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Margaret L. Jorgensen v. Cleon A. Jorgensen : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARGARET L. JORGENSEN,
Plaintiff-Respondent

vs.

ALFON A. JORGENSEN,
Defendant-Appellant

No. 10353

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This matter arose upon supplementary proceedings to find the defendant-appellant in contempt for failure to pay support money and upon defendant-appellant's motion for modification of the Divorce Decree eliminating such support payments.

DISPOSITION IN LOWER COURT

The defendant-appellant was not found in contempt and a judgment was entered for past due support payments. The provision for future support payments for minor children was eliminated but the provision for alimony was increased from One Dollar per month to Seventy Dollars per month until a lump sum of \$1700.00 was paid and plaintiff-respondent was awarded attorney's fees.

RELIEF SOUGHT ON APPEAL

The defendant-appellant seeks a reversal of the judgment increasing alimony to Seventy Dollars per month and also seeks a reversal of the judgment awarding the plaintiff-respondent attorney's fees.

STATEMENT OF FACTS

On December 11, 1962, plaintiff commenced an action for divorce by filing a complaint in the District Court. The matter came to trial on May 27, 1963, and on June 24, 1963, the District Court entered its Findings of Fact and Conclusions of law awarding plaintiff a divorce and custody of the minor children and findings and concluding as follows:

1. That defendant should pay to plaintiff the sum of \$1.00 per month alimony.
2. That defendant should pay all debts of the parties.
3. That plaintiff should be awarded all the property of the parties.
4. That defendant should pay \$75.00 per month for mortgage payments on the home.
5. That plaintiff was entitled to claim the minor children as a deduction on her income tax returns.
6. That the defendant was employed and earning between \$80 and \$100 per week.
7. That the defendant should pay plaintiff's attorneys' fees and court costs totaling \$240.00.

On April 23, 1964, the plaintiff made an affidavit in which she recited the following:

1. The Court's order to pay \$1.00 per month alimony.
2. That the parties had stipulated in the hearing on on the Divorce that "as part payment for the support of the family" the defendant would make the mortgage payments on the home.
3. That the balance due on the mortgage was \$3304.68 and said mortgage was in arrears in the sum of \$840.00.
4. That the defendant had filed a petition in bankruptcy.
5. That the plaintiff is without funds to pay for her attorney.

Based on these facts the plaintiff asked for a modification of the divorce decree to give her the sum of \$125.00 per month for the support of the minor children, for a judgment in the amount of \$840.00 for past due support payments and for attorney's fees.

On June 9, 1964, the Court entered its Findings, Conclusions and Decree on the supplemental proceedings. The only change in circumstances found by the Court was that the defendant had petitioned for discharge of his debts in bankruptcy. The Court modified the decree as follows:

1. A judgment was entered for \$840.00 (representing the sum in which the mortgage was in arrears).
2. The defendant was ordered to pay the sum of \$100 per month as continuing alimony and support payments.
3. The defendant was ordered to pay the additional sum of \$75.00 as attorneys' fees.

On June 23, 1964 a writ of garnishment was served upon defendant's employer. Kloepfer Sand & Gravel Co., and a return was made showing wages in the sum of \$54.65 were due. On October 23, 1964, another writ of garnishment was issued and served upon Kloepfer Sand & Gravel Co., but no answers were made by the Garnishee.

On February 12, 1965, the plaintiff made another affidavit in which she alleged that the defendant had been ordered to pay \$100.00 per month for the support of the family but had only paid \$342.93 and asked that a judgment be entered against the defendant in the amount of \$557.07 and that he should be punished for contempt. Plaintiff again asked for attorney's fees.

The defendant answered the plaintiff's affidavit and motion and asked the court to modify the divorce decree on the following grounds:

1. All the minor children have reached their majority.
2. The plaintiff is employed and is earning \$250.00 per month and in 1964 earned as much as the defendant.
3. The defendant is unemployed.

Based on these grounds the defendant asked the court to terminate the provision for \$100.00 per month support and require each party to pay their own attorney's fees.

At the hearing on February 23, 1965, the plaintiff presented no evidence, but the plaintiff's attorney accused the defendant of slapping the District Court in the face by petitioning for a discharge in bankruptcy (a matter that had been considered and adjudicated as a change in

circumstances by the Court in June 1964). The Court made its decision and then permitted the defendant to testify regarding change in circumstances. The defendant testified that he was unemployed, that all his minor children had reached their majority, that the plaintiff was employed and earning \$250.00 a month, and that in 1964 the plaintiff had earned as much as the defendant.

The Court entered a judgment that the defendant not only should pay the amounts past due on support money but should also pay the sum of \$1700.00 with interest at seven per cent per annum at the rate of \$70.00 per month as alimony and should also pay the plaintiff's attorney's fees.

