, Utah

Clifford L. Ashton
Richard H. Stahle
of VanCott, Bagley, Cornwall & McCarthy
Attorneys for Plaintiff-Appellant
141 East 1st South
Salt Lake City, Utah

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STATEMENT OF THE KIND OF CASE

Plaintiff wife appeals from Order Reducing Alimony.

DISPOSITION IN LOWER COURT

The Court, on defendant-husband's Motion and three day hearing reduced alimony from $1,000.00 per month to $1.00 per year.

RELIEF SOUGHT ON APPEAL

Affirmance.

STATEMENT OF FACTS

Parties were married Dec. 17, 1949 and were divorced May 17, 1967 without having had children. Property, including home, automobiles, stock, bonds and bank accounts were split down the middle, and defendant-husband, by stipulated settlement, was ordered to pay $1,000.00 per month alimony. The Decree was adorned with language purporting to forever divest the Court of Review.

> " . . . and that said amount shall not hereafter be adjusted, notwithstanding increases or decreases in any amount in the income of plaintiff, and notwithstanding any changes in the income of the defendant unless said changes are substantial and so decrease the defendant's income so the defendant is reasonably unable to pay the alimony agreed to herein." AR p. 11.

Defendant-husband later complained the Stipulation and Decree was unreasonable and that he signed while under mental and physical duress—

> A. (by Dr. Felt) All I can say at this time, I was under enough mental and physical duress, as Mr. Burton indicates, so as to sign and not to contest this is being in fact the best that my counsel, who I felt to be skilled and professional, could secure. And although I questioned that, as well as other portions which

haven't been alluded to yet, I was told and assured that in view of discussions through the counsels that this was proper and that I should therefore sign. (R-373, L 30).

* * *

A. (Dr. Felt) The substance was, well, any Third District Court Judge would agree that this was fair and equitable and so I think it is too. (R 373, line 27.

* * *

Q. So you really weren't prevailed upon in any manner to sign this agreement rather than not to sign it?

A. (Dr. Felt) Only to the extent that was the best we could do, therefore, ergo, write your name, the answer was always the same, well, there it is. (R 375, L 22).

At the time of marriage, defendant-husband had a medical doctor's education substantially completed by the winter they were married, 1949.

Q. And so, except for the one quarter and winding up ceremonies, he had completed his medical education when you and he were married?

A. (Mrs. Felt) He had completed his M.D. He had not completed his medical education.

Q. He had not completed his residency nor internship, you mean?

A. That's correct.

The alimony settlemen tindicated court and counsel mistakenly thought she had put him through college, the alimony settlement reading—

> "The amount of the aforesaid alimony for the support of Lee C. Felt is a reasonable sum in view of the efforts made by plaintiff in assisting defendant in his professional education . . ." AR p. 11.

whereas his family put him through school which she admitted—

> Q. . . . You really didn't assist him in his basic education at all, did you?
>
> A. (Mrs. Felt) When he was in college, I did not. (R 316, L 8).
>
> Q. Who paid for your medical education?
>
> A. (Dr. Felt) My parents. (R-325, L 21).

His parents provided an automobile as well—

> Q. Besides that, your parents bought you an automobile?
>
> A. (Dr. Felt) Yes, they did. (R-409, L 25),

and provided them with a duplex (R-318, L 6) without down payment (R-318, L 16).

Plaintiff-wife had a bachelor's degree in arts at the time of marriage (R-289, L 8). She contributed modestly to family income while defendant-husband interned.

At the time of the divorce (1967) defendant-husband earned substantially as an eye surgeon and she modestly, with intermittent parttime work and defendant was "suffering and continues to suffer serious health problems as a result of the emotional involvements and

disturbances connected with the divorce matters and proceedings herein. (AR p. 18.)

At the time of Motion for Modification (1969), plaintiff-appellant-wife was in excellent and vigorous health—

> Q. You are in vigorous health, are you not?
>
> A. Yes, I am.)R-291, L 4);

plays tennis, golf and skates and skis (R-290, L 29), was socially prominent (R-291, L 7), without dependents (R-291, L 16), had income from several sources, (R-296, L 10)—

> Q. So that year of 1968 you had income from the Southeast Furniture, and from Circuit and Eddington and from Cottonwood Mall and you had the alimony and the KUTV?
>
> A. (Mrs. Felt) Yes.

Her salary alone was $8,091. Income from other sources $12,078.00; total for 1968, $20,968.00 (R-296, L 16); 1969 salary without alimony, $8,500.00 or $8,600.00 (R-297, L 25).

