

1964

Morris L. Peters v. Virginia S. Peters : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MORRIS L. PETERS,
Plaintiff — Appellant,

— vs —

VIRGINIA S. PETERS,
Defendant — Respondent.

Case No. 10059

FILED
MAY 7 - 1964

BRIEF OF RESPONDENT

Clerk, Supreme Court, Utah

Appeal From the Judgment of the

~~UNIVERSITY OF UTAH~~ Special District Court for Weber County
Hon. Parley Norseth

JUN 30 1964

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In the
SUPREME COURT
of the
STATE OF UTAH

MORRIS L. PETERS,

Plaintiff and Appellant

—vs.—

VIRGINIA PETERS,

Defendant-Respondent

Case No. 10059

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

This is an appeal from a decision of the District Court of the Second District before Hon. Parley E. Norseth, in which Plaintiff's complaint for divorce was dismissed and Defendant granted a decree of divorce on her counterclaim. Defendant was awarded \$2500.00 in lieu of alimony, together with \$350.00 counsel fees for the use and benefit of her attorney.

DISPOSITION IN LOWER COURT

Plaintiff and appellant herein filed an action for divorce on the 23th day of October 1963 (R-2) together

with an order to show cause, why Defendant should not remove herself from the home of Plaintiff and Defendant together with a restraining order enjoining and restraining Defendant from returning to her home and from harassing or annoying Plaintiff or the adopted daughter of both Plaintiff and Defendant (R. 3) and a citation directed to Defendant (R. 12). Defendant, thereafter filed an answer and counterclaim (R-4) and a motion to vacate the restraining order and order to show cause and for an order for temporary alimony and attorney fees (R-6). Because of the manifest unfairness of the restraining order having been issued enjoining Defendant from returning home after she had left in the morning and was served at her work, without her having an opportunity to be heard before the issuance of such an order, the Defendant filed an affidavit of prejudice.

The matter was on November 4, 1963 transferred to Judge Norseth's division. He immediately vacated the restraining order and ordered Defendant to occupy the home with Plaintiff, and ordered Plaintiff to pay Defendant \$50.00 as temporary alimony and set the time for trial for November 13, 1964 at 1 P.M. (R. 10) Defendant thereupon, with leave of Court filed an amended counterclaim (R. 11).

On November 18, 1963 a trial was had and the matter submitted and the Court instructed counsel to submit written briefs (R. 14). Although Defendant submitted her brief within the required ten day period (R. 17) Plaintiff at no time filed a brief.

On December 18, 1963, Judge Norseth rendered his memorandum decision (R. 20) and thereafter, in accordance with the memorandum, on the 3rd day of January 1964, findings of fact and conclusions of law (R. 21) and a decree of divorce (R. 22) were made and entered and a memorandum of costs filed (R. 15). By its provisions Plaintiff's complaint was dismissed and Defendant awarded a decree of divorce on her counterclaim. The real property standing in the joint names of the parties was awarded to Plaintiff; the personal property which each of the parties had at the time of the marriage was awarded to each of them respectively. The Defendant was awarded a sum of \$2500.00 in lieu of alimony together with \$350.00 as counsel fees for the use and benefit of Plaintiff's attorney.

On January 7th, 1964, Messrs. Clayton & Gould were substituted as counsel for Plaintiff in place of Messrs. Richards, Alsup & Richards. (R. 23)

Defendant thereupon caused to be issued a writ of execution and garnishment (R. 24, 25, 26) and on the 14th day of January, 1964, plaintiff filed notice of appeal (R. 27).

On February 5, 1964, and before the transcript and record had gone to the Supreme Court, Defendant filed a petition for temporary alimony, pending the disposition of the action in the higher Court, and for an attorney's fee in accordance with Sec. 30-3-3, Utah Code Annotated, for the preparation and presentation of Defendant's defense in the Supreme Court.

