

1967

## Nabbie C. Sorensen v. S. Morgan Sorensen : Appellant's Brief

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# IN THE SUPREME COURT

of the

## STATE OF UTAH

NABBIE C. SORENSEN,

*Plaintiff and Appellant*

vs.

S. MORGAN SORENSEN,

*Defendant and Respondent*

Case No.

11013

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### APPELLANT'S BRIEF

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

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

NABBIE C. SORENSEN, <i>Plaintiff and Appellant</i>	}	Case No. 11013
vs.		
S. MORGAN SORENSEN, <i>Defendant and Respondent</i>		

BRIEF OF APPELLANT

STATEMENT OF NATURE CASE

This is an appeal from an order reducing alimony from \$1,250.00 per month to \$1,000.00 per month. The original decree of divorce was entered on the 29th day of May, 1962. The appellant will be referred to as plaintiff and the respondent will be referred to as defendant.

DISPOSITION IN LOWER COURT

The order appealed from was entered on August 11, 1967 (R-41) and the Findings of Fact and Conclusions of Law in support of the order were entered on August 21, 1967. (R-43-44) The Notice of Appeal was dated and filed on September 5, 1967. (R-49)

The matter was heard before the Court on June 27, 1967 on defendant's Petition for Modification and the trial court, as justification for the reduction of alimony found the following:

## FINDINGS OF FACT

1. Defendant has, since the decree was entered herein, experienced changes in his financial circumstances as follows:

A. His remuneration for services, as distinguishable from income from investment, has been reduced \$500.00 per month.

B. He has remarried and has thereby assumed new financial obligations particularly with reference to a handicapped child of his second wife.

C. He has reasonably increased business related expenditures including:

i. expenditures for furnishings in his home which he uses as a display setting for sales purposes.

ii. expenditures for travel and other costs in connection with his service on boards of directors of national furniture marketing association

but which are not deducted as ordinary business expense.

2. Plaintiff's financial circumstances have changed since the decree was entered herein in the following particulars.

1. Her daughter, Christine, who was living with plaintiff when the decree herein was entered, has since married, is employed at South East Furniture Company, the corporation of which defendant is an officer and director, and no longer lives with plaintiff or requires consideration in plaintiff's daily household budgeting.

Based on the Findings of Fact, the Court adopted Conclusions of Law as follows:

1. That the alimony defendant is required to pay plaintiff should be reduced from \$1,250.00 per month (\$15,000.00 per year) to \$1,000.00 per month (\$12,00.00 per year) effective August, 1967.
2. That each party should pay his own costs and attorneys fees in connection with the proceedings on the aforesaid petition.

### RELIEF SOUGHT ON APPEAL

Plaintiff challenges the foregoing Findings and Conclusions, there being no evidence to support the same and the same being entirely without substance. She seeks to re-establish her right to alimony in the sum of \$1,250.00 per month and to have the cause remanded for that purpose and in connection therewith to have the trial court award such attorney's fees as may be reasonable in defending against defendant's petition and for the prosecution of this appeal and her costs.

### STATEMENT OF FACTS

By way of preface, the original file, including the minute order dated April 26, 1962, the order clarifying minute order bearing mailing date of May 9, 1962, the Findings of Fact and Conclusions of law and Decree of Divorce dated May 29, 1962 has been either lost or misplaced, and by stipulation dated the 31st day of August, 1967 (R-1) copies of each of the named docu-

ments were filed to stand for all purposes in lieu of the originals. The copies of the several documents are attached to the stipulation and so filed. (R-2-22)

Exhibits pertaining to the instant matter and contained in the record consist of Exhibits 1 through 6, both numbers inclusive and each bear the date 6-27-67 in connection with the exhibit number. This case was appealed to this court following the entry of the decree in 1962, which decree was affirmed. *Sorensen v. Sorensen*, 14 Utah 2d 24, 376 P.2d 547 (1963).

The defendant is Vice President and Merchandise Sales Manager of South East Furniture Company with which Company he has been identified since 1926. (R-53) He is a director of the corporation (R-54) and as such, with his brother Horace A. Sorensen and other brothers and relatives, determines policy of the corporation. (R-73)

Following the divorce in the instant matter, the defendant married Marjorie Holbrook, the former wife of Dr. Von Holbrook (R-77) who has two children as issue of her prior marriage; one child being physically handicapped. Dr. Holbrook pays \$125.00 per month for John, the physically handicapped child and no effort has been made to increase the support payment nor has support been refused by the boy's father. (R-81) The child Christine, the issue of the parties herein, was eighteen at the time of the trial of the action in 1962 (R-61) and is not referred to as a dependent in the Findings of Fact incident to the 1962 decree of divorce.

