

1958

# William G. Erickson v. Helen W. Erickson : Brief of Appellant

Utah Supreme Court

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Sumner J. Hatch; Attorney for Plaintiff and Appellant;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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WILLIAM G. ERICKSON,  
*Plaintiff and Appellant,*

—vs.—

HELEN W. ERICKSON,  
*Defendant and Respondent.*

FILED

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Clerk, Supreme Court, Utah

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**BRIEF OF APPELLANT**

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WILLIAM G. ERICKSON,  
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*Defendant and Respondent.*

Case No. 8938

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The parties will be referred to as in the court below.

The plaintiff and defendant were divorced on the 10th day of February, 1954 (R. 7), the plaintiff being granted the divorce, and plaintiff being ordered to pay child support in the sum of \$150.00 per month. The divorce was not contested and was procured subsequent to the filing of an appearance, consent and waiver by the

defendant acknowledging receipt of a copy of the complaint (R. 3). The conclusions of law (R. 5) and the decree (R. 6) ordered child support as set forth in the complaint, indicating that the court in its discretion adopted the sum agreed to by the parties by means of allegations of the complaint and the appearance, consent and waiver, after having heard the evidence for the divorce.

On the 23rd day of March, 1956, defendant had plaintiff ordered into court to show cause why, among other things, he should not be required to pay defendant the sum of \$350.00 per month as child support (R. 11). The defendant appeared as ordered before the Honorable Maurice Harding sitting as a Third District Judge. Judge Harding granted attorney's fees, judgment on an automobile, and modified the decree allowing the defendant to remove the children from the state, but did not allow the requested increase in support money or any part of the amount.

On June 2, 1958, defendant brought an order to show cause requesting modification of the decree to increase support money from \$150.00 to \$400.00 per month, alleging in her petition that the sum of \$400.00 was reasonably necessary to support the children and alleging on information and belief that the plaintiff's income had substantially increased since the divorce and that the plaintiff is now earning \$20,000.00 per year (R. 14). This was the only change of circumstances alleged. The order came on for hearing before the Honorable Martin

M. Larson on the 11th day of June, 1958. Judge Larson allowed the testimony to go back to the time of divorce, despite the intervening order to show cause why support should not be increased which was heard before Judge Harding on March 3, 1956.

On the 23rd day of June, 1958, the court entered its findings of fact and conclusions of law (R. 60-61) and order (R. 63) granting the defendant a 50% increase in child support and \$125.00 attorney's fees. On June 26, 1958, plaintiff filed a motion for new trial. The motion was heard by the court and was denied by order filed on the 16th day of July, 1958. Plaintiff duly appealed from the order modifying the decree and from the denial of the motion for new trial.

### STATEMENT OF FACTS

The plaintiff is the father and defendant is the mother of Pamela and William G. Erickson, Jr., 11½ and 8 years of age, respectively (R. 25). William G. Erickson, Jr. is referred to in the transcript as Eric. The parties have been divorced since February 10, 1954. The children have been in the custody of the defendant during the interim period. The court at the time of the divorce ordered support money payments in the sum of \$150.00 per month, or \$75.00 per child. With respect to the order to show cause appealed from, the defendant testified as follows:

That she presently resides in Kansas City, Missouri; that she has been married since the divorce from the

plaintiff, and that her husband died on October 11, 1957 (R. 25); that she is paying \$160.00 for an apartment; milk and groceries for the two children and herself run between \$150.00 and \$160.00 per month (R. 26), that groceries are high because she doesn't have time to shop; that lights run \$17.00, gas \$6.00, and telephone \$9.00, and that \$31.00 of the \$32.00 for utilities would be the children's share (R. 27). Clothes for the children run \$20.00 per month for each child (R. 27), cleaning for the children runs \$5.00 per month. Hospitalization insurance runs \$8.00 per month, lunches for the children run \$12.00 per month, cosmetics for the 11½ year old girl, \$5.00 per month (R. 28), and miscellaneous entertainment runs \$20.00 per month. Their allowance is \$6.00 per month, and the total is \$314.50 per month for the support of the children (R. 26). It will probably cost \$500.00 to have the children's teeth straightened (R. 29). Plaintiff has paid the \$150.00 per month decreed by the court with the exception of one month in 1957 when he had the children (R. 30). Defendant makes \$250.00 per month as secretary for a hotel manager, with the promise of a substantial increase when she learns to take shorthand.

In February, 1954, at the time of the divorce, the parties were paying \$150.00 for a house for plaintiff, defendant, and the two children; food for the four persons was \$125.00 per month; she didn't know the amount of doctor bills; Pamela has an illness, a heart murmur, that she has had since she was a baby (R. 34).

