

1983

Beverly J. Wacker v. Samuel J. Wacker : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

BEVERLY J. WACKER, :
 :
 Plaintiff- : SUPREME COURT NO. 19008
 Respondent, :
 :
 vs. : Civil No. 6733
 :
 SAMUEL J. WACKER, :
 :
 Defendant- :
 Appellant. :

APPELLANT'S BRIEF

APPEAL FROM THE ORDER AND JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
DUCHESNE COUNTY, STATE OF UTAH
HONORABLE RICHARD C. DAVIDSON, JUDGE

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meaning of Section 30-3-5(3), Utah Code Annotated, 1953, as amended, and extended its order denying defendant's claim for alimony should be terminated. From this Order and Judgment, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the order of the lower court reversed and requests an order terminating alimony.

STATEMENT OF FACTS

A divorce action was heard by the trial court on September 25, 1978, with Findings of Fact, Conclusions of Law, and Decree of Divorce being entered by the court on October 10, 1978. (R. pg 15). After the divorce was granted, plaintiff left Roosevelt, Utah and eventually came to reside in Nogales, Arizona (TR54). During her residence in Nogales, plaintiff has lived with Dennis Warr intermittently for three years (TR 49). In July of 1979, plaintiff had sexual relations with Mr. Warr (TR 59), and as a result of such relations with plaintiff, Mr. Warr contracted a venereal disease - Herpes Simplex 2 (TR 60). Plaintiff and Mr. Warr subsequently shared the same bedroom on occasion (TR 48). Mr. Warr kept his clothing and personal effects at plaintiff's residence (TR 50). Mr. Warr and the plaintiff share the rent, utility and grocery bills (TR 51). From February 1982 to September 1982, Samra Lee Wacker, daughter of plaintiff and defendant, resided with plaintiff and Mr. Warr.

Sandra Lee testified that Mr. Warr maintained no other residence during the seven month period that she resided with the plaintiff (TR 50). Defendant learned of plaintiff's conduct and filed his-motion for termination of alimony.

ARGUMENT

POINT I

DEFENDANT WAS ENTITLED TO AN ORDER TERMINATING ALIMONY REQUIRED TO BE PAID TO PLAINTIFF BY REASON OF PLAINTIFF'S CONDUCT, AND IN ACCORDANCE WITH SECTION 30-3-5(3), UTAH CODE ANNOTATED 1953, AS AMENDED.

Defendant maintains that the undisputed facts before the court show that plaintiff was residing with a person of the opposite sex and had admitted sexual conduct with that person.

In filing his motion for termination of alimony, defendant relied upon the following statute:

(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.

Utah Code Annotated 30-3-5(3) (1953) (as amended 1979). The wording of this section of the statute implies a mandatory termination of alimony upon establishing that the former spouse is residing with a person of the opposite sex and has

had sexual contact with that person. In this case, the plaintiff testified that she has had sexual contact with Warr (TR 59) in July of 1979 and plaintiff's daughter testified that during the period from February 1982 to September, 1982, the plaintiff and Mr. Warr shared the same bedroom on occasion. (TR 48). Mr. Warr and the plaintiff have been living together for approximately three years (TR 49) and Mr. Warr kept his clothing and personal effects at the residence of plaintiff and had no other residence (TR 50). These conditions occurred while the defendant was under an order of the court to support the plaintiff by the payment of alimony. All of the provisions of Section 30-3-5(3) have been met and relief from the payment of alimony should be granted.

Prior to the 1979 amendment of Section 30-3-5(3), alimony could be terminated only upon the remarriage of the spouse receiving alimony. In enacting Section 30-3-5(3), the legislature gave recognition to changes in lifestyle that took place during the 1960's and 70's and allowed the courts to take into consideration the effect of cohabitation by the ex-spouse with a member of the opposite sex for purposes of terminating alimony payments. Through Section 30-3-5(3) the legislature sought: "To create an additional excuse for relief from alimony. There are some instances that are particularly galling. When the former spouse takes housekeeping with another man, it is not equitable for the

former husband to have to continue support." (43rd Legislature, Feb. 26, 1979, Third Reading of Bill in House).