Plaintiff-wife, after the divorce, voluntarily placed herself in the labor market despite $1,000.00 a month alimony coming in (R-301, L 26 to 30) earning over $9,000.00 in 1969 (R-302, L 2), and besides her salaried job, did freelance work on the side (R-287, L 21) in the advertiisng business, did consultant work in addition for a television station in which she had acquired an ownership interest (R-287, L 26), realized income from

stocks and bonds in addition (R-288, L 14), was acquiring a condominium unit (R-282, L 23), enjoyed medical and vaaction benefits in connection with her work (R-291, L 30) also paid club membership (R-282, L 3), had obtained "extensive training in the radio and TV field" (R-289, L 10), was admittedly able to earn a livelihood . . . " (R-289, L 13) and was voluntarily far from dependent—

> Q. Let's talk about the present. You have chosen to become a self-employed, highly professional individual, haven't you?
>
> A. (Mrs. Felt) Yes. (R-289, L 22)

and admittedly clung to the alimony to provide for the rainy day or "security" (R-301, L12)—

> So I need this money to try to provide for some kind of security if I am an in accident, or if I am out of work for a short amount of time, or even a long amount of itme . . . " (R-301, L11).

Her voluntary departure from dependency rolls is illustrated in other testimony—

> Q. The fact remains that in 1968 you voluntarily worked in spite of $1,000.00 a month coming in?
>
> A. I want to get enough ahead that we can forget this. (R-301, L 26)
>
> Q. In 1969 you voluntarily worked. Did I say $7,000 odd dollars coming more? More money than most girls working in the business world earned? You voluntarily worked and earned another $9,000.00 didn't you?
>
> A. Yes. (R-302, L 1)

The settlement left her with $10,000.00 or so plus home equity, (R-220, L 4) (R-219, L 18).

In connection with the wife's rainy day theory, it is notable she wound up with a $50,000.00 life insurance policy on his life, doubple indemnity (AR page 6) and thereafter sought and obtained another $60,000.00 double indemnity policy on defendant's life. (R-210).

Q. (By Mr. Hunt) Is it double indemnity on those?

MR. BURTON: If you know.

A. Yes.

Q. On both of them?

A. I believe so.

Q. So they would pay $200,000.00 in the event of his death?

MR. BURTON: By accident.

To enhance entitlement position, plaintiff-wife testified she had remained childless but the evidence showed she had acquiesced in his sterilization to prevent pregnancy because of hereditary muscular dystrophy (R-387, L 27), plaintiff knowing this before marriage—

Q. Did you and she discuss this?

A. Oh, yes.

Q. Was she in favor of it?

A. Definitely.

Q. It was a matter that could have a risk that could have been run by both of you, could it not?

Q. You and she may have had children and have run the risk one way or the other of the child being disabled or defective?

A. That's correct.

Q. And did she help you make this decision?

A. Yes. (R-388, L 18)

And apparently adoption was not considered in the early stages of the marriage (R-388, L 20), only 8 or so years later, (R-388, L 27) and only after the marriage was already on the rocks. (R-389, L 24). She earlier testified:

Q. The Court: Had the difficulty been rather long and extended?

A. (Mrs. Felt) It's been, I think this is something I should have done ten years ago but I kept trying and trying until obviously there was nothing left. (R-22, L 1)

Defendant-respondent-husband, with generous legal assistance, paid substantially the sums ordered until health problems—

A. Health problem was a compression syndrome resulting in a partial paralysis of the right shoulder. (R-378, L 3)

and neurological problems (R-331, L 15) prompted him to seek medical advise from two doctors (R-331, L 17) and (R-332, L 1), Dr. Robert Jones and Dr. W. Spence, defendant testifying that—

"It became simply mentally and physically impossible to maintain this kind of burden on my-

self, or, to say the least, of my dependents or, in fact, on my patients." (R-330, L 7)

Defendant fell behind on the alimony, sought relief in Court and testified—

A. In my opinion, it is impossible to maintain such an alimony figure. (R-329, L 22)

* * *

Q. And what else?

A. And although I managed to maintain these alimony payments as long as I could during 1968, it became simply physically and mentally impossible to maintain this kind of burden on myself, or to say the least, of my dependents, or in fact, on my patients.

Q. Why?

A. Because the overhead costs and business costs associated with running my practice were continually on the inflationary rise; although my fee structure had remained, and still has remained, the same for about 14 years. And yet, in order to accomplish this alimony fee, it was necessary during the latter part of '68—excuse me—of '67 and early part of '68 to in effect, rush through more people, work longer, maintain a heavier surgical schedule, if possible, in order to meet this figure. Now this was difficult to do, and several effects manifested themselves by this action. First of all, patients who were not used to being rushed through in half the time would remark, at least to me or at least to my girl . . . (R-330, L 24)

* * *

THE COURT: Yes. You can state it.