At the time of the divorce in 1962, the court found in its Finding No. 7 that the defendant was earning substantially \$45,000.00 per year and the sum of \$1,250.00 per month, commencing with the calendar month of May, 1962 was a reasonable sum to be required to be paid by the defendant to the plaintiff as alimony until the court otherwise orders. (R-13) Since the divorce, the defendant's earnings have substantially increased. His income tax return for the calendar year 1962 shows wages in excess of \$54,000.00; the income tax return for the year 1963 shows wages in excess of \$55,000.00; the income tax return for the year 1964 shows wages in excess of \$59,000.00; the income tax return for the year 1965 shows wages in excess of \$60,000.00 and the income tax return for the year 1966 shows wages in excess of \$58,000.00. The income tax returns, together with all of the defendant's answers to interrogatories were stipulated as evidence in the instant matter. (R. 65-66)

Exhibit 1 in the instant matter ( a copy of the minutes of a Board of Directors meeting of South East Furniture Company held on August 2, 1966) discloses that Horace A. Sorensen and S. Morgan Sorensen, the latter being the defendant in this case, each took a voluntary reduction from future commission payments of \$500.00 effective September 1, 1966, in order to augment a monthly bonus and a salary in favor of one Ward E. Johnson. The reduction of \$500.00 per month from defendant's commission earnings is the premise upon which he asserts his claim for reduction of alimony.



Since the defendant's remarriage, he has acquired a new home at a cost of \$85,000.00 including the cost of the land of which amount his present wife, the former Mrs. Holbrook, contributed \$32,000.00 or \$33,000.00. (R-80)

Interrogatory No. 7 and the answer thereto as made by the defendant (R-36) is as follows:

Question: State your present net worth and your net worth as of the 29th day of May, 1962, and itemize assets and liabilities for each date.

Answer: 7 It is difficult to give an accurate statement of defendant's net worth as of May 29, 1962. The basis on which the trial court proceeded in this matter (based on the valuation reports of securities and real properties in evidence) would establish defendant's net worth at approximately \$175,000.00. There has been no significant change in defendant's net worth since that time.

The plaintiff did not testify in the instant matter. In the prior appeal this court commented on the substantial interests involved and that the division of property was such that the defendant would not "be greatly hindered in the mode of living to which he has accustomed himself." There is nothing in the present record to dilute the observation of this court or to show a change of circumstances on the part of the husband except that his earnings have increased rather than decreased.

## ARGUMENT

Section 30-3-5, *Utah Code Annotated* 1953 provides in part:

“\* \* \* Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.”

In *Hamilton v. Hamilton*, 89 Utah 554, 58 P.2d 11, (1936), this court stated that the power to make amendments in the particulars authorized by the statute,

“\* \* \* is not without limits. Thus, in the absence of changed conditions or circumstances a modification of a decree may not be had.”

We believe that there has been no deviation from that rule.

Confining our attention to the findings of the trial court and in the order of their presentment, the action of the trial court was arbitrary and capricious and there is no merit in the various contentions.

1. *The reduction in defendant's salary of \$500.00 was a voluntary act on his part and is relatively insignificant.*

We have already pointed out the wages shown by the W-2 Forms and deducted as such by the corporate employer. The total income for the year 1962 was in excess of \$60,000.00; for the year 1963 in excess of \$66,000.00; for the year 1964 in excess of \$64,000.00; for the year 1965 in excess of \$67,000.00 and for the year 1966 in excess of \$64,000.00.

Over objection that the defendant could not go behind the decree which reflected a salary of \$45,000.00 in 1962 (R-63) the trial court permitted a suggestion that prior to 1962, part of defendant's remuneration was income from investment and that the Internal Revenue Service was attempting to make a finding that part of the reported salary of some \$60,000.00 per year was in fact a constructive dividend, at least to about 20%. (R-68) In the instant action however it was stipulated that all of the salary and wages reflected by the tax return for 1963 and subsequent years were actually expensed out by the company as wages and salary and that the Internal Revenue Service had not surcharged the defendant or anyone else on the theory of a constructive dividend. (R-64)

The \$500.00 per month reduction was a voluntary one in the sense that the defendant S. Morgan Sorensen and his brother Horace A. Sorensen permitted their commissions on sales to be reduced by \$500.00 each as a temporary expedient (see Exhibit 1, 6-27-67). The bonus and salary to Ward Johnson was eliminated at the stockholders meeting held March 7, 1967 (Exhibit 2, 6-27-67) and the defendant attempted to explain perpetuating the \$500.00 per month reduction on the ground that it was to assist his son Steven who had been with the company for some eleven years and that the minutes of the two meetings (Exhibit 1 and 2) were being misconstrued (R-75).

