

1963

Marie Clark Knighton v. Calvin K. Knighton : Brief of Appellant

Utah Supreme Court

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Bernard M. Tanner; Bradford, Tanner & Forbes; Attorneys for Respondent;
Howard F. Richards; Gustin, Richards & Mattsson; Attorneys for Appellant;

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IN THE SUPREME COURT

of the **FILED**
STATE OF UTAH

MAY - 9 1963

MARIE CLARK KNIGHTON,
Plaintiff-Appellant,

Clerk, Supreme Court, Utah

vs.

Case No. 9895

CALVIN K. KNIGHTON,
Defendant-Respondent.

APPELLANT'S BRIEF

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake County
Honorable Joseph G. Jeppson, Judge

EDWARD F. RICHARDS of
GUSTIN, RICHARDS &
MATTSSON
1007 Walker Bank Building
Salt Lake City 11, Utah
Attorneys for Appellant

BERNARD M. TANNER of
BRADFORD, TANNER & FORBES
455 East 4th South
Salt Lake City, Utah
Attorneys for Respondent

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IN THE SUPREME COURT
of the
STATE OF UTAH

MARIE CLARK KNIGHTON,
Plaintiff-Appellant,

vs.

CALVIN K. KNIGHTON,
Defendant-Respondent.

} Case No. 9895

APPELLANT'S BRIEF

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This was a hearing on a petition for modification of the decree of divorce.

DISPOSITION IN LOWER COURT

The Court modified the decree of divorce by reducing the alimony payment and modifying the amount to be paid by the defendant on certain obligations of the parties.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the court's order grant-

ing a modification of the decree of divorce insofar as it relates to alimony and payment of obligations.

STATEMENT OF FACTS

A complaint was filed on the 22nd day of June, 1962, (R.2). The plaintiff's petition for an order to show cause was heard on the 26th day of July, 1962, by the Honorable A. H. Ellett (R. 7). The Court found that the defendants earnings were \$374.00 per month, the house payments were \$90.00 per month and that the plaintiff would require at least \$225.00 per month for the house payments and the support and maintenance of herself and the two minor children (R. 7-9). The Court further found that the defendant should pay the outstanding bills incurred by the parties prior to July 1st, 1962, with the exception of the monthly payments on the home (R. 8).

The case was heard on its merits on the 23rd day of October, 1962, before the Honorable Stewart M. Hanson. On the 25th day of October, 1962, a memorandum decision was rendered (R. 10-11). The memorandum decision held that plaintiff should be awarded the home subject to the existing mortgage thereon; that she should be awarded the 1960 Chevrolet automobile subject to existing obligation thereon, which obligation the defendant shall pay and that the defendant be awarded the 1953 DeSoto automobile. The decision further stated that plaintiff should receive \$75.00 per month per child for support and maintenance of the children and \$75.00

per month as alimony. The Court made the further comment in its memorandum decision, that in the opinion of the Court in making this award the defendant's present financial condition does not permit him to pay anymore than above set forth in view of the many outstanding obligations incurred by the parties during their marriage (R. 10-11).

In accordance with the memorandum decision, findings of fact, conclusions of law and the decree were duly made and entered on the 20th day of November, 1962 (R. 12-20). In finding No. 7. the Court found that the defendant was an able-bodied man earning and capable of earning in excess of \$400.00 per month (R. 13).

On the 4th day of March, 1963, an order to show cause issued at the instance of plaintiff and petition for modification of the decree were heard (R. 28). At the commencement of the hearing counsel for plaintiff made a motion to dismiss the petition for modification upon the ground that it failed to state facts sufficient to grant relief thereunder, which motion was denied (R. 55).

At the time of said hearing the evidence disclosed that the defendant had failed to pay \$175.00 alimony and support money, monthly payments of \$57.90 each on the Chevrolet automobile for the months of December 1962, January and February 1963 (R. 38) and payments owing to the Utah Finance Company of \$17.00 per month for three months (R. 53).

In 1961 defendant's earnings were approximately \$6,000.00. This included \$12.00 a week over and above his regular salary for extra work he performed (R. 51). During the months of October, November, December 1962 and January and February 1963, he made the gross of \$2,422.84 (R. 54). Defendant claims his net income was \$1,816.13 (R. 55) which is arrived at after deducting the usual deductions and \$20.00 a month payable to the Credit Union for a loan that he took out in July or August 1962.

The defendant testified that in January 1963 he paid out \$485.34 which included the payment of \$225.00 or \$237.50 to plaintiff but did not include a payment on the DeSoto automobile, \$17.00 to the Finance Company and the payment on the Chevrolet automobile (R. 49). Defendant stated he had paid in full the amount owing on his DeSoto automobile in December 1962 (R. 49).

Under the terms of the decree of divorce defendant was ordered to pay \$225.00 support and alimony, \$57.90 for the Chevrolet, \$17.00 Utah Finance, \$13.76 to Continental Bank, \$15.02 insurance or a total of \$328.68 (R. 73). In addition he had the payment of \$36.05 for the De Soto automobile.

The defendant testified that Mrs. Knighton ought to give up her schooling and go to work to help support the children (R. 75). That she should be able to take care of herself as she had asked for the divorce (R. 76).

Defendant has been earning more since the entry of the decree (R. 84). His net pay per month is about \$380.00 which includes his commission and he also received a \$20.00 Christmas bonus (R. 52).

Mrs. Knighton's condition has not changed. The cost of living and cost of essentials are the same as those at the time of the entry of the decree. The \$225.00 will not cover her expenses and she requires help from outside (R. 79).