The plaintiff testified as follows:

That he is an M.D. surgeon; he has been practicing since 1952; and he was a resident in a hospital from 1950 to 1952 (R. 36); he brought, at the court's order, income tax returns from 1953 to 1957, inclusive. The returns were prepared by accountants and accurate to the best of his knowledge with the exception of 1954 when there was a \$500.00 tax deficiency which he has subsequently been paying to the government. The returns were offered and entered in evidence as Exhibit P-4 without objection.

R. 39 through 40 and R. 45 and R. 46 are a series of conclusions and contradictions of the plaintiff regarding interpretation of the income tax returns (Exhibit 4) which were prepared by accountants. They are entered in evidence and constitute the best evidence of what they contain.

The plaintiff works for American Smelting and Refining, which employment constitutes \$6,000.00 per year of his income. Kennecott Copper Company has purchased American Smelting and Refining and the plaintiff will no longer be employed by them after the first of the year, or nine months from the date of the hearing. This will cause a \$6,000.00 decrease in income, together with an increase in office expenses (R. 47-48). The plaintiff has remarried and has three children by this marriage, Chuck, 11½ years of age, an adopted child, and two natural children, Haze, 2½ years, and Amy Joe, eighteen months (R. 49). The child Haze has a visual defect which



will require special care and training and increased expenses. The plaintiff has substantial obligations still existing from his marriage to the defendant and their divorce, on which he is presently making payments totaling \$176.00 per month (R. 51). Plaintiff has \$788.43 of listed current monthly expenses, including \$176.00 per month on obligations from his marriage to the defendant, \$150.00 child support and a \$90.00 payment on an automobile that is necessary to his profession and earning ability, thus leaving \$144.00 per month for food, clothing, medical expenses, and entertainment for a family of five persons (R. 51-53).

Plaintiff has been on no trips other than one trip with Pamela and Eric when he went to the Middle West to get them in the summer of 1957, and with the exception of one party for business associates in 1956, has done no entertaining (R. 53). His take-home income after taxes and deductions is approximately the same as in 1954, the year of the divorce (R. 54).

The \$150.00 support money was arrived at by stipulation of the parties and approved by the trial court (R. 54).

Plaintiff belonged to a golf club during his marriage to the defendant but has had to give up membership as he couldn't afford it.

## STATEMENT OF POINTS

## I.

NO SUBSTANTIAL CHANGE OF CIRCUMSTANCES HAS BEEN SHOWN SINCE THE TIME OF THE HEARING BEFORE JUDGE HARDING IN 1956 OR SINCE THE TIME OF THE DIVORCE IN 1954 TO WARRANT AN INCREASE IN CHILD SUPPORT.

## II.

THAT NEITHER THE FINDINGS OF FACT NOR THE CONCLUSIONS OF LAW SHOW A CHANGE OF CIRCUMSTANCES TO SUPPORT THE MODIFICATION MADE IN THE DECREE.

## III.

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING AN INCREASE IN SUPPORT MONEY, AND ALLOWING THE COURT'S ORDER TO STAND WOULD BE GROSSLY INEQUITABLE.

## ARGUMENT

## I.

NO SUBSTANTIAL CHANGE OF CIRCUMSTANCES HAS BEEN SHOWN SINCE THE TIME OF THE HEARING BEFORE JUDGE HARDING IN 1956 OR SINCE THE TIME OF THE DIVORCE IN 1954 TO WARRANT AN INCREASE IN CHILD SUPPORT.

The only change of circumstances alleged by the defendant in her petition was a substantial increase in earnings of the plaintiff since the divorce, the allegation being on information and belief that the plaintiff is now earning \$20,000.00 per year (R. 14). The income tax records of the plaintiff (Exhibit 4) are the only competent evidence as to this allegation, and show the following:

<i>Year</i>	<i>Adjusted Gross Income</i>	<i>Taxable Income</i>
1954 .....	\$9,534.82	\$6,581.34
1955 .....	10,135.75	5,284.08
1956 .....	11,596.99	6,217.72
1957 .....	11,325.06	4,495.22

The year of the divorce was 1954.

The plaintiff testified that his take-home pay after taxes and deductions was approximately the same in 1957 as in 1954, at the time of the divorce (R. 54). True, the plaintiff has acquired additional responsibilities during the intervening years, but they were acquired during a period when the defendant had also remarried and while the plaintiff was abiding fully with the order of the court with regard to the support of the children that are issue of the marriage between the parties.

We contend that the husband in a divorce suit has the same right to build a new life and family as does the wife, and his duty to the children of the dissolved marriage is equal to but not in excess of his duty to a subsequent family.