In *Cody v. Cody*, 47 Utah 456, 154 P. 952 (1916) the Court interpreted the Legislative intent in connection with the statute above mentioned as follows:

“We do not think the Legislature intended that the courts should review the allowances made by them for alimony in divorce proceedings, but what was intended was that, where material new conditions have arisen after the decrees were made, which conditions were not, and could not have been, considered or passed on by the courts, then, upon proper application and proof, the courts may make ‘subsequent changes or new orders’ respecting the allowance of alimony or the distribution of property or the disposal of children. Where a party is dissatisfied with the original allowance or distribution of property, or the disposal of the children, he must prosecute a timely appeal to review the court’s orders or decrees in that regard, and in such cases the review must be had upon the evidence adduced upon the original hearing. When the conditions have changed, however, as before stated, the changes or new orders must be based upon the allegations of the changed conditions and the evidence in support thereof.”

The son Steven was working with the South East Furniture Company at the time of the divorce. It would be quite a stretch of the imagination to say that there had been a substantial change in circumstances when the father (still in a \$60,000.00 a year bracket) could by a voluntary act on his part, through the exercise of business policy, make a token sacrifice or so-called incentive pay going to the son of the former marriage. We assert that there is no substantial showing justifying the find-

ing that defendant's remuneration for services, as distinguished from investment or otherwise, has been produced justifying the reduction of alimony. The Court would take judicial notice that reducing defendant's gross income by \$3,000.00 a year would result in little or no benefit to him by reason of the tax bracket that he remains in but could be of severe consequence to the plaintiff in the maintenance of the standard of living recognized by this court on the first appeal of this case.

2. *Defendant's remarriage and the reference to new financial obligations, particularly with respect to the handicapped child of his second wife are specious reasons for the reduction of alimony.*

Dr. Holbrook has never denied support for his handicapped child, nor has he been requested to offer additional support. (R-81) The boy John is to be given every consideration but on the other hand the defendant should not be heard on his complaint that the boy has to accompany his mother and her new husband on "boating trips" and at other times when it is inconvenient to have a babysitter. (R-83) The present Mrs. Sorensen has been a financial advantage and not a disadvantage to the defendant. We would think that there would be many divorced men who would welcome a contribution of \$32,000.00 from the new wife in connection with an \$85,000.00 home. The Findings in this regard are specious on their face.

3. *The so-called increased business expenditures should not justify the reduction in alimony.*

Whatever the defendant does in advertising his wares through the medium of his new home, entertainment or travel are matters of pure business policy. The record does not show the amount of these aesthetic contributions (R. 70-73) but if they are of any genuine purpose and amount, the court can again take judicial notice of the fact that they can be deducted as proper business deductions either by the defendant personally or the company for which he works.

4. *The daughter Christine was not a dependent at the time of the alimony award and should not now be considered as having been a dependent.*

Christine was 18 years of age at the time of the divorce and was living with her mother. She is now married and employed by the South East Furniture Company. (R. 61-62) There is nothing in the record to show whether Christine was a financial burden to her mother or the impact of Christine's marriage and employment on the plaintiff's "daily household budgeting." The plaintiff was present at the time of the hearing and could have been called as an adverse witness. The fact is that Christine was not recognized as a dependent at the time of the divorce and her employment by the South East Furniture Company should not now be of advantage to the defendant within the contemplation of dependency or the want of it.

### CONCLUSION

The trial court made no memorandum relating to its reasons for the reduction of alimony. The Findings

of Fact and Conclusions of Law were prepared by defendant's counsel as an afterthought both in fact and in time after the order reducing the alimony. With the utmost regard for the integrity of the Court we suggest that the action of the trial judge in the instant case was arbitrary and capricious. The order has no foundation in the record and the cause should be remanded to reinstate the alimony award as of the month of August, 1961 and with directions to fix counsel fees and costs both on the trial court level and in this Court in favor of the plaintiff.

Respectfully Submitted,

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