1967

Nabbie C. Sorensen v. S. Morgan Sorensen : Respondent's Brief

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

RESPONDENT'S BRIEF

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

FRANK J. ALLEN
CLYDE, MECHAM & PRATT
351 South State Street
Salt Lake City, Utah
Attorneys for Respondent

HARLEY W. GUSTIN
GUSTIN & RICHARDS
1610 Walker Bank Building
Salt Lake City, Utah 84111
Attorneys for Appellant

INDEX

Cases Cited

INDEX — (Continued)

Statutes Cited

Texts Cited

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

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an appeal from an order reducing alimony from $1,250.00 per month to $1,000.00 per month. The Decree of Divorce was entered on May 29, 1962. The order reducing alimony was entered on August 11, 1967. Plaintiff-appellant will herein be called "plaintiff", and defendant-respondent will herein be called "defendant."

DISPOSITION IN LOWER COURT

Trial court found there to have been changes in the circumstances of the parties justifying reduction in alimony and entered its order accordingly on August 11, 1967.

STATEMENT OF FACTS

Because the transcript from the original trial has been lost, counsel are at some disadvantage in supporting, by reference to the record, statements with reference to the financial circumstances of the parties as of the date (May 29, 1962) the decree herein was entered. Certain of the exhibits reveal, however, what circumstances, presumably established by the evidence, were emphasized to the court in the original presentation.

Exhibit 4 (of the exhibits received in the original proceeding) is a summary of the facts plaintiff urged the Court to consider in fixing attorney's fees as well as in deciding the cause. Among the facts emphasized in that summary are these:

> 1. "Mr. Sorensen disclaims anything but a moral obligation on a voluntary basis with respect to Christine, who still lives with her mother while attending the University and who is unmarried" (Item 11, page 4)
>
> 2. "One of the novel features of the case is a plan of orderly liquidation of the assets with high intrinsic values but not readily marketable" (Item 13, second paragraph).
>
> 3. "Early in the controversy the defendant stopped plaintiff's credit with former trade accounts including the services of Mr. Don Andrus, the gardner, and Kent Anderson the handy man. Mrs. Sorensen re-employed Mr. Andrus for work around the home and the adjoining acreage, borrowing money for that purpose, she being incapable of performing the necessary physical labor in the premises." (Item 13, first paragraph.)

It is evident that, in the initial presentation of the case to the trial court, the court's attention was particularly drawn to the facts that Christine was unmarried and living with her mother, that she was attending the University (which everyone knows involves significant cash outlay) and that support money was not being awarded for Christine because she was eighteen. Further, stress was laid upon the "novel" circumstance that the bulk of the property awarded to plaintiff had "high intrinsic value" but was "not readily marketable" and, far from being a reliable source of income, had to be maintained at considerable net expense so that "liquidation" was a problem.

In these regards, the circumstances of the plaintiff had, by the time of hearing on the Petition for Modification, completely changed. Christine was then married, was no longer living with the plaintiff and was in fact employed by defendant (Record 61, 62). The property Mr. Andrus was hired to maintain had been sold (Record 69). Thus the property awarded to plaintiff which had been, at the time the decree was entered, productive of net expense was converted to a form presumably productive of net income.

Let us now consider the defendant's circumstances and how they have changed. When the decree was entered, defendant was, in effect, single. He was receiving, the court found, income of $45,000.00 per year as a result of his personal services. This finding of the trial court (Finding No. 7, Record page 13) was made in the face of uncontroverted evidence that the income

reported by defendant's employer as wages varied from $52,898.00 to $59,369.00 (Exhibits 3 and 10 from original proceeding.) The trial court recognized that the remainder (varying from $13,000 to $20,000) of defendant's so reported income was in the nature of return on the investment represented by defendant's capital stock.

There is no evidence in the record relating to the petition for modification which would support a contention that plaintiff's personal services have become more valuable to his employer since 1962. On the contrary, the record (Pl's. Exhibits 1 and 2, Transcript P. 54) confirms that defendant and his employer recognize that defendant must sooner or later reduce the quantum of time and energy he devotes to the business and make some preparation for retirement. Accordingly, assistance has been provided and defendant's *salary* appropriately reduced. It is true that defendant's *gross* income has not yet been significantly affected, but his *real* income has been and, as we will subsequently urge as POINT III of our Argument, defendant's return from investment of his share of the marital estate is not material to the present inquiry.