A. I am not quoting necessarily, but people, of course, who did feel inclined to comment left the impression that this was becoming a factory, and maybe it was the work hours were somewhat longer with shorter lunches. The surgical schedule was more crowded, and when I got home at night, I was so tired, and I mean it, that I fell in front of the dinner table, and then, from there into bed, kicking everything along the way. I didn't have to be told that a fuse was going to be blown one of these days, and finally, it was. And later that year, in spite of this type of a schedule, as you know, I developed some neurological problems.

Q. Did you actually consult doctors regarding those?

A. I consulted two physicians, and on their advice, was instructed—there were a few particular measures which I followed, but in addition ,was told simply that this sort of stuff has got to be stopped, and it was. And it still is.

Q. And were there any instructions, medically, with respect to the—you say, this sort of stuff. You have got to tell me more what you mean by this sort of stuff.

A. I knew by mid-1969 that this schedule—this work load, and this burden, whatever you want to call it, was not going to work. Now, as I said, the reason was because of the way I performed, the way it was affecting other people. They were not used to this kind of

rushing, so I really did not have to be told to slow down, but it finally came to that.

Q. Did you, in fact, consult a doctor?

A. I consulted two physicians and they both said, in effect, the same basic thing, which I knew anyway. You can't do this.

Q. And those doctors were who?

A. First one was Dr. Jones. He referred me to Dr. Spence.

Q. And Dr. Spence—what is his first name?

A. Robert Jones.

Q. Robert Jones, and who, then, is Dr. Spence?

A. First initial is W. I am not familiar with his first name. Definitive treatments were carried out for two month, and when that was finished, in December, as I recall, the question came to my mind, well, now, is this going to happen again and I was advised again not to start pushing again. Anything can happen. If you want to have trouble again, just go back and carry on and do too much, and I was again advised, and it was stressed, and they put it into strong terms that this kind of activity . . . (R-331, L2)

Q. But those doctors are here in town and available to be called if necessary, is that right?

A. They are.

Q. Well, Dr. Felt, in your professional work, is it professionally advisable in your opinion to carry on the type of work load you did in '68 and '69? (R-332, L 25)

A. My answer would be no. It is not advisable. (R-333, L 5)

Q. So the general advice was, you slow down?

A. Yes. (R-379, L 16).

In addition to his personal and health problems, Dr. Felt had suffered a drastic price-cost squeeze with gross overhead costs, according to schedules prepared by a CPA firm, Exhibit 144-D (R-337, L 9) increasing from $38,000.00 in 1967 to $43,000.00 in 1969 (R-336, L 23) Exhibit 14-D and 16-B, gross income down from $70,108.00 in 1967 to $67,648.00 in 1969, Exhibit 14-D, adjusted gross income down $34,040.00 in 1967 to $38,187.00 in 1968 and $28,014.00 in 1969, Exhibit 14-D and net income after taxes, etc., down from $17,317.00 in 1967, $17,573.00 in 1968 to $14,395.00 in 1969, Exhibit 14-D and 15-D—

Q. And your final net income, there is a trend downward, is there not?

A. That's right.

Q. From $17,000. to $14,000. Is that correct?

A. Yes. (R-336, L 25)

Specific cost items testified to, more drastically demonstrated the cost-price squeeze. Seminars and meetings, by stipulation (R-341, L 17) necessary in this doctor's field, rose drastically upward in costs. (Ex. 17-D); insurance 1967 to 1970, $311.00 to $1,286.00, (R-343, L 29) Exhibit 21-B; base telephone $33.00 to $87.00; labor and billing costs, with the same office and

fee set-up (R-330, L 15) $465.00 to $900.00; auto insurance $136.00 to $207.00; meetings and seminars $1462.00 to $3250.00 (R-344, L 22) Exhibit 21-D; rent $240.00 to $280.00.

Remariage and support of a fatherless child increased defendant-husband's family and personal expenses substantially. This was conceded and that personal and living expenses would be drastically higher, albeit applicable to both parties, (R-345, L 21 and L 28).

To October 1, 1970, defendant had paid alimony of $30,543.83 (R-386, L 21). When the relief given at court, a reduction was made conditional upon payment of back alimony, he raised and paid the same (R-209), $13,923.67, with $1,000.00 per month accruing through May, 1971, (R-211)—a total of $48,000.00 plus interest (R-206) plus costs (R-196), plus attorney's fees (R-207, etc., etc., and only then was confronted with this appeal.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY AND NECESSARILY COMPARED CONDITIONS THEN, i.e., AT TIME OF DIVORCE, AND NOW IN REDUCING ALIMONY.

> An alimony award is never quite final, but always subject to review and modification for good cause and changed circumstances.