STATEMENT OF POINTS

ARGUMENT

POINT I.

THAT THE PETITION OF CALVIN K. KNIGHTON, DEFENDANT AND RESPONDENT, TO MODIFY THE DECREE OF DIVORCE ENTERED ON THE 20TH DAY OF NOVEMBER, 1962, FAILS TO STATE FACTS UPON WHICH RELIEF COULD BE GRANTED AND THE COURT ERRED IN NOT DISMISSING THE SAME.

Paragraph 5 of the petition to modify the decree is the only paragraph contained in said petition which relates to the financial condition of defendant. There is no allegation that he is earning less than he did at the time the decree was entered or that the plaintiff is working and earning money on her behalf. The paragraph merely sets up what he was required to pay under the decree, what he was earning at that time and that the required payments work a grave hardship and a manifest injustice upon the defendant.

To support a modification of the decree of divorce there must be an allegation setting forth the change of condition of the parties.

This Court, in the case of *Osmus v. Osmus*, 114 Utah 216, 198 P.2d 233, stated at page 236:

“The second question, namely, whether the court erred in denying defendant’s petition for modification of the decree, poses no difficulty. 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. *Cody v. Cody*, 47 Utah 456, 154 P. 952; *Chaffe v. Chaffee*, 63 Utah 261, 225 P. 76; *Rockwood v. Rockwood*, 65 Utah 261, 236 P. 457; *Carson v. Carson*, 87 Utah 1, 47 P.2d 894; *Jones v. Jones*, 104 Utah 275, 139 P.2d 222; *Gardner v. Gardner*, Utah 177 P.2d 743. In this case there has been neither pleading nor proof of change of circumstances. On the contrary, defendant expressly concedes, in his brief, that there were no changed conditions between the date of the divorce decree and the petition for modification. Under the rule of the cases above cited, the trial court could not properly make an order modifying the decree.”

Gale v. Gale, 123 Utah 238, 258 P.2d 986:

The legal principle controlling in this case is that a divorce decree may not be modified unless it is alleged, proved and the trial court finds that the circumstances upon which it was based have undergone a substantial change.”

Chaffee v. Chaffee, 63 Utah 261, 225 P. 76.

Anderson v. Anderson, 13 Utah 2d 36, 368 P.2d 264. This case holds :

“The case of *Cody v. Cody* seems of interest here, and is to the effect that the generalization of Title 30-3-5, Utah Code Annotated 1953, contemplates an opportunity for divorced litigants to come into court for modification of the original decree based on changed conditions, and that any dissatisfaction with such decree is a matter of appeal. Absent of an appeal, it is not subject to modification except where such changed conditions are demonstrated.”

Points 2 and 3 will be discussed together.

POINT II

THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT A MODIFICATION OF THE DECREE OF DIVORCE IN RELATION TO ALIMONY.

POINT III

THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE MODIFICATION IN RELATION TO OBLIGATIONS THAT THE DEFENDANT AND RESPONDENT SHOULD BE REQUIRED TO PAY.

There is no evidence to support a change in conditions or circumstances in this case of either the plaintiff or defendant which would support the findings that the plaintiff should only receive \$1.00 per month alimony and be required to take care of certain obligations.

Defendant was making at the time of the entry of the decree, at least, \$375.00 per month net. At the

time of the hearing of the petition for modification that sum had been increased slightly. There is no evidence that the obligations of defendant were greater at the time of modification of the decree than at the time the decree was entered in November 1962. In fact, the evidence discloses that one obligation had been paid in full, that is, he had paid the balance of the payments owing on the DeSoto automobile that was awarded to him under the original decree, which payments were \$36.05 per month. At the time the divorce was commenced defendant was earning in addition to his regular pay approximately \$12.00 a week or better than \$50.00 a month additional income. Defendant's income for the five months of October, November, December 1962, January and February 1963, was \$2,422.00 gross, \$484.00 per month which gave him a gross income for the year of \$5,800.00 If he assumed the extra work that he was doing prior to the filing of the divorce he would have additional \$600.00 or he would have a gross income of \$6,400.00.

To modify a decree of divorce there must be evidence to support a material change of conditions.

Osmus v. Osmus, 114 Utah 216, 198 P.2d 233.

Gale v. Gale, 123 Utah 238, 258 P.2d 986.

Carson v. Carson, 87 Utah 1, 47 P.2d 894.

Hamilton v. Hamilton, 89 Utah 554, 58 P.2d 11.

If defendant thought the decree of divorce was oppressive or was dissatisfied with the terms thereof it

became his duty to appeal not wait after the divorce became final and then move for modification.

Cody v. Cody, 47 Utah 456, 154 P. 952.

Anderson v. Anderson, 13 Utah 36, 268 P.2d 264.

The modification of the decree in regards to alimony and the payment of bills is not only contrary to the evidence of a change of condition but is oppressive on the plaintiff. The court has taken the sum of approximately \$400.00 divided it approximately equal between the plaintiff and defendant. Out of this \$200.00 plaintiff is required to spend \$90.00 for the payment on the home so that she may maintain a place for herself and the children to live in. She is further required to support and feed three people and to pay obligations which the divorce decree required the defendant to pay.

CONCLUSION

In conclusion we respectfully submit that the decision of the District Court should be reversed, the order and judgment modifying the decree of divorce vacated and set aside and that plaintiff should be awarded a reasonable sum for the use and benefit of her attorneys in connection with the preparation and presentation of this appeal.

Respectfully submitted,

GUSTIN, RICHARDS

& MATSSON

Attorneys for Appellant-Plaintiff

1007 Walker Bank Building

Salt Lake City 11, Utah