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William G. Erickson v. Helen W. Erickson : Brief of Respondent

Utah Supreme Court

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McCullough, Boyce & McCullough; Attorneys for Defendant and Respondent;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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WILLIAM G. ERICKSON,
Plaintiff and Appellant,

vs.

HELEN W. ERICKSON,
Defendant and Respondent,

Clerk, Supreme Court, Utah

Case No.
8938

BRIEF OF RESPONDENT

McCULLOUGH, BOYCE & McCULLOUGH
Attorneys for Defendant and Respondent
417 Kearns Building
Salt Lake City, Utah

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WILLIAM G. ERICKSON,
Plaintiff and Appellant,

vs.

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Defendant and Respondent,

Case No.
8938

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The questions raised by this appeal are (1) whether the circumstances on which the divorce was based have substantially changed to justify the trial court's increasing support money for two children from \$150.00 per month to \$225.00 per month; and (2) whether the trial court abused its discretion in granting this increase.

STATEMENT OF FACTS

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

The parties were married in 1942 (R 4). There are two children, issue of the marriage, Pamela Ann, approximately 11½ years of age, and William G. Erickson, approximately 8 years of age (R. 24). William G. Erickson, Jr. is referred to in the transcript as Eric; plaintiff and appellant is the father; defendant and respondent is the mother.

On February 10, 1954, the parties were divorced (R 7); the plaintiff being granted the divorce and being ordered to pay child support in the sum of \$150.00 per month (R 6). The divorce was not contested and was procured upon the filing of an appearance, consent and waiver by the defendant (R 3).

The court made no finding of fact regarding the earnings of the plaintiff but did adopt the allegation contained in plaintiff's amended complaint (R 1) and made a finding that the "plaintiff is willing to pay defendant for the use and benefit of the children the sum of \$150.00 per month." (R 4). The divorce decree granted custody of the children to the defendant and ordered plaintiff to pay \$150.00 per month to defendant for the use and benefit of the minor children (R 6) who were then approximately 7 and 3 years of age. (R 4)

On April 6, 1956, defendant had plaintiff appear in court on an order to show cause to show (1) why he should not be ordered to deliver to defendant certain articles of personal property; (2) why defendant should not be awarded judgment against him for \$300.00, the amount paid by defendant on an automobile; and (3) why the decree of divorce should not be modified to permit defendant to take

the children with her out of the State of Utah, and that plaintiff pay \$350.00 per month for the support and maintenance of the children. (R. 11) The order of the court following the hearing granted to defendant relief sought on all but the increase in the support money. (R. 12) The order is silent as to that matter (R. 12). There is a dispute between the parties as to whether the matter of increased support was gone into on the hearing of April 6, 1956. (R. 21, 22, 23) In any event, there was no specific denial of the increase at that time, and the court made no findings regarding the matter.

On June 2, 1958, defendant filed a petition for order to show cause alleging that she reasonably required \$400.00 per month for the support and maintenance of the children and alleging that plaintiff's income had very substantially increased since the divorce was entered. (R. 14) An order to show cause was issued requiring plaintiff to show cause why the divorce decree should not be modified to provide that plaintiff pay to defendant \$400.00 per month for the support and maintenance of the minor children. (R. 16) Hearing was held June 11, 1958, before the Honorable Martin M. Larson. The defendant testified at that hearing as follows:

That she resides in Kansas City, Mo., with the two children, who have been in her care and custody since the divorce in 1954. (R. 25) Defendant is working as a secretary to the manager of a hotel earning \$250.00 per month gross with take home of \$228.00 per month. (R. 27)

Defendant gave an itemization of the living expenses for herself and the children in Kansas City, Mo. and allocated certain portion of those expenses as being the children's share (R. 26, 27, 28, 29). The total expense for the chil-

dren amounts to \$314.50 per month (R. 29). Both children have crooked teeth, which defendant has been advised by an orthodontist to have straightened, which will probably cost \$500.00 for each child. (R. 29) That an increase in support money is essential just to raise the children normally. (R. 30) That the children at the time of the divorce in 1954 were much younger and expenses in Salt Lake City are much lower than in Kansas City. (R. 32, 33) That Pamela has a heart murmur, which she has had since a baby (R. 34). That defendant remarried, and her husband died October 11, 1957; that defendant did not inherit anything from his estate. (R. 25)