Defendant's real income, the income really available for personal and family use, is substantially reduced since 1962. His testimony (Transcript P. 72) is that he uses his home as a convenient and attractive environment in which to display the furniture he sells. It is not the policy of his employer to permit his use of such furniture without charge; he is obliged to buy it. He

has incurred such obligations in connection with the furnishing of his home to be an effective sales tool that approximately $560.00 per month is deducted from his wages. (Def's Exhibit 4) Defendant and his family enjoy the furnishings, of course, but the elegance is maintained largely for business purposes, and the expense of that maintenance is properly considered in any determination of defendant's real income. Associated with the expense of maintaining a "display house" is the expense of business entertainment in it. Here again, the only testimony is that defendant spends from $200.00 to $250.00 per month for such entertainment. Plaintiff, on the other hand, has no business responsibilities revealed by the record. Her alimony plus return from investment of her share of the marital estate, in excess of $100,000.00, is available for her personal enjoyment. Further, defendant has heavy travel expenses, not paid by his employer, in performing adequately as a director of two national associations of merchandisers. (Transcript 71)

Finally, defendant has remarried and has, in consequence, assumed new responsibilities, financial and otherwise, toward a wife and her handicapped son. There are frequent occasions, as examination of Defendants Exhibit 3 will reveal, when defendant's "net pay" per month (including amounts recognized by the trial court as investment return) is not enough to pay the alimony. If we examine defendant's financial statements in evidence we discover that his gross income approaches $60,000.00 per year. Of that, he has paid,

under the original decree, $15,000.00 in alimony, $15,000.00 in income taxes and some $10,000.00 per year in defraying the expenses we have discussed.

ARGUMENT

POINT I.

THE COURT WHICH ENTERS A DIVORCE DECREE HAS CONTINUING JURISDICTION TO MODIFY THE DECREE IN RESPECT TO ALIMONY AND HAS, IN THAT REGARD, A BROAD DISCRETION.

The legislature has specifically provided (Section 30-3-5 UCA 1953, as amended) that a divorce decree is subject to "subsequent changes or new orders" in regard to distribution of property "as may be reasonable and proper." In this connection, this Court has consistently adhered to the universally revered doctrine that the determination from time to time of the amount which should be paid as alimony is a matter which rests in the sound discretion of the trial court. As early as *Read* vs. *Read,* 28 Utah 297, 78 Pac. 675, the view was expressed that:

> "unless it is made to appear that there has been an abuse of discretion on the part of the court in dealing with one or both of these questions, its judgment and orders granting and fixing the alimony will not be disturbed."

This language was quoted with approval in *Blair* vs. *Blair,* 40 Utah 306, and the concept has since been frequently stated.

It is settled, of course, that the trial court has jurisdiction to modify a decree by reducing alimony initially awarded (*Myers* vs. *Myers,* 62 Utah 70; 218 Pac. 123, 30 ALR 74) and an order modifying a decree in respect to alimony is clearly among the "orders fixing the alimony" to which this Court made reference in *Read* vs. *Read,* supra.

Plaintiff cites *Hamilton* vs. *Hamilton,* 89 Utah 554; 58 P.2d 11, in support of her contention that, to justify alimony modification, a change in the "conditions or circumstances" of the parties must be shown. We do not quarrel with the *Hamilton* holding. Against the background of the many cases construing Section 30-3-5, however, it must be recognized that the determination of whether circumstances have so changed as to justify alimony modification is a matter which rests in the sound discretion of the trial court. The appellant must demonstrate an abuse of discretion. (See Sections 674, 675 on Divorce, 24 Am. Jur. 2nd 793.

POINT II.

THE MERE FACT THAT THE CHANGES IN HIS FINANCIAL CIRCUMSTANCES ON WHICH DEFENDANT RELIES ARE THE RESULT OF POLICY DECISIONS IN THE MAKING OF WHICH HE PARTICIPATED DOES NOT DISQUALIFY HIS PETITION.

Plaintiff asserts, in her argument, that defendant's salary reduction was a "voluntary act" and that his increased business expenditures "can be deducted" and, inferentially, would be deducted except for lack of ordi-

nary business acumen on the part of defendant or his employer.