RELIEF SOUGHT ON APPEAL

Plaintiff and appellant herein seeks to reverse the ruling of the trial Court and grant him a divorce and particularly to relieve him from having to pay out any money, either in lieu of alimony or as attorney's fees and to turn Defendant out of the marriage empty handed. Appellant further appeals from the trial court's order awarding temporary alimony and attorney's fees for respondent's counsel in the Supreme Court.

STATEMENT OF FACTS

The parties were married on the 6th day of November, 1961, at Preston, Idaho. Both parties had been married before. Appellant had living in his home a young woman named Jacklyn Peters, but appellant and his former wife had not adopted the girl. (Tr. 6)

Prior to the marriage appellant persuaded respondent to sign an antinuptial agreement which was introduced in evidence . (R. 16)

About 15 months after the marriage the parties had trouble and Plaintiff and appellant brought an action for divorce against Defendant and Respondent and on February 13, 1964 a decree was entered in favor of Plaintiff and against Defendant (Tr. 8). By its terms nothing was awarded to Defendant by a default. Later, on the 14th day of May, 1963, this Decree of Divorce was set aside (Tr. 35).

Evidence was introduced of a deed to the home which the parties occupied dated March 9, 1962 (Tr. 36).

Appellant and Respondent took title to the property as joint tenants. On April 22nd, 1963 and prior to the setting aside of the Decree of Divorce, Mrs. Peters, Respondent, conveyed to appellant by warranty deed, her interest in the property (R. 16) (Tr. 80).

On April 29, 1963 a Decree of Adoption was made and entered in which Appellant and Respondent adopted Jacklyn. All of appellant's stocks and bonds which the parties held as joint tenants, were transferred to appellant alone (Tr. 54-Tr. 80). Now with all of his property recouped, the appellant had the decree of divorce set aside and the marital relationship was resumed.

Thereafter the marriage continued and shortly before the filing of the present action, Appellant transferred \$2,500.00 from his own bank account and placed it in the name of Jacklyn (Tr. 53). Shortly after this Appellant then commenced the present divorce action.

All the way through the trial Appellant exhibited a great concern for his money and property and a fear that Respondent, as his wife, might share in some of it (Tr. 40-41, 56-57). Appellant contends that Respondent did not treat this young lady who was eighteen years of age properly and that she quarreled with him over money (Tr. 37).

Respondent, on the other hand, in support of her counterclaim, contends that Appellant treated her cruelly and struck her on a number of occasions (Tr. 87). She testified that she had gotten along with Jacklyn and purchased gifts for her (Tr. 81), (the young lady Jacklyn

(Tr. 71)) and made clothes for her. Appellants testified that she had worked during the entire marriage, and took home about \$250.00 per month; that out of this money she had paid her own doctor bills and bought groceries (Tr. 88) and used all of her money in the home (Tr. 94) (Tr. 40).

Based upon this evidence the Court dismissed Plaintiff's complaint, granted Defendant a divorce on her counterclaim and awarded her \$2500.00 in lieu of alimony, together with \$350.00 as counsel fees.

The real property, together with all his stocks, bonds, bank accounts automobile and motor boat was awarded to Appellant.

ARGUMENT

POINT I

THE RECORD SUSTAINS THE DISTRICT COURT IN AWARDING RESPONDENT A LUMP SUM IN LIEU OF ALIMONY.

Throughout the trial it appears that Appellant was very much concerned about parting with any of his worldly goods or permitting Respondent to participate in any kind of security that he might be able to give her. This attitude apparently was with him even prior to the marriage, when he took Respondent to his attorney and there she, without advice of counsel, entered into the anti-nuptial agreement (R. 16).