At the hearing of June 11, 1958, the plaintiff testified as follows:

That he is an M.D. surgeon and has been practicing since 1952 and was in his surgical residency from 1950 to 1952. (R. 36)

The plaintiff, at the court's order, brought his income tax returns for the years 1953 to 1957, which he testified were prepared by accountants and are accurate to his best knowledge except that he was assessed \$500.00 tax deficiency for 1954 (R. 37). The returns were offered and received in evidence without objection. (Exh. 4). Disregarding the earnings of the plaintiff's wife, these returns disclose the following regarding plaintiff's income:

Year	Gross Income	Adjusted Gross Income
1953	10,801.00	7,484.71
1954	10,801.00	6,753.68
1955	11,013.88	7,672.76
1956	15,742.10	11,596.99
1957	15,760.28	11,325.06

Plaintiff's wife had earnings of \$3,540.00 for 1954 (Exh 4) but she and plaintiff were not married until December 17, 1954. (R. 48) She had earnings for 1955 of \$2,512.50 (Exh 4) but does not work now. (R. 54)

Plaintiff testified that he works for American Smelting & Refining Co. in addition to his private practice and that \$6,000.00 of his income is from this employment (R. 46) and that there has been a change in status with regard to the American Smelting & Refining Co. which change will take this employment from him and affect him \$6,000.00 per year commencing sometime in the future. (R. 47, 48).

Plaintiff remarried December 17, 1954, with two children born issue of the marriage, Haze, 2½, Amy Jo, 18 months, and Chuck, 11½ who has been formally adopted by plaintiff. (R. 48, 49)

Plaintiff testified fully about his debts, obligations and expenses (R. 51, 52, 53) but nothing was shown as to how long it will require at present rate of payment to clear up old debts (R. 51, 52, 53)

On June 23, 1958, the court entered its findings of fact and conclusions of law (R. 60, 61) and order (R. 62). The court made findings that the minor children are now 11½ and 8, residing in Kansas City, Mo., with their mother, who reasonably required \$225.00 per month to support and maintain the children; that at the time of the divorce decree no finding was made of plaintiff's earnings; that plaintiff as a doctor engaged in practice in Salt Lake City, Utah, now has a substantial income which for the years 1956 and 1957 before taxes exceeded \$10,000.00 per year, and that plaintiff is well able to pay \$225.00 per month for the support and maintenance of the children (R. 60, 61). The court order increased support money to \$225.00 per month com-

mencing July 10, 1958. (R. 62)

On June 26, 1958, plaintiff filed a motion for a new trial. (R. 63) The motion was heard by the court and was denied by order filed July 16, 1958. (R. 64) Plaintiff appealed from the order modifying the decree and from the order denying plaintiff's motion for a new trial. (R. 65)

STATEMENT OF POINTS

I.

THE PLEADINGS ALLEGE, THE EVIDENCE PROVES, AND THE TRIAL COURT FOUND THAT THE CIRCUMSTANCES ON WHICH THE DIVORCE DECREE WAS BASED HAVE SUBSTANTIALLY CHANGED.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE INCREASE IN SUPPORT MONEY.

ARGUMENT

POINT I. THE PLEADINGS ALLEGE, THE EVIDENCE PROVES, AND THE TRIAL COURT FOUND THAT THE CIRCUMSTANCES ON WHICH THE DIVORCE WAS BASED HAVE SUBSTANTIALLY CHANGED.

This court has held and reaffirmed that “a decree of divorce may not be modified unless it is alleged, proved and the trial court finds that the circumstances on which it was based have substantially changed.”

GALE V. GALE, 258 P. 2d 986, OSMUS V. OSMUS, 114 Ut 216, 198 P. 2d 233, HAMPTON V. HAMPTON, 86 Ut 570, 47 P 2d 419, HENDRICKS V. HENDRICKS, 91 Ut 553, 63 P 2d 277.

Appellant cites *Hampton v. Hampton* and quotes from that case as follows:

“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.”