If there is any factor well established in the Utah law respecting alimony, it is that the alimony decree is always subject to review for good cause shown.

In an early land mark case, ***Buzzo vs. Buzzo,*** 45 Utah 625, 148 Pac. 362, where original alimony was reduced without the wife's consent, she contending it was unchangeable being a consent decree and not only tied to a property settlement but payable out of real property, Judge Frick ably wrote:

> "We have a statute (Comp. Laws 1907, section 1212) which provides that in case a divorce is granted the district courts of this state shall have the power to make such orders in relation to 'the children, property, parties, and the maintenance of the parties and children as shall be equitable.' It is further provided that 'subsequent changes may be made by the court in respect to the disposal of children or the distribution of property, as shall be reasonable and proper.' Waiving, for the purpose of this decision, the question of whether under said statute the courts may modify a decree for alimony wherein specific real property is decreed to the wife, or where a fixed lump sum is paid to her, yet where, as here, a sum is named in the decree of divorce, which is made payable monthly, *all courts agree that, under statutes like ours, the courts upon the application of either party have the power to change, modify, or revise such a decree,* and whenever it is satisfactorily made to appear that the circumstances and conditions of the parties, or one of them, have changed so that the amount originally allowed is *no longer just or equitable,* the court may modify the same." (Citing many cases, New Hampshire, Wisconsin, California,) (emphasis added).

The court further said:

> "We are of the opinion, however, that every decree of divorce and alimony must be deemed to have been entered subject to the provisions of section 1212, (predecessor of current code provision)
>
> All courts agree that if it is provided in the decree itself, that it may be modified or revised in case the circumstances and conditions of the parties have materially changed the modification may then be made. . . . Now, we think that under statutes like ours the provision therein contained authorizing a change in modification, is as much a part of the decree as *though it were written into it.* (Emphasis added).

As if to emphasize the appropriateness of review in these matters, the alimony statute, 30-3-5, Utah Code Annotated, which, prior to the 1969 Amendment, read as follows:

> "Disposition of property and children. — 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 children, as may be equitable; provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.

was, by said amendment, changed to read as follows:

> "Disposition of property and children. — 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 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. (Emphasis added),

the underlined words "The court shall have continuing jurisdiction to make . . . " being added. Granted the change was unnecessary as to continuing jurisdiction, our court having continuously and consistently, from the earliest cases reiterated the proposition. *Whitmore vs. Harding,* 3 Utah 121, 1 Pac. 465; *Reid vs.* Reid, 28 Utah 297, 78 Pac. 675.

In all of the alimony modification cases reviewed by this writer, when the modification was sustained by the appellate court, the method used by the trier of the fact, the trial judge, was similar to that used in the instant case, i.e., a review of the situation at time of divorce as against the circumstances of parties at time of motion for modification. Many of the reviews were exhaustive as in the instant case and as indicated in the *Slaughter v. Slaughter* case 18 Utah 2d 274, 421 P.2d 503, indeed, the trial court is obligated to inquire and review and familiarize itself with the circumstances (then and now), otherwise, how else could he determine what is "just and equitable" at a given time?

Indeed, the pattern of our Supreme Court is to affirm drastic revisions respecting alimony and support where the record indicates that the review is thorough and that the trial court rendered its modification based on a thorough understanding of all factors. This was illustrated by *Harrison vs. Harrison,* 22 Utah 2d 180, 450 Pac. 2d 456, where the Supreme Court affirmed a drastic revision upward in alimony and three years after the divorce decree split up a $10,000.00 bank account.

Gollegos vs. Stringham, 21 Utah 2d 139, 442 Pac. 2d 30, albeit not a modification case but an ordinary appeal, comments on the latitude of the trial court—

> "'. . . Due to the perrogatives and the advantaged position of the trial judge, he has a comparatively wide latitude of discretion in determining the rights and duties of the parties to a divorce in order to provide the most equitable and practical basis for them to readjust their lives in as happy and useful manner as possible. . . . This judgment should not be upset unless it appears that it works such an inequity or injustice, or places one of the parties in such an impractical situation that equity and good conscience demand that it be revised. We are not persuaded that he abused the discretion which is reposed in him in such matters."

In *Slaughter vs. Slaughter,* 18 Utah 2d 274, 421, P.2d 503 (alimony appeal affirmed), this court commented on the type of review carried on by the trial court saying—

" . . . It is our impression that the trial court has given *conscientious and judicious consideration* to the various factors appropriate to consider in such situations and has entered the decree which he deems just and equitable in the circumstances. See Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977; MacDonald v. MacDonald, 120 Utah 573, 236 P 2d 1066; Habbeshaw v. Habbeshaw, 17 Utah 2d 285, 409 P 2d 972. We are not persuaded that he abused the broad discretion which is reposed in him in such matters." (Emphasis added).