Appellant here complains that the Court erred in awarding a lump sum in lieu of alimony. In the case of *Foreman v. Foreman*, 111 Utah 72, (176 P. 2nd 144) at page 87, the Court said:

“The marriage in the case at bar lasted approximately 68 days, both parties are in their early middle ages, each is coming out of the experience approximately as he or she went into it as far as health and job expectations are concerned. Both parties had substantial property to begin with and except for the \$1800.00 awarded Mrs. Foreman approximately \$1400.00 of which came from the property Mr. Foreman had prior to his marriage, they are separated with their treasures \$425.00 gross and \$365.57 net. Mrs. Foreman’s \$25.00. The Court found that the conduct of the Defendant, respondent, has caused the Plaintiff great mental and physical distress and illness, and that her conduct has not caused him any distress. The parties litigated fully the question of fault in the case at bar—a material distinction between the case at bar and *Pinion v. Pinion*, 92 Utah 255. 67 P. 2d 265.

And we state in *Pinion v. Pinion*, 92 Utah at page 260, 67 P. 2nd page 267 :

‘In cases where her health has suffered or his conduct has been such as to justify, alimony for a period may be granted.’

Under the reasoning of the above cited case if alimony for a period is proper a lump sum award could be properly made. . .”

The matter of a lump sum payment in lieu of alimony is a discretionary matter with the trial Court.

In 27 A. C.J.S. 1079 it is stated as follows :

“It has been held to be proper and the better practice, at least with respect to some situations to award alimony in gross, as where the divorce

is an absolute one, restoring the parties to the state of unmarried persons, where the marriage was of particularly short duration, where there being no children, the lives of the parties will diverge, where the wife has brought money or property to the husband, or where property has been accumulated by the joint efforts of the husband and wife. It must be clear that the husband has assets sufficient to pay the gross award.

“In the final analysis, the question of whether or not an allowance of a gross sum should be made must be determined by the facts of the particular case, having due regard to the best interest of the parties and the husband’s financial ability to respond to an award in gross; and in general, where the award may be by alimony in gross or by periodic alimony the award will depend on the sound discretion of the court under the particular circumstances. Accordingly, where alimony in gross is awarded, it is especially important that every fact material to the determination of a just award should be before the Court.”

In the instant case the Court took into consideration all of the circumstances including Appellant’s ability to pay and the fact that he had acquired a considerable amount of property, although he had most of it when he married Respondent. (Tr. R. 16) The fact that Respondent worked and contributed her small amount to the welfare of the family was also considered by the Court.

In *Sorenson. v. Sorenson*, 14 U. 2nd 24, 376 P. 2nd 547, Mr. Justice Wade said in the opinion :

“Unless there is a manifest injustice and inequity or a clear abuse of discretion, this Court

will not substitute its judgment for that of the trial Court."

According to his brief Appellant not only objects to the award of a lump sum in lieu of alimony, but, to the payment to Respondent of anything at all. Even though she worked, during nearly all of the marriage and turned her money to the payment of household obligations, and to the paying of her own doctor bills (Tr. 88), Appellant is unwilling to give her anything for her efforts in the marriage and would like her turned out with nothing, he to have and keep all of the benefits of her labors during the marriage. In other words, the obligation to support his wife during the marriage meant nothing to him. Appellants points out that she is in good health and able to make her own way and therefore the Court should turn her out with nothing.

Judge Norseth considered all of the facts before him including the length of the marriage, the condition of the parties and the financial ability of the Appellant to at least in part compensate her for her efforts in the marriage. (Tr. 101)

We submit that there has been no abuse of discretion by the award to Respondent of a lump sum which Appellant has been ordered to pay in lieu of alimony.

In the case of *Alldredge v. Alldredge*, 119 Utah 504, 229 P. 2nd 68, 34 ALR 2nd 305, "Ch. J. Wolfe"

"The modern view is that the Court should, in doing equity, take into consideration all of

the circumstances and withhold or decree alimony and distribute the property in accordance with those circumstances."