Defendant recognizes that these cases state the law governing the instant case, but asserts that the law applied to the facts of the case uphold the action of the trial court.

The defendant's petition for order to show cause alleges that the children, now approximately 11 and 7 years of age, are living with defendant in Kansas City, Mo. and that the defendant reasonably required not less than \$400.00 per month adequately to support, maintain and educate them. (R. 14)

And, with regard to the plaintiff's ability to pay and the substantial change in his circumstances, the petition alleges “that plaintiff's income has increased very substantially since the divorce decree was entered and that plaintiff

is now earning approximately \$20,000.00 per year and is well able to pay to defendant the sum of \$400.00 per month for the support and maintenance of the minor children of plaintiff and defendant." (R. 14)

These allegations of the increased needs of the children and of the increased ability of the plaintiff to meet these needs may be over-simplified, but certainly the allegations are adequate to meet the requirements of this court as to the necessity of *alleging* a substantial change of circumstances to allow the modification.

With respect to the proof that the circumstances on which the divorce was based have substantially changed the defendant submits the following:

At the time of the divorce, February 10, 1954, no finding was made by the trial court of the plaintiff's earnings or of the needs of the two minor children; the court however did make a finding that "the plaintiff is willing to pay to defendant for the use and benefit of the minor children the sum of \$150.00 per month." (R.460) It must be assumed that the trial court at the time of hearing and granting the divorce was satisfied that \$150.00 per month support money was adequate for the children at that time, or was a fair amount for plaintiff to pay at that time, or both.

At the hearing of June 11, 1958, the evidence was that defendant required \$314.50 per month just to raise the children normally. This amount made no provision for straightening their teeth, for the children's allowance, for Christmas and such special occasions. Defendant gave a detailed itemization of expenses making up the \$314.50 per month. (R. 26-29) The evidence further showed that the children are now approximately 11½ and 8 years of age compared to 7 and 3 at the time of the divorce. We believe that the court

can take judicial notice of the fact that, other things remaining the same, as a child grows older his or her needs for support, maintenance and education increase.

The evidence at this hearing was that plaintiff's adjusted gross income—his net income from his profession—had increased from \$6,753.68 for the year of the divorce, 1954, to \$11,596.99 for 1956, and to \$11,325.06 for 1957. These figures show an increase in adjusted gross income of \$4,843.31 for the year 1956 over the year 1954, and show an increase of \$4,571.38 for the year 1957 over the year 1954. The adjusted gross income is the money the plaintiff has to provide for himself and his dependents and to pay his taxes. This is the money he and his dependents must live on. Plaintiff's adjusted gross income for 1954 was only 59% of what it was for 1957. This certainly shows a substantial change in plaintiff's circumstances since the divorce and an ability to pay more to meet the needs of the children.

When the divorce was granted the children were approximately 3 and 7 and the father must realize that what was adequate for them at those ages would not be adequate for them as they grew older. When he remarried and took on other obligations, he did so charged with the realization that as the children of his first marriage grew older he would have the responsibility of meeting the needs of those children so far as his ability permitted.

It is true the plaintiff has remarried and has dependents other than the two children of the defendant. It is further true that the trial court in weighing the needs of the children of the first marriage and the father's ability to meet those needs cannot disregard the present wife and children of that marriage.

The foregoing would seem to meet the requirements of this court as to *proof* of substantial change of circumstances to justify the modification of the decree.

With regard to the court's findings of a substantial change of circumstances to permit the modification of the decree:

The court found that the children now approximately 11½ and 8 reside with the defendant in Kansas City, Mo. and that the defendant reasonably requires \$225.00 per month to support and maintain them. The court further found that no finding was made of plaintiff's earnings at the time of entering the decree of divorce and that the court made a finding only "that the plaintiff is willing to pay to defendant for the use and benefit of the minor children \$150.00 per month."

The court further found that plaintiff as a doctor engaged in practice in Salt Lake City, Utah, has a substantial income from his profession and that during 1956 and 1957 his income before taxes exceeded \$10,000.00 per year and that plaintiff is well able to pay \$225.00 per month for the support and maintenance of the two minor children.