The plaintiff faithfully abided by the orders of the court with respect to child support with the exception of one month when he had the children in his custody, and his changes of circumstances from 1954 to 1956 were such that Judge Harding in the hearing of March 3, 1956 (R. 12) did not see fit to grant an increase in child support requested by that order to show cause (R. 10). The income tax returns entered in evidence show a decrease

in gross income between the hearing before Judge Harding and the June 11, 1958 hearing before Judge Larson, rather than showing an increase.

The plaintiff has listed his current monthly expenses including \$176.00 in obligations still being paid off from the first marriage, together with \$150.00 child support per month and a \$90.00 automobile payment on a car necessary to his business. None of the other listed expenses can be said to be for luxuries or of a frivolous nature, but after payment, the plaintiff's present family of five has less for food, clothing, and entertainment than the defendant testified she pays for groceries per month.

The defendant's own testimony shows that she is presently making \$250.00 per month, or \$3,000.00 per year, where at the time of the divorce she was not working.

Also, the uncontroverted evidence shows that the plaintiff will lose \$6,000.00 per year by termination of his employment with American Smelting and Refining Company on or about the first of the year, and before his existing obligations are liquidated. This court has repeatedly held —

“A divorce decree may not be modified unless it is alleged, proved, and trial court finds that circumstances on which it was based have substantially changed.” *Gale v. Gale*, 63 U. 261, 258 P. 2d 986; *Hampton v. Hampton*, 86 U. 570, 47 P. 2d 419; *Rockwood v. Rockwood*, 65 U. 261, 236 P. 457.

“To entitle either party to modification of alimony or support provision of a decree of divorce, such party must plead and prove a change of circumstances such as to require in fairness and equity a change in terms of decree.” *Osmos v. Osmos*, 198 P.2d 233, citing other cases.

In *Hampton v. Hampton*, cited *supra*, at page 420 this court held:

“It is well settled in this court that in order to secure a change in a decree for alimony the moving party must allege and prove changed conditions arising since the entry of the decree which require, under rules of equity and justice, a change in the decree. *Chaffee v. Chaffee*, 63 Utah, 261, 225 P. 76; *Rockwood v. Rockwood*, 65 Utah 261, 236 P. 457. It is likewise well settled in this state that where the appeal is on a question of the propriety of the judgment for alimony this court is required to review the evidence in the nature of a trial *de novo* on the record and the appellant is entitled to the judgment of this court as well as the trial court on this question. *Openshaw v. Openshaw*, 80 Utah 9, 12 P. (2d) 364; *Dahlberg v. Dahlberg*, 77 Utah 157, 292 P. 214, and cases therein cited.

“The above cases, and cases therein cited, likewise establish the rules that it is not necessary for this court to find a gross abuse of discretion on the part of the trial court before modifying the judgment as to alimony, and that no general rule as to the amount of alimony can be laid down to follow in all cases, but the decree in each case must be determined upon the facts, the conditions, and circumstances of the parties in each particular case, and that if, upon examination of the

record, this court is convinced that the award in the trial court is inequitable and unjust, then this court should direct such decree as it finds to be just and equitable. The amount of alimony is measured by the wife's needs and requirements considering her station in life and upon the husband's ability to pay."

In the Hampton case as in the present case, the father of the child had married again and had additional dependents requiring his support. '

## II.

THAT NEITHER THE FINDINGS OF FACT NOR THE CONCLUSIONS OF LAW SHOW A CHANGE OF CIRCUMSTANCES TO SUPPORT THE MODIFICATION MADE IN THE DECREE.

The only finding that shows a material change from the findings at the time of the original decree is Finding No. 2 (R. 60) showing an increase in the age of the children.

The original findings do not show the earning power of the plaintiff, but the amount of child support stipulated to by the parties (R. 54) was the amount set forth in the amended complaint (R. 1). Defendant acknowledged receipt of a copy of the complaint in her appearance and waiver (R. 3), and the court in its Conclusions of Law and Decree adopted that amount after hearing the testimony for the divorce.

The court must also take into account the absence of findings and conclusions in the order signed by Judge Harding on the 6th day of April, 1956 (R. 12). In the

order to show cause from which that order arose, the defendant requested an increase in child support from \$150.00 to \$350.00 per month which, upon plaintiff's appearing and showing cause, was not granted. The plaintiff's income has decreased rather than increased since the time of that hearing.

### III.

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING AN INCREASE IN SUPPORT MONEY, AND ALLOWING THE COURT'S ORDER TO STAND WOULD BE GROSSLY INEQUITABLE.