The Court because of the short duration of the marriage did not saddle appellant with a permanent Order for payment of alimony. The award as made was commensurate with the parties standard of living and the Court took into consideration the contribution which Respondent had made to the marriage by way of money. She testified that she had contributed her pay check to the marriage in addition to serving Appellant as a faithful wife (Tr. 88). The divorce was not of her making, but rather was Appellant's idea. Now he would like to cast her off like an old suit of clothes and replace her with a new one at little or no cost for the exchange. This was all visible and apparent to Judge Norseth at the trial, and was all undoubtedly considered by him in making his decision.

POINT II.

THE TRIAL COURT CAREFULLY CONSIDERED THE EVIDENCE IN AWARDING RESPONDENT A DIVORCE FROM APPELLANT.

(A) THE DECISION IS SUPPORTED BY THE EVIDENCE.

(B) THERE IS ABUNDANT EVIDENCE OF THE EXTREME MENTAL ANGUISH SUFFERED BY RESPONDENT.

A. The trial Court had both of the parties before it and had an opportunity to observe the demeanor of each of them.

This Honorable Court has held that a wife is entitled to a decree of divorce on the ground of cruelty on much

less evidence than it will require of the husband who must show a somewhat aggravated case.

In the case of *Doe v. Doe*, 48 Utah 200, 158 P. 781, Ch. J. Straup said:

“Each case must depend upon its own facts and circumstances. The adjudged cases show that courts, on the ground of cruelty, grant the wife a decree on much less evidence than they do the husband. That rests on sound principles, for acts and conduct on the part of a husband may well constitute cruelty to the wife, causing her great mental distress, when similar acts and conduct on her part may not constitute cruelty to him, or cause him great mental distress. Before a decree is granted the husband on such ground, it ought to be a somewhat aggravated case.”

This was followed and quoted in *Hyrup v. Hyrup*, 66 Utah 580, 245 P. 335.

Again in *Cordner v. Cordner*, 91 Utah 466, 61 P.2nd 601, this Court citing the Hyrup case (*supra*) states it as follows:

Moffatt J.

“Two people who cannot adjust themselves should not by the court be required to maintain a relationship that has become intolerable to them. No such situation is revealed by the allegations of the complaint. Some nagging and fault finding by each spouse is to be expected, and the husband being the stronger, ought to take and forbear much of it with patience * * * what may be cruelty causing great mental distress in one case

may not be in another. Each case must depend upon its own facts and circumstances. The adjudged cases show that courts, on the ground of cruelty, grant the wife a decree on much less evidence than they do the husband. That rests on sound principles, for acts and conduct on the part of a husband may well constitute cruelty to the wife causing her great mental distress, when similar acts and conduct on her part may not constitute cruelty to him, or cause him great mental distress. Before a decree is granted the husband on such ground, it ought to be a somewhat aggravated case." *Doe v. Doe*, 48 Utah 200, 158 P. 781; *Hyrup v. Hyrup*, 66 Utah 580, 245 P. 335.

See also *Schuster v. Schuster*, 88 Utah 257, 52 P. 2nd 428; *Lundgreen v. Lundgreen*, 112 Utah 31, 1 184 P. 2nd 670.

In the recent case of *Stevenson v. Stevenson*, 13 Utah 2nd, 153, 360 P. 2nd 923, this Court held, (Callister, Justice):

"(1) What constitutes mental cruelty must be ascertained from the facts of each case. Whether Defendant's conduct was cruel and whether it caused plaintiff to suffer great mental distress, can only be determined in light of the sensibility of this particular plaintiff. Persons' sensibilities may vary due to their different degrees of intelligence, refinement, delicacy of health, etc. For this reason, the same conduct may constitute mental cruelty in one case and not in another. The ultimate answer depends not so much on defendant's conduct, but rather on the effect such conduct had upon the plaintiff.

(2) An additional factor of importance is whether the granting of the divorce would conflict with the public interest our divorce statutes were designed to protect. The public has an interest in the preservation of marriages in which the parties have mutual love and respect, and where the circumstances promote the happiness welfare, health and morality of the parties and of their children. However, there is no public interest in the preservation of a marriage where one of the parties can no longer endure the relationship without impairing his or her health; or where the conduct of one party has deteriorated the relationship to the extent that the parties will no longer continue cohabitation, and the marriage exists only in name but not in fact."