STATEMENT OF POINTS

1. The District Court erred in increasing the alimony to be paid to the Plaintiff where the Plaintiff did not petition for an increase in alimony from \$1.00 per month to a lump sum of \$1700 payable at the rate of \$70 per month with interest at the rate of seven per cent per annum.
2. The District Court erred in increasing the alimony to be paid to the Plaintiff where the only change of circumstances shown by the evidence was that the Plaintiff is employed and the Defendant is unemployed and that the minor children have all reached their majority.
3. The District Court erred in awarding Plaintiff attorney's fees since the only evidence presented was the Plaintiff is employed and able to pay her attorney's fees and the Defendant is unemployed.

ARGUMENT

IN ORDER FOR THE PLAINTIFF TO OBTAIN AN INCREASE IN THE AMOUNT OF ALIMONY IT IS NECESSARY FOR HER TO PLEAD A CHANGE OF CIRCUMSTANCES SUCH AS TO REQUIRE THE SAME.

In *Osmus v. Osmus*, 114 Utah 216, 198 P. 2d 233, the Utah Supreme Court said:

“It is a principle now firmly established in this jurisdiction that to entitle either party to modification of a decree of alimony or support money, that such party plead and prove a change in circumstances such as to require, in fairness and equity, a change in the terms of the decree. (Citing cases). In this case there has been neither pleading nor proof of change of circumstances.”

Notwithstanding this well established rule, it appears that the Plaintiff was able to obtain an increase in the amount of alimony without either pleading or proof of a change in circumstances.

The original divorce decree provided that the defendant was to pay the plaintiff the sum of \$1.00 per month alimony. The decree does not state the amount the defendant was to pay as support for the minor children. Since the Court found that the plaintiff should be entitled to claim the minor children as income tax deductions, it apparently was the intent of the Court that the defendant should contribute less than one-half of the children's support. Other than the payment of debts the only amount to which the defendant was definitely com-

mitted was the payment of \$75.00 per month on the real estate mortgage. (It appears from the statement of plaintiff's counsel at the beginning of the February 23, 1965 proceedings that the mortgage payments were the total amount the defendant was required to pay as support money in accordance with an oral stipulation between the parties.)

In her affidavit of April 23, 1964, the plaintiff stated that the defendant had filed a petition for discharge of his debts in bankruptcy and stated that the mortgage was in arrears in the amount of \$840.00. The plaintiff also stated that the Court should enter judgment against the defendant for the sum of \$3304.68 and provide for future alimony and support in the amount of \$125.00. But unless this statement can be considered as a prayer for relief, the affidavit contains no prayer for relief. There is no statement as to whether or not the defendant paid the \$1.00 per month alimony.

The Court's decree and findings of June 9, 1964, contain no fact or finding showing that there was any increase in alimony. Since plaintiff's only complaint in her affidavit of April 23, 1964 is that the defendant is not supporting her minor children and since the only amount the Court found the defendant was owing as a result of such failure to support was the amount the mortgage was in arrears, it would seem that the Court felt that the petition for discharge of the mortgage in bankruptcy required a modification of the amount to be paid as support. The plaintiff also seems to have understood that this was the intent of the decree in her affidavit of February 12, 1965, as she states in paragraph 3 that

the sum of \$100 was to be used for the support of the family and in paragraph 7 she states this sum was to be used to pay the mortgage indebtedness on the property. But the plaintiff alleges no facts which show a change in circumstances which require an increase in the alimony from \$1.00 per month to \$70.00 per month. See also Gardner v. Gardner, 111 Utah 286, 177 P 2d 743, and Jones v. Jones 104 Utah 275, 139 P. 2d 222 holding it was reversible error for the lower court to modify the alimony (or support) award by increasing the amount when there was no pleading to support that modification.

A MATERIAL AND PERMANENT CHANGE OF CIRCUMSTANCES MUST BE SHOWN BEFORE A PLAINTIFF IS ENTITLED TO AN INCREASE IN THE AMOUNT OF ALIMONY.

The rule that a permanent and material change in circumstances must be shown before a party can obtain a modification of a divorce decree with respect to alimony was clearly established in Cody v. Cody, 47 Utah 456, 154 Pac. 952. This doctrine has not been modified by the Utah Supreme Court. The Court has also held that the statute under which a party obtains a modification of a divorce decree (Section 30-3-5, Utah Code Annotated, 1953) makes no distinction between the spouses. See Martinett v. Martinett, 8 Utah 2nd 202, 331. P. 2d 821.

A review of the facts in this case without further citation of authority should be sufficient to show that the plaintiff has shown no permanent and material change of circumstances which entitled her to an increase in the amount of alimony.