In this connection, we would point out to the court that the only evidence in this record is that, in order to produce the $45,000.00 per year which the trial court found to be his wages (Record, page 2) defendant, who is now 55 years old (Record page 73), has devoted at least 60 hours per week to the performance of his myriad duties with South East Furniture Company. Beginning at page 53 of the Record, defendant tells of his business responsibilities. At page 54, we find this testimony:

> Q. How much time do you spend each week in the performance of these employment obligations that you have described?
>
> A. Well, certainly not less than 60 hours, sometime considerably more than that.
>
> Q. What have you done in the last year or so with reference to getting some relief from this work load?
>
> A. Well, we have been trying the last, oh, year or so, to take some of the pressure off, because the work load, because of complications and the complexities of our business — we have been trying to take some of the work load off, by distributing some of the detail work that I have been doing, to other people.

It is undoubtedly the law that a defendant under a duty to pay alimony may not avoid that duty by simply refusing to produce income. Conversely, the law does not require that income at a level which will permit alimony payment be maintained by an effort greatly in

excess of the norm and one which must jeapordize health. The plaintiff cannot reasonably insist that the defendant, now 55 years of age, work indefinitely on a 60 hour weekly schedule so that she, who has not engaged in productive employment since her marriage, may enjoy an income which, assuming a 5% return on the value of her share of the marital estate, exceeds the Governor's salary.

The record does not support plaintiff's contention that defendant's salary reduction was voluntary. It was accepted in recognition, by the directors of South East Furniture Company, that there are physical limitations on the personal services which defendant can contribute.

Plaintiff asserts that this Court can judicially notice the deductibility of the travel, entertainment and advertising expenses which defendant has incurred but which neither he nor his employer has treated as deductible. Even if the concept of judicial knowledge could be so stretched (a proposition for which plaintiff cites no authority), we submit that South East's deduction of these expenses, as the alternative to paying defendant the money to defray them, would reduce defendant's income by their amount. The enlargement of these expenses, deducted or not, constitutes a change in defendant's financial circumstances.

POINT III.

DEFENDANT'S INCOME ATTRIBUTABLE TO INVESTMENT OF THE SHARE OF THE MARITAL ESTATE AWARDED TO HIM SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER CHANGES IN INCOME HAVE OCCURRED.

The trial court found in the initial proceeding that $45,000.00 per year of the total defendant received from South East Furniture was for services, the remainder was return on the investment represented by his common stock. That finding is res-judicata. Plaintiff continues to emphasize, however, that, even though defendant's salary has decreased by $6,000.00 per year, the amounts he receives by reason of his stock ownership have increased to keep pace.

We would be disposed to concede the relevancy of fluctuations in defendant's investment income *if* plaintiff and the court has been amenable to the receipt of evidence about plaintiff's income from investment of her share of the marital estate. The following is a resume of the property awarded plaintiff by the trial court as the resume appeared in defendant's brief on appeal from the original decree (references are to the original record which is now lost):

The equity in the duplex, which had an undisputed value of $24,000.00 and a debt of $8,983.88	$15,016.12
The triplex, which had an undisputed value of $27,500.00, and a debt of $8,977.19	$18,522.81

An undivided one-half interest in the Holladay property, with the appellant being ordered to assume and pay both the back taxes and the balance of the mortgage on the home, so that the wife would get one-half of the gross value	67,500.00
Country Club Membership. (This had a gross value of $6,000, according to him, (R. 175) and $7,200 to $7,500, according to her, (R. 114) but he was ordered to pay the transfer fees, which she thought would be $3,000 (R. 114)	6,000.00
Cash surrender value of $50,000.00 New York Life Insurance Co. policy	4,050.00
The Antiques	600.00
Total	$111,688.93

"In addition the plaintiff was awarded miscellaneous items of personal property which were not separately valued (R. 47) and all of the furniture and fixtures in the duplex and triplex which were not separately valued (R. 45).

Using the same values as noted above to arrive at the gross value of the total marital estate, as the same is listed on pages 4-7 of this brief, the estate (without the 8,000 shares of inherited stock) and a value of $210,074.67, so that on these values, the wife received approximately 53 per cent of the marital estate.

