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Verla H. Carter v. Gerald W. Carter : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT
OF THE STATE OF UTAH

VERLA H. CARTER,
Plaintiff-Respondent

vs

GERALD W. CARTER,
Defendant-Appellant

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Case No. 14554.

BRIEF OF RESPONDENT

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE STATE OF UTAH

VERLA H. CARTER,
Plaintiff-Respondent

vs

GERALD W. CARTER,
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Case No. 14554.

STATEMENT OF THE KIND OF CASE

This case arose as a petition to modify the alimony obligation of the defendant pursuant to an existing Decree of Divorce.

DISPOSITION IN THE LOWER COURT

The hearing on the Petition for Modification occurred on January 14, 1976. Judge Joseph Harlon Burns of the Fifth Judicial District denied defendants Petition to Modify the Divorce Decree to reduce alimony from \$200.00 dollars per month to \$100.00 dollars per month.

RELIEF SOUGHT ON APPEAL

The defendant-appellant is seeking a reversal of Judge Burns Order denying the Petition for Modification of the Divorce Decree. The plaintiff-respondent urges affirmance of Judge Burns Order.

STATEMENT OF FACTS

On the 12th day of June, 1973, the plaintiff was awarded a Decree of Divorce from the defendant. At that time,

the Court ordered the defendant to pay to the plaintiff \$200.00 dollars per month as alimony. The defendant subsequently filed a Petition to Modify the Divorce Decree to reduce the alimony from \$200.00 dollars per month to \$100.00 dollars per month. The defendant alleged, as grounds for the modification, that he had incurred additional obligations, that his yearly income had been reduced, that his health had impaired his earning capacity, and that the plaintiff's needs had been reduced.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PETITION FOR MODIFICATION OF THE DIVORCE DECREE.

In hearings on Petitions to Modify Divorce Decrees, trial courts have traditionally been given a great deal of discretion. The trial court is granted its power to hear this type of Petition in Utah Code Annotated, Section 30-3-5, which provides, in pertinent part, as follows:

"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..."

The trial court's discretion, however, is not without limit. The party seeking a modification of the divorce decree has the burden of proving a change in circumstances which would warrant such modification. Osmus v. Osmus, Utah, 198 P.2d 233 (1948), Gale v. Gale, Utah, 258 P.2d 986 (1953), Klein v. Klein, Utah, 544 P.2d 472 (1975), Sorensen v. Sorensen, 20 Utah 2d 360, 438 P.2d 180 (1968), Allen v. Allen, 25 Utah 2d 87, 475 P.2d 1021 (1970).

In Osmus v. Osmus, supra, the Supreme Court stated:

"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."

Whether or not the defendant has met this burden is a matter for the decision of the trial court in his sound discretion.

In deciding whether the defendant has met this burden, the trial court must consider many factors related to the financial condition of the defendant and plaintiff. No one factor is controlling, but all are considered in making this determination.

A reduction in the defendant's income has always been considered an important factor. However, many cases have been decided wherein a reduction in income has been held to be an insufficient ground for modification in light of other circumstances. In looking at defendant's income, the courts of Utah and other states have preferred to consider earning capacity rather than actual income. In a recent Pennsylvania case, it was held that the trial court abused its discretion by granting a reduction in alimony even though the husband's income had reduced from \$30,000.00 to \$15,000.00 per year where it was shown that the husband's financial condition still allowed him to pay the alimony. There the court said, "The court has the power and duty to look beyond the actual earnings of the parties, and may consider his earning power, and the nature and extent of his property and other financial resources." *Shuster v. Shuster*, 226 Pa.Super. 542, 323 A.2d 760 (1974). In *Osmus v. Osmus*, supra, the husband's income had been drastically reduced, yet the court held that his earning capacity was still sufficient to pay the required amount of alimony. In *Ridge v. Ridge*, Utah, 542 P.2d 189 (1975), the Supreme Court held that a reduction in

income from \$32,000.00 per year to 23,000.00 per year was sufficient to justify a reduction in alimony from \$625.00 per month to \$500.00 per month. The Court felt that a person with an income of \$23,000.00 could only afford alimony of \$500.00 per month. In the case at bar, the defendant with an income of \$21,000.00 was only required to pay \$200.00 per month alimony. If the Supreme Court felt that a person with an income of \$23,000.00 could pay \$500.00 per month along with his many other obligations, it logically follows that a person with \$12,000.00 income, as in this case, should be able to pay \$250.00 per month alimony. It also follows that the defendant in this case is capable of paying \$200.00 per month on his income of \$12,000.00 per year and should not therefore be granted a reduction in alimony to \$100.00 per month.