At the time of the original Divorce Decree on June 24, 1963, the District Court found that the defendant was employed and earning between \$80 and \$100 per week and that there were three minor children. Based on this information the Court awarded the plaintiff all the property belonging to the parties, the sum of \$1.00 per month alimony, permitted the plaintiff to claim the minor children as deductions on income tax returns, and ordered the defendant to pay all the debts of the parties plus the mortgage payments of \$75.00 per month and plaintiff's attorneys fees in the sum of \$240.00.

The first change in circumstances occurred prior to the supplementary proceedings on June 9, 1964, and consisted only of a change in the status of the parties in that the defendant attempted to obtain relief from his financial obligations by filing a petition for the discharge of same in bankruptcy. There is no finding that the defendant obtained a discharge of his debts in bankruptcy, but the Court increased family support to a fixed figure of \$100 per month for the three minor children.

The plaintiff served two writs of garnishment upon the defendant's employer and the evidence shows that on December 4, 1964, the defendant was unemployed. The last minor child of the parties reached her majority on January 28, 1965 and eliminated the need for further support. The Plaintiff apparently became employed and at the time of the hearing on February 23, 1965, was earning \$250.00 a month. In the previous year her income was equal to that of the defendants.

The plaintiff now owns all the property of the parties.

She has two judgments against the defendant for his failure to make all the payments on the mortgage when due while the minor children were living with the plaintiff. The plaintiff is no longer entitled to any money for support of the minor children as they have reached their majority. The plaintiff is employed and the defendant is unemployed. In 1964 the plaintiff earned as much as the defendant, and at her current monthly salary she will earn an equal amount in 1965.

If the wife was unemployed and the husband had received all the property of the parties and was earning the sum of \$250 per month there is little doubt but that the court would continue an award of alimony to the wife or make an award of alimony to her. But even though the Court has indicated in *Martinett v. Martinett*, supra., that Section 30-3-5, Utah Code Annotated, 1953, makes no distinction between the sexes the District Court ordered the unemployed defendant who received nothing in the property settlement to continue to pay an employed plaintiff who is not supporting any minor children the sum of \$70.00 per month alimony. It is respectfully submitted that the lower court in making this award is ignoring the language of the *Martinett* case, supra., at page 205 of 8 Utah 2nd:

"It is necessary to so apply the law as to do justice between them on the basis of a realistic appraisal of their circumstances and the problems each must confront."

It is respectfully submitted that a realistic appraisal of the circumstances of the parties shows that the plain-

tiff has all the property of the parties, that she is employed and in the year 1964 earned as much as the defendant, and that she now has two judgments against the defendant in the total amount of \$1390.00 which are bearing interest at the rate of eight per cent per annum. The defendant's situation is much less favorable. The defendant is unemployed and as soon as he finds employment he must pay the judgments against him in plaintiff's favor amounting to \$1390.00 plus interest. The defendant received no interest in the property the parties accumulated during their twenty-four years of married life. As shown by the pleadings, findings and evidence the defendant's income has decreased from around \$5200 in 1962 to \$3000 in 1964 which indicates he has passed the peak of his earning power. Where the plaintiff has shown no requirement for further payments of alimony it seems unjust to impose an additional burden of a \$1700 alimony judgment upon the defendant.

In considering the problems each party must confront it appears that the Court must recognize that the defendant's employable years are almost ended. It seems only fair in view of the fact that he received none of the property the parties accumulated during their lifetime to permit him some opportunity to accumulate some form of savings for his retirement years.

THE PLAINTIFF SHOULD BE DENIED COUNSEL FEES WHERE SHE HAS SHOWN NO NECESSITY FOR THE SAME

The general rule is that provided by statute (see Section 30-3-3 Utah Code Annotated, 1953), a party is

entitled to counsel fees if necessary to prosecute the action. The Utah Supreme Court has said that suit money is based on the necessity of the party receiving the same (Weiss v. Weiss, 111 Utah 353 at page 361, 179 P. 2d 1005). In the proceedings in the District Court the plaintiff presented no evidence that she did not have funds with which to bring the supplementary proceedings. The evidence presented by the defendant was that the plaintiff is employed and earning \$250 per month and that all the minor children of the parties have received their majority. There was no finding nor was there any attempt to find that the defendant was in contempt for failing to pay the \$100 per month as support since the plaintiff admitted in her affidavit that the defendant had paid nearly \$350 which seems to be substantial compliance with the order during the time the defendant was employed.

In view of the foregoing facts discussed in this brief which show that the plaintiff is in a more favorable economic position than the defendant, awarding the plaintiff counsel fees seems to be contrary to the statutory provision as above interpreted.

CONCLUSION

In making a realistic appraisal of the circumstances of an unemployed husband who is without any property as compared to an employed wife who has received all the property of the parties, it is respectfully submitted

there is no equitable basis for increasing the alimony award to the wife and awarding her counsel fees in addition thereto.

Respectfully submitted

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