Again, it seems the findings made by the court, while they may be over-simplified, are sufficient to meet the requirements of this court as to the necessity of the trial court *finding* that circumstances on which the divorce was based have substantially changed.

POINT II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE INCREASE IN SUPPORT MONEY.

It is basic in our divorce law and this court has adopted and reaffirmed that the substantial change in circumstances which will justify a modification of a divorce decree may be either a substantial change in the needs of the children or in the ability of the father to pay, or both.

For example, the needs of the children at the time the divorce is granted may far exceed the ability of the father to pay and the support money awarded must of necessity be limited to the ability of the father to pay in such cases. Similarly, the father's ability to pay at the time of the divorce may greatly exceed the needs of the children at that time. In such cases the award of support money is based on the need of the children considering their station in life.

The law contemplates that when there is a need on the part of the children at the time of the divorce, which exceed the father's ability to pay, all that need be done to justify an increase in support money is to show a substantial increase in the father's ability to pay; and when the needs of the children increase substantially, if the father has always had or has now acquired the ability to pay more, the court on a proper showing of such facts has the power to increase the support money.

No general rule as to the amount of support money can be laid down to follow in all cases, but each case must be determined upon the facts, the conditions and circumstances of the parties in each particular case. This is where the discretion of the trial court enters in. The trial court, after having all the facts, the conditions and circumstances of the parties in each particular case presented to it, weighs these factors and determines what in equity and justice should be awarded for support money. This discretion of the trial court will not be disturbed unless there is clear abuse of

discretion on the part of the trial court.

In support of this proposition, this court stated in *BULLEN V. BULLEN*, 71 Utah 63, 262 P 292:

“The matter of disposing of the property and providing for the support of divorced persons and their children rests in the sound legal discretion of the trial court, reviewable only for abuse of discretion.” Cites *Read v. Read*, 28 Utah 297, 78 P 675; *Blair v. Blair*, 40 Utah 306, 121 P 19; *Stewart v. Stewart*, 66 Utah 366, 242 P. 947).

And stated in *ALLEN V. ALLEN*, 165 P 2d 872, at page 875:

“We believe that the great weight of authority supports the rule that a decree of the trial court in divorce proceedings relative to alimony and division of property, will not be modified except when the trial court has abused its discretion; otherwise, the appellate court by its own actions would alter the purpose for which it was created.”

In this case, the trial court found from competent evidence that the needs of the children now greatly exceed the \$150.00 per month awarded at the granting of the divorce. The court further found that the appellant has income substantial enough to enable him to pay \$225.00 per month. A man with adjusted gross income (net income from his profession) in excess of \$11,000.00 per year as shown for 1956 and 1957 has the ability to pay an amount consistent with the increased needs of the two children of the first marriage and still provide adequately for himself and dependents of the second marriage. Plaintiff in his brief refers to defendant's having acquired extremely expensive tastes and that such tastes might well account for a good portion of the existing indebtedness being paid off by plain-

tiff. This criticism of defendant seems hardly appropriate coming from a man who for the year 1954 reported on his federal income tax return "professional entertainment" of \$2,548.75, (or from a man who operates a 1958 and a 1953 automobile).

Plaintiff makes much of his loss of income of \$6,000.00 per year by reason of termination of his employment by American Smelting & Refining Co. about the first of the coming year or later. At the time of the hearing June 11, 1958, such loss of income was at best very speculative and certainly not very convincing or conclusive. Plaintiff as a surgeon may well be able to put this time to more profitable use, either in private practice or in other employment. His stock-in-trade is his time and until it is shown that his change in employment, when and if it occurs, results in substantial reduction of his income, the court would not be justified in taking such speculative facts into consideration in making its decision.

CONCLUSION

Respondent contends that the evidence shows a substantial change in circumstances which justifies the trial court's increasing the support money for the two children from \$150.00 to \$225.00 per month, and that this award, made in the sound exercise of discretion by the trial court, should not be disturbed.

Respectfully submitted,

McCULLOUGH, BOYCE & McCULLOUGH
Attorneys for Defendant and Respondent
417 Kearns Building
Salt Lake City, Utah