In the *Whitmore vs. Harding* case, 3 Utah 121, 1 Pac. 465, the court reviewed the eccleastical, chancery and legislative history of divorce and affirmed the continuing right of reviews of the then Third District Court over the previous decision of the then Probate Court citing the Territorial Statute Comp. Laws of 1852, Sec. 6, as providing, among other things—

"When a divorce is decreed, the court shall make such order in relation to the children and property of the parties and the maintenance of the wife and such portion of the children as shall be awarded to her, as may be just and equitable . . . provided further, that when it shall appear to the court *at a future time* that it would be for the interest of the parties concerned that a change should be effected in regard to the former disposal of children or distribution of property, the court shall have *power to make such change* as will be conducive to the best interests of all parties concerned." Section 3 of 'An act in relation to guardians,' also in force at that time, provides: 'When a divorce is decreed or obtained, such order in relation to the children and prop-

erty of the parties, and the maintenance of the wife, may be made as shall be deemed right and proper; *subsequent changes* may be made by the probate court or selectmen in those respects when circumstances render them expedient." (Emphasis added).

In *Reid vs. Reid,* 28 Utah 297, 78 Pac. 675, the Court cited and relied on the Whitmore case emphasizing that the trial court's action would not be set aside except for abuse of discretion and affirmed the trial court's decision and commented—

> "Should appellant be thrown out of employment, or for any legitimate reason be unable to pay the amount now fixed by the court, the court may, in the exercise of its own judicial discretion under Section 1212 Rev. St. 1898 make such order in the premises as will be just and equitable to both parties."

The term *"just and equitable"* and the authority of the court on modification to make such changes as are just and equitable under the circumstances, the language used in the memorandum decision herein, is consistently and repeatedly found in a review of the Utah alimony medification cases.

In commenting upon the retention of jurisdiction, the Supreme Court made an interesting comment in *Bott vs. Bott,* 20 Utah 2d 329 437 Pac. 2d 684, as follows:

> " . . . Under our statutes, the court retains jurisdiction of the parties to modify the decree with respect to the distribution of the property. Sec-

tion 30-3-5 UCA 1953, Doe vs. Doe, 48 Utah 200, 158 Pac. 781. *Especially should this be true where the parties voluntarily litigate a matter over which the court has jurisdiction.*" (Emphasis added.)

"(1-4) In reviewing the trial court's order in divorce proceedings there are certain well established principles to be borne in mind. The findings and order are endowed with a *presumption of validity,* and the *burden is upon the appellant* to show they are in error. Even though our constitutional provision, Section 9 of Article VIII, states that in equity cases this court may review the facts, we nevertheless take into account the *advantaged position of the trial judge.* Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence *in the light most favorable to them;* and we will not disturb them merely because this court might have viewed the matter differently, but *only if the evidence clearly preponderates against the findings.*

(5) For similar reasons, the trial court is allowed a comparatively *wide latitude of discretion* in determining what order should be made in such matters; and we will not upset his judgment and substitute our own *unless it clearly appears that the trial court abused its discretion or misapplied the law.* The following are a few examples of innumerable cases supporting the principles just stated: Slaughter v. Slaughter, 18 Utah 2d 274, 421 P.2d 503; Dahlberg v. Dahlberg, 77 Utah 157, 92 P.2d 214; Hendricks v. Hendricks, 91 Utah 553, 63 P.2d 277; Anderson

> v. Anderson, 104 Utah 104, 138 P.2d 252; Allen v. Allen, 109 Utah 99, 165 P.2d 872; Alldredge v. Alldredge, 119 Utah 504, 229 P.2d 681, 34 A.L.R.2d 305 (1951); Pinion v. Pinion, 92 Utah 255, P.2d 265. (Emphasis added).

In *Whitehead v. Whitehead,* 16 Utah 2d 179, 397 P. 2d 987, (alimony appeal, affirmed), this court reiterated—

> "Due to the prerogatives reposed in him under the law and to his advantaged position, the trial judge must necessarily be allowed a wide latitude of discretion in such matters, and his judgment should not be changed lightly, nor at all unless under the fact shown by the evidence it works a manifest inequity or injustice."

If ever a court performed necessary surgery after exhaustive search and discovery, and effected a necessary modification in the interest of equity and justice, it is in the instant case.

POINT II.

THE COURT PROPERLY FOUND SUBSTANTIAL CHANGED CONDITIONS.

A. WIFE'S GOOD HEALTH, HIGH EARNINGS, ADMITTED LACK OF NEED, INVESTMENT POSITION, UTILIZATION OF EDUCATION AND TRAINING WARRANTED REDUCTION.