In considering all the evidence it would appear that the defendant is now spending for an apartment for herself and the two children \$192.00 per month, consisting of \$160.00 per month rent and \$32.00 utilities (R. 26-27), as compared to the \$150.00 rental for the family of four at the time of the divorce (R. 32), and plaintiff's \$126.00 house payments plus utilities for his present family of five. The defendant testified she spends \$150.00 to \$160.00 per month for food and milk, plus \$20.00 per month per child for clothes, while the plaintiff has \$144.00 per month for food, clothing and entertainment for a family of five, and the parties and their children before the divorce subsisted on \$125.00 per month.

It would appear that the defendant has acquired extremely expensive tastes, which might well account for a good portion of the existing indebtedness being paid off by the plaintiff. The increase granted by the

trial court is in the sum of \$75.00 per month, or \$900.00 per year, and amounts to well over 50% of the increase in plaintiff's adjusted gross income between 1954 and 1957, and over 100% of the taxable increase of the plaintiff during those years. The income tax forms entered in evidence by the plaintiff show there was an actual decrease in taxable income for the year 1957 in comparison with any of the prior years. While it is true that the plaintiff has additional exemptions that he did not have in 1954, these exemptions were acquired during a period when the plaintiff was complying fully with the court's child support decree, and while the plaintiff's adjusted gross income is substantially as found by the court in Finding No. 5, it is only slightly increased from the time of the divorce, and his change of circumstances with regard to responsibilities and liabilities shows a more serious financial condition in 1958 than the evidence shows in 1954. We refer again to the Hampton case wherein the court holds in 47 P. 2d, page 421:

"It may be conceded that \$50 per month is necessary for the support of the plaintiff and their minor child, but the more difficult question is whether the defendant is able to pay this amount of alimony under his present circumstances. We are convinced that the changed conditions appearing in the record require a reduction in the amount of alimony as fixed by the trial court, which we feel is more than the defendant is able to pay, and at the same time maintain his station in life as a teacher and support his present family; and, accordingly, we have determined that the amount should be reduced to \$45 per month."



In the present case, the pleadings show that the defendant entered her appearance and waiver with full knowledge of the amount of child support agreed upon by the parties and of her situation at that time. The court concluded in its Conclusions of Law that the plaintiff should pay to defendant for the support of the children \$150.00, and made that order in the decree. We do not contend that the decree of the court may not be modified, but contend that there is no showing, let alone pleading, of a substantial and permanent change in circumstances justifying any increase whatsoever, but the trial court ordered a 50% increase in child support. The change shown by the evidence indicates a much greater financial responsibility on the shoulders of the plaintiff with little increase in earnings from 1954 through 1956, and an actual decrease between 1956 and 1957. On the other hand, the testimony of the defendant indicates that she has an income of \$3,000.00 per year, where she had no income at the time of the divorce. Her testimony also shows that her main financial change as far as the children go is an existence on a higher standard of living when judged by monetary expenditures than that which plaintiff is now living and considerably higher than the Erickson family was living at the time of the divorce. In fact, it shows a standard of living far beyond the means of the \$250.00 per month secretary to a hotel manager. The expenses for which the plaintiff is liable are fully set out in the income tax returns, and his testimony indicates a financial situation despite earning capacity which makes the payment of \$150.00 per month

as child support difficult, and the payment of \$225.00 as ordered by the court impossible.

### SUMMARY

Plaintiff contends that the pleadings do not allege, that evidence considered as a whole does not show, and the findings of fact and conclusions of law are insufficient to support the decree by Judge Larson substantially increasing payments of child support. We readily agree that on the scale which the defendant is attempting to live the \$75.00 per month per child is an inadequate amount. However, on the other hand, the status of the doctor's financial affairs and present responsibilities make it inequitable if not impossible for him to pay an increased amount of child support at this time, especially in view of the pending loss of \$6,000.00 salary per year, together with a considerable part of office and personnel expenses now furnished by the American Smelting and Refining Company. True, the doctor over a period of years can possibly build his income back to its present level and the 1954 level through private practice, but he is placed in an even worse financial condition by being forced to comply with the order appealed from. He will be under an extreme handicap in maintaining his professional reputation and standing in building his income to a point where an increase over and above the \$150.00 ordered at the time of the divorce is justified and proper.

It seems to be the general public opinion that the fact that a person is an M.D. puts them in a financial class by themselves. The entire record, including the testimony of the income tax return exhibits, shows that the plaintiff in this matter is in bad financial straits despite an annual income above average, before business expenses and pre-existing personal expenses not entirely attributable to the plaintiff are considered, which makes the money available for actually existing insufficient to make the decree of the trial court equitable.

We sincerely request that the court in its capacity to review the facts as well as the law in equitable matters of this type, reverse the decision of the lower court, and order the original child support payments of \$150.00 per month or \$75.00 per child reinstated.

Respectfully submitted,

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