If the large house and property in Holladay has a value of $187,000.00, then since she received one-half thereof, (R. 46), the total awarded to her would be increased by $26,000.00 to $137,688.93, and the gross value of the marital estate would be increased to $262,074.00. Under these

> values, she would have received approximately 56 per cent of the total marital estate. The matter is made even more disproportionate by the fact that defendant paid $7,000.00 for plaintiff's attorney and also had his own attorney to pay (R. 48)."

Plaintiff had then, when the decree was entered, assets valued at roughly $125,000.00 the bulk of which were non productive and, as she argued to the court (Exhibit 4 of the exhibits from the original proceeding) expensive to maintain so that a part of her alimony was diverted to their maintenance.

Defendant testified (Record 69) that the non productive property has been sold. Defendant offered to prove that plaintiff has received her share of the sale proceeds in cash (Record 70). Plaintiff objected to the introduction of such evidence on the grounds of its immateriality (Record 69), and the court sustained the objection (Record 70). Plaintiff cannot equitably be heard to say that changes in defendant's investment income are material but changes in her investment income are not.

It is perfectly clear that defendant's salary (as distinguished from investment income) from South East has been reduced by $6,000.00 per year since the decree. The $500.00 per month provided for in Exhibits D-1 and D-2 is not contributed by stockholders, it is deducted from defendant's salary.

POINT IV.

WHEN THE INCOME TO BE DIVIDED AMONG HUSBAND AND WIFE IS LARGE, THE HUSBAND'S MORAL OBLIGATIONS TOWARD OTHERS MAY BE CONSIDERED IN DETERMINING WHETHER MODIFICATION IN RESPECT TO ALIMONY IS PROPER EVEN THOUGH SUCH OBLIGATIONS MAY NOT BE RELEVANT WHERE THE ORIGINALLY AWARDED ALIMONY PROVIDES ONLY A MINIMUM DECENT SUBSISTENCE FOR THE WIFE.

One significant change which has occurred in defendant's situation since the divorce decree is his remarriage. He has assumed responsibilities not only to his present wife but also to her two children, particularly a son afflicted with cerebral paralysis. To provide wholesome activity for this child, who finds it more and more difficult to relate with his contemporaries, elaborate outings are planned. The boy especially enjoys boating, and defendant has purchased a boat, at considerable expense, so that this source of pleasure for the boy can be afforded him. (Record 59, 60)

Plaintiff discounts defendant's new role as a basis for alimony modification because it was voluntarily assumed. No authority is cited for plaintiff's proposition that a change in situation must have occurred against the will of the husband in order to constitute grounds for modification. There are, as this Court knows, text statements generally to the effect that remarriage is a questionable basis for alimony modification. Writers (e.g. Section 689 of the American Juris-

prudence treatise, 24 Am. Jur. 2d 804) say remarriage is not good grounds in "ordinary" cases but call attention to cases where the husband's remarriage *has* been taken into account in readjusting alimony.

This Court in *Hampton* vs. *Hampton*, 86 Utah 570, had before it the petition of a divorced husband for alimony reduction where the changes in circumstances included his remarriage. Sixty dollars per month had initially been awarded for alimony and support of one child by the first marriage. Clearly, the first wife and her child were living near the minimum subsistence level on that award. In reducing the alimony and support obligation even more than the trial court reduced it, the court said this:

> "We are convinced that the changed conditions appearing in the record require a reduction in the amount of alimony as fixed by the trial court which we feel is more than the defendant is able to pay and at the same time maintain his station in life as a teacher *and support his present family.*" (Our emphasis added)

We do not pretend other changes in circumstances in the *Hampton* case were not of greater importance than the divorced husband's remarriage. We cite the case as a judicial recognition of the fact that a divorced man is still a *person*, and he may form new relationships which are not meretricious or inimical to society but which society encourages and will endeavor to protect. The new family was unquestionably a strong factor influencing the Court *even* in a case where the initial award afforded a bare subsistence to the first family.

Similarly in *Knighton* vs. *Knighton,* 15 Utah 2d 55, 387 P.2d 91, the Court had to divide a monthly income of some $365.00 (reduced from $495.00) between two families. The solution upheld by this Court was the elimination of the $75.00 per month alimony for a period of adjustment after which alimony was restored to $50.00 per month.