In determining these factors the trial judge has the advantage of hearing the testimony and observing the demeanor of the witnesses and unless there is an abuse of discretionary powers, this Court has held it will not disturb the ruling of the trial Court. *Weiss v. Weiss*, 111 Utah 353, 179 P. 2nd 1005.

In *Lawlor v. Lawlor*, 121 Utah 201, 240 P.2nd 271, this Court held (Wade Justice) :

"This court is reluctant to modify a divorce decree because the evidence is contradictory and the trial court having seen and heard the witnesses is more able to determine their credibility than we are. Also, in the absence of an abuse of discretion, we do not disturb the property division. We have carefully read the transcript and feel that the court's decision is fairly sustained by the evidence and that there was no abuse of discretion."

In considering the testimony the Trial Court had to conclude that from the very beginning of his relationship with respondent appellant never at any time acted in good faith.

The evidence therefore weighed heavily in favor of respondent on her counterclaim.

The terms and conditions which appellant imposed on respondent by his antenuptial agreement, (R. 16) together with the terms and conditions therein contained and the circumstances under which he persuaded respondent to go to his own lawyer's office and enter into it (Tr. 30-74) should give any trier of the facts a true insight into the small, shabby manner in which this man's mind worked. This Court may observe from examination of the record what a difficulty appellant's counsel had to get him to state anything of any consequence whatsoever as to what caused him to file this action.

(Tr. 14-15-16-17-18-19)

In appellant's brief, in an attempt to discredit respondent, he states that respondent had had "some association with her ex-husband." Transcript 21 :

"Q. At this time did you dial the phone, or did you see your wife dial your phone?

A. I did, yes.

Q. Who did she ask for?

A. She asked for her boy.

Q. What is the boy's name?

A. Eddie.

Q. All right, and then Eddie came to the phone?

A. He did not come to the phone. She talked to her ex-husband.

Q. And that is what you are complaining about today? Is that it?

Mr. Richards: That isn't proper voir dire.

Mr. Duncan: All right,

BY Mr. Richards:

Q. Now did this cause a problem between you and your wife? The fact she was talking to her ex-husband?

A. I told her to knock it off, and I believe she cut it out. They went back together again, so—Her ex-husband and his wife went back together again, and then she never called, that I know of, anymore."

This is a grabbing of straws when by appellant's own testimony, she quit talking to her ex-husband when he complained.

Respondent's concern for her own son and appellant's refusal to consider her desires in regard to the boy along with his insistence that the 18-year old young woman, Jacklyn, whom appellant had raised to have every privilege of a natural born daughter, while he turned respondent's son out. (Trans. 90), caused additional friction and clearly demonstrates appellant's one-sided thinking.

"Q. Now one other thing. At the time you were married, was your son living there?

A. Yes.

- Q. And why does your son not live there now?
- A. Because we were always arguing, it seemed like, and part of it was because he just—well, he did not want him in the house.
- Q. Did Mr. Peters say anything like that?
- A. Yes. He said that he was not welcome.
- Q. Did you discuss his living there before you were married?
- A. Yes.
- Q. And what did Mr. Peters say he could do?
- A. He said he could live there. In fact he was planning on building a home, and had even chosen a bedroom Eddie was supposed to occupy.”

There was considerable testimony about Mrs. Peters wanting to be alone some times with appellant and the fact that he wanted Jacklyn along all the time.

As to the name calling appellant testified that respondent called Jacklyn a “whore,” but respondent denies this and states the only time this word was used in the home was when appellant called her one. (Tr. 80)

All through the trial appellant, by his own testimony and his conduct appears penurious, stingy and totally unable to accept respondent fully as his wife and permit her to share in the family affairs, especially in regard to any interest appellant had in any property. Trans. 40:

"Q. Well, you took this title as joint tenants, isn't that right?