Plaintiff argues that events specifically contemplated by the parties in the divorce decree cannot warrant change in alimony. In the first place the changes that have taken place could not have been contemplated. She was in poor health at the time of the divorce and in vigorous health at the time of Motion to Reduce alimony. Her income then was near non-existence and at the time of reduction, approximately $8,500.00 per year plus the alimony plus consultation fees, plus investment income plus free lance advertising work. She was unemployed at the time of the divorce decree and with a bachelor's degree and therafter obtained extensive training in television, radio advertising, etc,. voluntarily abandoned a dependent position and status and became full time employed plus, vigorously utilizing her extensive education and training, hanging on to the alimony only to save for the rainy day (R. 301 L. 12).

These changes *could not have been contemplated* at the time of the decree.

Furthermore, the unwarranted language in the decree seeking to divest the court of future jurisdiction to change the same, with documents prepared by the plaintiff and only summarily read by defendant—

> "A. Probably 10 minutes to read it." (R-327 L 27)

could not divest the court of its power to exercise continuing jurisdiction. In *Callister vs. Callister,* 1 Utah 2d 34 261, Pac. 2nd 944, which was a proceeding to modify a decree based on an agreement and property

settlement arrangement to provide alimony for life, and in which the language was rather severe, the Court held that it did not thereby lose its right to make such modification or change thereafter as might be appropriate based on changed circumstances. The court said, page 37:

> "It is generally held that under such a statute the court can modify a decree for alimony regardless of whether the decree was based upon an agreement of the parties."

There the plaintiff was awarded $400.00 per month during the life of the plaintiff or until her remarriage" and certain property was divided. Several years later plaintiff asked the court to reduce the alimony from $400.00 to $200.00 per month, alleging reduced income, $1,000.00 to $600.00 per month, health impairment, remarriage and a wife and child to support and necessity to abstain from activities producing physical or mental strain; also, the plaintiff, on the other hand, had rental income and income from investments and stocks and the trial court's modification was affirmed.

In that case, the plaintiff, seeking to sustain the position that the alimony for life provision was a part of a property settlement division and, therefore, untouchable in the future by the court cited various non-Utah decisions including California decisions respecting property settlement decrees. The Utah Supreme Court, in response, page 40, noted:

> "A subsequent opinion by the Supreme Court of California, *Hough v. Hough,* 26 Cal. 2d 605,

160 P.2d 15, 18, clarifies and appears to set at rest the law of California relative to the issue here under discussion. It quotes with approval the following from 39 *Michigan Law Review* 128:

> 'Assuming that the court has power by statute to modify a decree not based on contract, it would seem that in the view of most courts there is no sufficient reason to take the decree based on contract out of the operation of the statute as to the alimony provisions. That the interest of the state in the marital status and the dissolution thereof is sufficient reason to support such a view hardly reems to require demonstration. * * * The obligation to pay alimony or support money to a divorced wife is one peculiarly justified by considerations of social desirability and generally prescribed as a consequence to dissolution of the marital relation. Being a continuing obligation, and being subject to scrutiny of the courts as to fairness and adequacy at its inception, it should so remain and the *contract of the parties should not be allowed to oust the court of power otherwise exercisable.*' " (Emphasis added).

The court in the Callister case further noted that (as in the instant case) the property was approximately equally divided and the alimony provision for life added. There as in the instant case plaintiff contended the court had erroneously reviewed the situation of parties and that the evidence did not support the trial court's Findings nor Conclusions; however, this court found that the trier of the facts had properly reviewed income, work load, mental strain, income from stock and investments

etc., etc., etc., at the time of the divorce as against the time of the application for modification, same as in the instant case.

The general rule cited in plaintiff's brief, page 21, attributable to 18 ALR 2d 10, is apparently not the rule in Utah according to the Callister case where Judge Hoyt wrote, page 38:

> "This view (property settlement with monthly payments for life not subsequently modifiable) is opposed to the majority of appellant decisions as appears from annotations in 18 ALR 1047, 1050, and 101 ALR 324, 326, and is not in harmony with views of this Court as announced in *Murphy vs. Moyle,* 17 Utah 113, 53 Pac. 1010. The Utah statute at the time of that decision was substantially the same as now. The court said: 'This statute is broad and comprehensive . . . and the court may afterwards, if occasion shall require it, make such change in any decree as 'will be conducive to the best interest of all parties concerned.' "

And in *Mathie vs. Mathie,* 12 Utah 2d 116, 363 Pac. 2d 779, albeit not a modification case, this court roundly held that,

> "The parties *cannot by contract completely defeat* the authority expressly conferred upon the court by our statutes, Sec. 30-3-5, Utah Code Annotated, 1953, in cases of divorce, to make such orders in relation to property as may be equitable." (Empasis added).