The *extraordinary* cases, cases where the husband's remarriage is considered a solid ground for alimony reduction, are of a kind this court infrequently sees. The family relations courts in this state are usually confronted with a situation where an income which is scarcely sufficient to supply the basic needs of one domestic establishment must be allocated to supply the requirements of two. The major concern is to establish for the plaintiff a foundation for survival in decency. Courts simply refuse to undermine that foundation on a showing that the husband has subsequently developed "moral" but not legally enforceable obligations.

In the instant case, plaintiff was awarded some $125,000.00 by way of property settlement and, if our research is adequate, the highest alimony in Utah's history. Plaintiff has received over $80,000.00 from defendant since the decree was entered. She need have concern, financially, for no one but herself. Defendant's position is that, where the income to be divided is large, it is entirely proper for the court to consider the income producer's moral obligations on a petition for alimony readjustment and to provide opportunity for their satisfaction.

There are no Utah cases which specifically announce this doctrine; there are none we find where the income to be divided is large enough to invite its invocation. In other jurisdictions, however, the concept is well established. Here is the American Jurisprudence statement:

> "Where an award of alimony against a husband having a large income is above the average level of income, *his moral as well as legal obligations in respect of the support of other persons may be considered even though the fact that* the obligation is only a moral one may (not) be relevant if the award involves only a minimum decent subsistence." (24 Am. Jur. 2nd 796) (Emphasis added)

Courts which have considered situations like the instant one have been very sensitive to real changes in the needs of the parties. A divorced wife whose husband has a large income may be entitled to be maintained in luxury, but the Court is always properly cognizant that other people may develop relationships toward the husband of a kind which society encourages. They may thereby become entitled to consideration when the question of how the husband's income should be divided is re-examined.

A petition very similar to defendant's was before the Washington Supreme Court in 1964. In *Harris* vs. *Harris,* 389 P.2d 655, an original alimony decree of $1,200.00 per month was reduced to $700.00 and later to $450.00 on no evidence perceptible from the report except the petitioner's testimony that he had remarried and assumed new responsibilities.

As we have pointed out, there are some months when defendant's take home pay will not pay his alimony. Infrequently is there as much left for his new family of four as defendant has paid plaintiff for her exclusive enjoyment. We believe the following from *Russell* vs. *Russell*, 142 F.2d 753, has application here:

> "Cases where the husband's income permits the alimony award to be higher than average standards of living require present peculiar problems. In such situations the Court should not make the award so high as to cause financial difficulties and personal embarrassment on the part of the husband which may impair his earning capacity. Even if a husband with a comparatively large income has wronged his former wife he must, nevertheless, live up to the standards required by his job and enjoy reasonable peace of mind."

CONCLUSION

Defendant's income from personal services has been reduced by $6,000.00 per year. The reduction has occurred in consequence of a policy to permit a diminution of defendant's business activity from a sixty hour per week schedule to one which more nearly accords with the norm for people approaching retirement age. Plaintiff resists alimony reduction because defendant's return from investment of his share of the marital estate has been increasing as rapidly as his income from other sources has diminished. Nevertheless, plaintiff objects to the receipt of any evidence about *her* increase in income (and elimination of expense) by reason of the conversion of her share of the marital estate to pro-

ductive asset form. The trial court, having sustained plaintiff's objection, properly discounted the evidence of plaintiff's increased return on investment. This is particularly true since most of the South East stock (the source of defendant's investment return) was his by gift or inheritance and included in the determination of marital estate against precedent.

The very judge who entered the decree is the one who modified it. He knows to what degree he was influenced by the 1962 arguments plaintiff made (Exhibit 4 of the original proceeding) that Christine was living with her while attending the University, and that the Holladay property was a drain on plaintiff's income rather than an asset contributing to her income.

Finally, defendant's remarriage and his desire to satisfy new moral obligations *are* relevant to an inquiry of this kind where the income to be divided is large, and plaintiff can obviously live in real luxury even under the modified decree.

Respectfully submitted,

CLYDE, MECHAM & PRATT
FRANK J. ALLEN
351 South State Street
Salt Lake City, Utah
Attorneys for Respondent