A. That was the way it—I didn't know what I was doing.

Q. That was the only thing that bothered you, that caused the first divorce?

A. That's right.

Q. All right. Now she conveyed all this property to you, didn't she?

A. Yes.

Q. So that it's your position now that she doesn't have any interest in that home?

A. That's right.

Q. Not even a dower right, is that right?

A. She hasn't put a dollar in it.

Q. By the way, she has worked most of her marriage hasn't she?

A. Quite a lot of it, yes."

The record bears this out completely. (Trans. 39-40)

B. As to evidence being offered by respondent showing that appellant's conduct resulted in extreme mental anguish, there were numerous quarrels, but in each case respondent attempted to reconcile them. After the first divorce she even transferred all interest to him in his stocks, bonds and real property which she held with him as joint tenants, all to make the "marriage work." (Tr. 78) (Also see record and file no. 39985 of first divorce action between the parties) :

“Q. Now I direct your attention to after this first Decree of Divorce was entered. Thereafter you got together, didn’t you?

A. Yes.

Q. Now did he come to you, or did you come to him?

A. He came down to my apartment.

Q. What did he say?

A. Well, we would sit and talk about these differences that were upsetting him so.

Q. Give us the substance of the conversation, as near as you can remember it.

A. Well, we were talking about reconciling, and it seemed like the only thing that was really upsetting him was that the house and the stocks were still as joint tenants.

Q. What did you say to him?

A. I said: ‘Well, if that is your problem, if we reconcile we’ll have a will made and then I’ll sign the house and the things back to you. If this is what will make the marriage work.’

Q. Is that why you signed?

A. Yes.

Q. Did you want to make this marriage work?

A. I certainly did.

Q. And did you exhibit any love or affection for your husband at that time?

A. Well, sure.”

On the other hand Appellant was cruel with respondent. There was some evidence of condonation from time

to time, but never, did they live together as husband and wife, after the beating he gave her and in which she caused the police to be called. (Tr. 87) The bruises were exhibited in Court at the trial about three weeks later (Tr. 49).

We submit that respondent was not only subjected to constant mental annoyances from appellant but that he also subjected her to physical mistreatment when he felt the occasion warranted it.

POINT III

THE TRIAL COURT'S AWARDS OF ALIMONY AND ATTORNEY'S FEES PENDING APPEAL WAS PROPER AND IN ACCORDANCE WITH THE STATUTE.

30-3-2, Utah Code Annotate:

"Temporary alimony and suit money. The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children and to enable such party to prosecute or defend the action."

This suit was of the Appellant's own doing. He commenced it twice.

After the entry of judgment Plaintiff and Appellant herein served Notice of his Appeal to this Court, but before the record had been transferred to the Supreme Court, the Defendant and Respondent petitioned the District Court for an award of temporary alimony pending the disposition of the action in the Supreme Court and for a reasonable sum as counsel fees for the use and bene-

fit of Respondent's attorney in the preparation and defense of the action in the Supreme Court. This was filed February 5, 1964 and the transcript and records were not received in the Supreme Court until March 18, 1964. The District Court thereafter awarded Defendant, Respondent herein, \$50.00 per month as alimony pending the disposition of the action in the Supreme Court and \$350.00 as counsel fees for the use and benefit of her attorney in preparing and presenting her defense in the Supreme Court.

The matter of attorney's fees is also a matter of discretion with the Court.

Again in the case of *Aldredge v. Aldredge* (supra) this Court held that even though a husband is granted a Decree of Divorce on the ground of mental cruelty and a wife's counterclaim is dismissed does not preclude an allowance to the wife of attorney's fees.

Ch. J. Wolfe':

"The general rule is that a wife is a privileged suitor in divorce cases and if she is without income competent for her support, and the maintenance of the suit, living separated from her husband, the Court will allow her alimony pendente lite and money to carry on her suit without inquiry into the merits.