Cody v. Cody, 47 Utah 456, 154, P. 952, cited in plaintiff's brief, page 22 and page 10, is simply no

help to plaintiff on any point, it merely decreeing that *alimony not initially granted cannot later be awarded* the wife at divorce having been denied alimony and filed for alimony long after rendition of the decree.

Allen v. Allen, 25 Utah 2d 87, 475 P. 2d 1021, cited by plaintiff, page 22, is no assistance to plaintiff– it does not hold that contemplated changes will not warrant a modification. It simply found there was no *supbstantial change.* The court (Judge Ruggeri)–

> "Bear in mind that the burden of showing a substantial change of circumstances is upon the defendant, the facts in the instant case failed to support the intervention of this court, and the trial court's judgment is affirmed with costs to the plaintiff."

The *Short v. Short* case, 25 Utah 2d 326, 481, P. 2d 54, cited by plaintiff is a case where the trier of the facts, to whom we must give the benefit of the doubt in ferreting out the facts, found insufficient change of circumstances to warrant a modification. Mrs. Short had been employed, was awarded $75.00 alimony and upon her going back to work, Mr. Short requested elimination of alimony.

The court found that she couldn't have contemplated living on a mere $75.00, therefore the fact of a subsequent salary did not warrant elimination of the alimony.

In commenting on this case, the plaintiff's brief fails to reveal that here the trial court, charged with

responsibility, and given the latitude to pick and choose, discover, weigh and determine, found inadequate grounds to modify the decree, opposite from the instant case. Also, unlike the instant case where exploration was exhaustive, comparative procedures in the Short case were so meager that the Supreme Court commented,

> "There is the one point on appeal: that the court erred in failing to compare the parties' present circumstances in relation to those at the time of the decree."

In the instant case, the plaintiff was sick, dependent, only partially trained, earned meagerly from intermittent parttime work and lived high. At the time of the application for reduction, she was full itme employed and had income from freelance work plus consultation fees plus investments, plus broadcasting company part ownership and was in vigorous health, had taken on a rather new way of life, had an income of close of nine thousand dollars without alimony and over twenty thousand dollars with alimony, and did not really live "high" so to speak but rather modestly, stashing the money away for the rainy day. (R-301, L 12) where she commented:

> " . . . so I need this money to try to provide for some kind of security if I am in an accident or if I am out of work for a short amount of time or even a long amount of time . . . "

The very definition of alimony contemplates maintenance and support—*not the creation of an estate* for

retirement. See *Hogland vs. Hogland,* 19 Utah 103, Pac. 20, where the court said:

> "Alimony is defined to be an allowance which a husband, by order of court, pays to his wife living separate from him, for her maintenance

That the complete change-over was *voluntary* unquestioned:

> **Q.** The fact remains that in 1968 you voluntarily worked in spite of $1,000.00 a month coming in?
>
> **A.** (Mrs. Felt) I want to get enough ahead that we can forget this. (R-301, L 27)
>
> **Q.** In 1969 you voluntarily worked, as I say, $7,000.00 odd dollars coming in — more money than most girls working in the business world earned—you voluntarily worked and earned another $9,000.00, didn't you?
>
> **A.** Yes.

Apparently Mrs. Felt believes she must expedite creation of an estate at Dr. Felt's expense, lest his health fail in the future.

> **Q.** At the present time then, you are in vigorous health and fully employed and employable and earning enough to sustain yourself. What you are really working for is old age in the future? That is what you are worried about
>
> **A.** I can live from day to day if nothing goes wrong.
>
> **Q.** Why don't we eliminate this alimony until such time as you are sick or unemployed or unemployable?

A. Maybe at that time Dr. Felt will be sick or unemployed.

If Dr. Felt died she would receive $110,000.00 on insurance plus double indemnity benefits if applicable.

B. HUSBAND'S INCREASED COSTS, DECEASED NET EARNINGS, INCREASED LIVING EXPENSES, AND OTHER FACTORS ARE GROUNDS FOR REDUCTION OF ALIMONY.

As against her change over from a dependent, semi-trained, intermittent part time working person to a consultant in her chosen field and in an investment position defendant-husband found himself in a serious cost-price squeeze substantially reducing his net income despite drasticaly increased personal and home expenses and new responsibilities and in addition, found his health seriously jeopardized with doctors warning him to slow down or suffer the consequences, and he concluding he was prostituing his profession to maintain the alimony. The circumstances drove him to seek medical and legal advice and relief from the equity arm of this court. Thereupon the trier of the fact, with inches of discovery material at its disposal and three days of testimony, found—

> " . . . By reason of a change of circumstances, the court has found that decree has become unjust and unreasonable." (R-472, L 18)

Nevertheless, alimony was continued through eight

more months from the hearing date, $8,000.00 more then to be not eliminated, but reduced to $1.00.

