1963

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

Utah Supreme Court

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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

RESPONDENT'S BRIEF

Appeal From the Judgment of the Third Judicial Court for Salt Lake County
HONORABLE JOSEPH G. JEPPSON, *Judge*

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Cases Cited

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PRELIMINARY STATEMENT

Respondent accepts appellant's STATEMENT OF THE KIND OF CASE, DISPOSITION IN LOWER COURT, AND RELIEF SOUGHT ON APPEAL, as contained on Pages 1 and 2 of Appellant's Brief.

STATEMENT OF FACTS

Respondent accepts the statement of facts outlined by the Appellant with the following comments and additions thereto:

Upon the case being heard on its merits the 23rd day of October, 1962, and the resultant memorandum decision rendered on the 25th day of October, 1962 (R. 10-11) the court held:

> ". . . that the defendant shall keep all payments current to the best of his ability, with the exception of house payments, which the plaintiff shall pay and that the plaintiff was entitled after the expiration of reasonable time to have the court further review the matter as to support and alimony payments." (R. 11)

Respondent emphasizes the fact that under the terms of the Divorce decree the defendant was ordered to pay monthly, a total of $328.68, (R. 73) plus $36.05 for the DeSoto automobile, or a total of $364.73. The defendant testified at the trial on October 23, 1962, that his living expenses were $175.00 per month (R. 120) and that due to the nature of his work and the hours thereof a substantial portion of this amount was required for eating out, and that transportation costs were also high due to the present location of his residence in Bountiful and his place of employment in South Salt Lake, including travel to and from Holladay for visitation with his children (R. 119).

In regard to paragraph 7 at the top of page 4 of Appellant's Brief, it should be noted that the gross figure of $2,422.84 was a combined record from Cottonwood Dairy for the amount earned during October, November, and December, 1962, and January and February, 1963. Defendant pointed out that if divided by 5 this would not

be representative of the monthly earnings for the balance of the year, as the months described included the three months of highest commission resulting from largest gross sales (R. 54).

Defendant being financially unable to pay both the outstanding obligations and alimony and support, elected to give preference to payment of alimony and child support, thus demonstrating a preference for discharging his responsibility to his family rather than to his creditors (R. 58, 69).

STATEMENT OF POINTS

ARGUMENT

POINT 1

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

Encompassed in the framing of paragraph 5 of the petition to modify the decree, is the idea that the original decree was an economic impossibility and that the defendant could not comply therewith. The provision in said memorandum decision (R. 11) that the alimony and support payment may be reviewed upon application of

plaintiff should be considered as reciprocal. If plaintiff had a right to call for a review, fairness and justice require that defendant have the same right.

The justification for the review of the decree is embodied in the fact that the decree on its face was inequitable, unconscionable and impossible of performance, and that defendant, after a bona fide effort of three or four months to comply with the decree, found it impossible to do so.

The court below gave considerable weight to these factors and made a slight modification of the decree but only enough to make it possible for defendant to comply.

In the case of *Bailey* v. *Superior Court,* 11 P. 2d 285, the court stated, at page 868:

> "The trial court entertaining the decree still retains jurisdiction to modify its order if circumstances warrant the change, and the proper procedure for the party who is unable to comply with an order for the payment of alimony or support of minor children is to seek a modification of the order, not to resist its enforcement and thereby subject himself to contempt proceedings."

The requirement that defendant pay $328.68 per month from total net earnings of from $374.00 to $380.00 per month is on its face confiscatory, inequitable and unjust.

A divorce suit is a suit in equity. (*Dorsie* v. *Dorsie,* 122 P. 2d 64; *Hiltbrand* v. *Hiltbrand,* 193 P. 2d 391; 68 Id. 275.)

Divorce proceedings are equitable proceedings and determination of the issues in each case turns on its own facts. (*Wood* v. *Wood,* 76 Ariz. 412; 265 P. 2d 778.)

It is not equitable to allow judgment either interlocutory or final to stand if it is confiscatory on its face and does not allow the defendant the bare necessities of life and the ability to maintain himself in his employment or so threatens his standing with his creditors as to imperil his employment.

The appellant cites the case of *Osmus* v. *Osmus, Gale* v. *Gale, Chaffee* v. *Chaffee,* and *Anderson* v. *Anderson,* to establish the legal principal that a decree cannot be modified unless it is alleged, proven and the trial court finds that the circumstances upon which it was based have changed. In the *Anderson case,* however, the part quoted from page 266 is a canvass or commentary given by the court to assist the litigants in that particular case under the set of facts with some guidance in any future litigation between the parties. It is submitted that the defendant herein making an honest effort to comply with the court's decision and finding from the real world of experience that such is impossible, should not in the spirit of equity be deprived of an early opportunity to seek redress in the original court which granted the decree.

The *Osmus case* is distinguished from the case at bar. In that case the court held that the defendant had no right to complain about the excessiveness of the alimony

because he had *stipulated* to the amount in the decree, apparently without any intent to comply with it. The court said at page 237:

> "He (the defendant) is hardly in a favorable position now to assert that the alimony awarded is excessive."

No such stipulation was involved in the case at bar, and the only reason for defendant's delay in protesting was his desire to make an honest effort to comply.

Points 2 and 3 will be discussed together.

POINT 3

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

POINT 2

THAT THE EVIDENCE IS SUFFICIENT TO SUPPORT A MODIFICATION IN RELATION TO PAYMENT OF JOINT OBLIGATIONS BY DEFENDANT.

Evidence at the trial and the hearing on the petition for modification demonstrated the unfeasibility of the decree as it stood because it did not leave defendant the means of supporting himself and maintaining his employment. While the Findings of Fact stated defendant's income to be between $400.00 and $484.50 per month, these figures represented defendant's gross income, his

net take-home pay being only $364.23 per month at the time of the last hearing (R. 55', 56). The decree called for payments totaling $328.68.

The original decree called for defendant to pay 87% of his monthly take-home pay for alimony, child support and payment of joint obligations. Even after the modification, defendant is required to pay 63% of his take-home pay.

A moderate reduction based upon these facts is not such an abuse of discretion by the court below as would warrant a reversal.

The appellant contends that if there were dissatisfaction with the decree an appeal was the proper remedy. However, this contention overlooks the inherent power of a court of equity to modify an inequitable decree, and thus accomplish an equitable result, or to correct its own errors.

CONCLUSION

In conclusion we respectfully submit that there was no evidence brought forth at the trial of November 20, 1962, or the hearing of March 4, 1963, that showed that the defendant had the ability to pay $225.00 per month support and alimony, plus $103.68 on joint obligations for a total of $328.68.

The respondent honestly attempted to comply with said decree for a period of over three months in spite

of the obvious impossibility and, therefore, petitioned the court for relief as a matter of equity to overcome a decree manifestly unjust on its face. Regardless of any other issues involved, equity demands that this order of modification be affirmed and that the defendant be awarded a reasonable sum for the use and benefit of his attorneys in connection with the preparation and response to this appeal.

Respectfully submitted,

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