"The reason for permitting a wife suit money to defend an action for divorce rests on the ground that the wife normally has no separate estate from which to pay for bringing or defending the action. This is the situation in the case at hand. Not to allow the wife expenses and counsel fees would in the majority of cases work an injustice

by denying her the power to enforce any marital rights which she may have. Here, as in the case of alimony, gross or immoral conduct may cause a denial of attorney's fees, but such conduct is not found in this case. It was error for the court to deny the defendant counsel fees which are a part of her costs pendente lite and which could have been required before the suit was concluded."

In *Weiss v. Weiss*, 111 Utah 353, 179 P 2nd 1005, Mr. Justice Wolfe writing the opinion stated:

"The statute does not contemplate that awards for expenses of suit or for temporary alimony should be made only in those cases where the "adverse party" (usually the wife) is destitute or practically so. It contemplates such awards when in the sound discretion of the court the circumstances of the parties are such that in fairness to the wife, she should be given financial assistance by her husband in her prosecution or defense of the divorce action, and for her support during its pendency."

The language of the Weiss case was requoted in the case of *Stuber v. Stuber*, 121 Utah 632, 244 P. 2nd 650, adding further:

"The rights of the wife to attorney's fees when she is forced to go to court to enforce a divorce decree should not be different from those of one who seeks temporary alimony. The court did not err in granting attorney's fees to respondent."

At the time the Order was made Plaintiff and appellant herein had merely filed his notice of appeal and the files and records were not sent to the Supreme Court until 40 days later.

We submit there was nothing at that time before this Honorable Court and had respondent waited during that time she would have suffered undue delay and hardship.

Under Rule 73 (G) Utah Rules of Civil Procedure, the District Court may in its discretion and with or without notice extend the time for filing the record on appeal, if its order for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order. This time also could be extended up by three months.

In *Peterson v. Ohio Copper*, 71 Utah 444, 266 P. 1050 this Honorable Court stated:

“Whenever the jurisdiction of the Supreme Court is involved, as it is by the filing and service of the Notice of Appeal, the trial Court is shorn of its jurisdiction, *except as to proceedings in aid of the appeal.*”

We submit that the order of the trial court for temporary alimony pending the disposition of the appeal was in aid of the appeal and to avoid an undue hardship. This was also true of the matter of the award of counsel fees for the use and benefit of respondent's attorney in preparing and presenting her appeal.

As to appellant's statement in his brief that respondent has not demonstrated a need for the relief granted, that is temporary alimony and attorney's fees on appeal, we again submit the case of *Weiss v. Weiss* (supra) wherein the Court stated that the statute did not contem-

plate awards for expenses of suit or for temporary alimony should be made only in those cases where the "adverse party" (usually the wife) is destitute or practically so. It contemplates such awards when in the sound discretion of the court the circumstances of the parties are such that in fairness to the wife she should be given financial assistance by her husband in her prosecution or as in this case her defense of the divorce action, and for her support during its pendency.

Again, in this matter, we submit the trial Court properly exercised its discretionary powers and there has been no showing of any abuse.

CONCLUSION

Respondent heartily disagrees with appellant's statement in his brief that the case at bar demonstrates "the unfortunate attitude of courts to treat divorce cases in an off hand manner."

Respondent submits that the trial Court considered thoroughly the underlying cause of the divorce which is born out by the record, that appellant, at the outset and before the marriage, planned to take what pleasures and conveniences he might enjoy from respondent and in return give nothing. His penurious, selfish, distrustful attitude, we submit was the sole cause of the marital trouble. The trial Court was more than fair and liberal to him. He was not saddled with alimony payments, but was required to repay respondent only a relatively small amount for the time, money and energy respondent

had given him in a futile attempt to make the marriage work. Under the circumstances which he had created from the beginning we submit Respondent is entitled to have the Judgment and Decree affirmed.

Respectfully submitted,

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