In other words, she can still lean on him for the rainy day she is concerned about. And the court did not disturb the life insurance benefits.

In the *Sorense nvs. Sorensen* case, 20 Utah 2d 360, 438 Pac. 2d 180, heavily relied upon by plaintiff, there was simply a failure of proof showing substantial change. This court (Judge Harding) in commenting, said:

> "In regard to (e) (adult daughter in home since married) there is no showing as to who furnished the daughter's support in the mother's home or who paid for whose schooling or other expenses . . . As to (f), no evidence was given or offered to show the amounts of income therefrom to support this ground. (Substantial improvement in liquidity of wife's separate property).

Of note is this comment in the Sorensen case—

> "The rules governing modification of the alimony portion of a divorce decree grants the trial court the advantage of some discretion, since the parties are usually before the court and a sounder appraisal of the situation can be made . . . "

POINT III

THE COURT MADE A NECESSARY AND WELL FOUNDED AND JUST REDUCTION OF ALIMONY BASED ON EXHAUSTIVE INQUIRY INTO CONDITIONS THEN AND NOW

REVEALING MATERIAL CHANGE AND UNFAIR ALIMONY UNDER CHANGED CONDITIONS.

A salient factor in this case is the voluntary placement by plaintiff of herself in the labor market in a highly professional capacity, intimately trained with two degrees.

It is important that her salary is high and that she obtains consulting fees for advisory work and free lance work. It is important that she has voluntarily chosen a modest way of living, investing and saving for security purposes. She is in vigorous health, participating in all activities with broad social contacts. She admits she does not need his helpto live on—only to save for the future. She almost but not quite admitted that the alimony should be eliminated—

Q. It is with reluctance you accept alimony?

A. I want it right now because I need it. I don't like it. I wish I didn't have to.

Q. Why not eliminate alimony until such time as you are sick, unemployed or unemployable?

Mr. Burton: I object to that question. It's not relevant. (R-3044, L 15).

* * *

Q. Why don't we eliminate this alimony until such time as you are sick or unemployed or unemployable?

A. Maybe at that time Dr. Felt will be sick or unemployed. (R-303, L 2).

It is apparent from the marriage settlement agreement that counsel involved mistakenly assumed she had put him through college but the record completely dispells that theory. Also, the writer of the decree overstepped in trying to divest the court of future inherent statutory alimony review authority and it is an elementary rule of construction that documents should be interpreted most severely against those who produced and wrote them. It is salient that defendant tried valiantly to keep up the alimony but failed finding it no longer possible. (R-329, L 21), "physically and mentally impossible." (R-330, L 9)

We cannot help but be impressed by the evidence indicating—

> "Patients who are not used to being rushed through in half the time . . . " (R-330, L 23)
>
> "The surgical schedule was more crowded and when I got home at night I was so tired, and I mean it, that I fell in front of the dinner table and from there into bed, kicking everything along the way . . . " (R-331, L 8)
>
> "And later that year, in spite of this type of schedule, as you know, I developed some neurological problems." (R-331, L 15.)

Defendant sought medical help and was told to slow down—

> A. I consulted two physicians and they both said in effect the same basic thing which I knew anyway. You can't do this . . .

> . . . treatments were carried on for two months and then when that was finished, I was advised again not to start pushing again. (R-332, L 10)

With the fee schedule remaining substantially the same (R-330, L 15) and overhead costs higher, many of them drastically—Exhibit 21-D and Exhibit 17-D) with gross income actually decreasing (Exhibit 14-D), and net income drastically reduced (Exhibit 14-D; also tax returns), and these facts are not in dispute whatsoever, we cannot question the substance of the change in defendant-husband's circumstances as concluded by the trier of the facts.

CONCLUSION

The trial court's inquiry was rather exhaustive. We cannot deny that it must have provided a broad acquaintance with the situation of parties at time of the divorce and at time of application for modification. The court found the $1,000.00 per month alimony *no longer* just, necessary or equitable. We are only left to inquire if the record viewed in light most favorable to defendant-husband sustains the finding. The respective situations, then and now, of parties, was weighed—health, training, education, income, investment situation, overhead costs, tax obligations, etc.—and the pre-trial discovery was mountainous.

We submit that the changes in the situation of either party warranted a reduction in alimony and that

the combined changes and fairness to parties compe
the modification arrived at.

Respectfully submitted,

GAYLE DEAN HUNT

Attorney for Defendant-
Respondent-Husband