Another factor often considered in determining a defendant's financial condition is his incursion of other responsibilities and debts. The fact that the defendant has remarried goes only to his ability to pay. The defendant has failed to prove that his remarriage has worsened his financial condition to such an extent as to warrant a reduction in alimony. The debts which the defendant has incurred since the date of the divorce decree have been for the most part to establish the defendant's venture into the cattle business. These debts will not hamper the defendant's ability to pay, but, considering the defendant's expertise with cattle, should enhance his financial situation.

Another factor to be considered by the trial court is the impairment of the defendants health since the Decree of Divorce. The defendant has shown only that his health problem has required him to refrain from riding certain types of construction equipment. However, he is capable of other profitable types of work, for instance, welding, farming and running cattle. The impairment of health or physical condition does not automatically require a modification if the husband is able to comply with the decree. See Young v. Young, 262 Ala. 254, 78 So. 2d 265 (1955) and Altenbach, 162 S.W.2d 361 (Mo. 1942). The defendant in this case has failed to prove to the satisfaction of the trial court that the impairment of his health would result in the inability to comply with the decree.

The trial court in a hearing of this kind should also consider the needs of the plaintiff. The defendant has alleged that the plaintiff's ten acres of land should yield \$200.00 per acre for a net income of \$2,000.00. However, the defendant has 35 acres of land which by the same token could yield \$7,000.00 per year if managed properly. At any rate, the defendant has failed to prove that the plaintiffs financial needs have changed sufficiently to warrant a reduction in alimony.

The defendant failed to prove to the trial court that there had been a substantial and material reduction in his ability to pay the required alimony. Considering all the factors involved, it cannot be said as a matter of law that the trial court abused its discretion in the slightest manner. In light

of the failure to prove an impairment of the defendant's ability to comply with the Divorce Decree, a reduction in the amount of alimony would have been an abuse of the trial courts discretion.

POINT II

THE TRIAL COURT'S DECISION SHOULD BE UPHELD IN ABSENCE OF A SHOWING THAT THE TRIAL COURT ABUSED ITS DISCRETION.

It is an established principle of law that a trial court's decision will be upheld unless there is a showing that the decision was clearly erroneous or was an abuse of discretion. MacDonald v. MacDonald, Utah, 236 P.2d 1066 (1951), Knighton v. Knighton, 15 Utah 2d 55, 387 P.2d 91 (1963), McKean v. McKean, Utah, 544 P.2d 1238 (1975). Since the trial court did not abuse its discretion, but decided properly considering all the facts, the decision of the trial court should be upheld.

POINT III

THE DEFENDANT'S PRESENT ADMISSION OF PRIOR TESTIMONY WAS PROPERLY CONSIDERED BY THE TRIAL COURT.


The defendant has alleged that the trial Judge considered prior testimony of the defendant in another matter in making his decision in this case. In the hearing involving the estate of George W. Hunter over which Judge Burns presided, the defendant testified that he was a competent cattlemen and that he was capable of running cattle under lease to the estate. In the hearing on the petition for modification, Judge Burns, in fulfilling his judicial duty of bringing out the truth, asked the defendant if he had not previously testified to being a competent cattlemen in the hearing on the estate. The defendant in the hearing admitted to having made such a statement (See transcript page 43, lines 19-27). The trial Judge could and did properly consider that admission in his decision to deny the petition for modification of the divorce decree. The defendant's admission took place within the hearing and was itself evidence which could be considered. The defendant's prior admission was never placed in evidence and was never necessary to the court's decision. The fact that the Judge asked the question based upon his knowledge of the prior proceedings, does not necessitate a finding that the Judge considered the evidence presented in the prior proceeding in his decision in the hearing. The following cases hold that judicial admission are evidence against the party who made them

see: Schucking v. Young, 78 Ore. 483, 153 P. 803, and
Oregon Short Line R. Co. vs. Blyth, 19 Wyo. 410, 118 P. 649.
The Judge is presumed to have decided the hearing based upon
the defendant's present admission absent proof to the contrary.

CONCLUSION

The Trial court's order denying the defendant's petition to modify the Decree of Divorce was properly decided within the sound discretion of the trial court. The plaintiff, therefore, urges affirmance of the trial court's order denying the petition to modify.

Respondent respectfully submit that the decision and judgment of the court below should be affirmed with costs to Plaintiff and Respondent.



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