The lower court held that the plaintiff did not reside with Mr. Warr within the definition of Section 30-3-5(3).

Webster's New Twentieth Century Dictionary 2nd Edition, defines the word "reside" as:

"To dwell permanently or for a length of time; to have a settled abode for a time; to abide; to live in or at."

It is clear from the facts of this case that Mr. Warr did reside with the plaintiff. The living situation between plaintiff and Mr. Warr has continued for over three years and is not merely a temporary arrangement.

Recently, the Utah Supreme Court examined Section 30-3-5(3) in Knuteson v. Knuteson, 619 P.2d 1387 (Utah 1980). The court in Knuteson held that the divorced wife was not a "resident" in the male neighbor's home within the meaning of statute.

Mrs. Wacker's situation can easily be distinguished from the Knuteson case. In Knuteson, the plaintiff (Mr. Ray Knuteson) was considerably in arrears in his payment of alimony. Therefore, the defendant (Mrs. Knuteson) could not afford payment of gas and electrical bills and consequently these utilities were shut off, forcing the defendant and her children to move out. The family accepted an offer to live at

the residence of a male neighbor, Mr. Gary Condor. During two months that defendant resided at the neighbor's home, defendant spent most of the daytime hours at her residence attending to household chores, such as cleaning, yard work, etc. Although the defendant did engage in sexual contact with Mr. Condor, it was clear to the court that she never intended to abandon her home or reside with a person of the opposite sex. As soon as the defendant received funds from the plaintiff, she returned to her own residence.

The situation in this case bears little resemblance to the Knuteson case. Mrs. Wacker has lived with a member of the opposite sex for approximately three years and during that time, defendant has continued his support by payment of alimony. The living situation in Knuteson stemmed from necessity, from an emergency situation caused by the actions of Mr. Knuteson. The court in Knuteson held that the statute (Section 30-3-5(3)) did not apply to an indiscretion which was the result of a temporary emergency situation occasioned by unlivable conditions caused by the ex-husband. Clearly that is not the situation in this case. Mrs. Wacker chose to reside with a member of the opposite sex, not as a matter of emergency or necessity, but rather one of convenience and personal preference. The action of Mrs. Wacker is not merely a single incident of sexual misconduct but rather a series of instances which gave her new partner (Mr. Warr) the benefit

a marriage relationship without the legality. The purpose of the statute as stated in Knuteson is "to prevent unreasonable servitude to an undeserving divorced spouse." Id. at 1389. The situation in Wacker v. Wacker, clearly is one to which the statute should apply.

The state of Illinois has enacted a statute which closely resembles the Utah statute:

"Unless otherwise agreed by the parties in a written separation agreement . . . the delegation to pay future maintenance is terminated upon the death of either party, or the remarriage of the party receiving maintenance, or if the party receiving maintenance cohabits with another person on a resident continuing conjugal basis."

Ill. Rev. Stat. 1977, ch. 40, par. 510(b) (Emphasis Supplied). The Illinois court had occasion to examine this statute in the case of In Re Support of Halford, Ill. App. 3d 609, 388 N.E.2d 1131. The facts of Halford are very similar to those on appeal. In Halford, the ex-husband filed a motion to terminate his alimony payment to his ex-wife because of the ex-wife's alleged cohabitation with another man. The evidence in Halford showed that Mrs. Halford had another man (Wayne Green) living in her home for over three years. Mrs. Halford testified that she has had sexual intercourse with this man three or four times since he has lived with her. In other testimony, Bruce Matthews, an ex-son-in-law of Mrs. Green, testified that he had seen Mrs. Halford and Mr. Green occupy the same bedroom. This situation clearly parallels the situation in here.

The court in Halford held that the evidence pro- established that the ex-wife's conjugal relationship was resident continuous basis, and thus Mr. Halford's obligation to pay future maintenance was terminated. The court stated, "Where the couple must also be cohabitating on a resident and continuing basis, proof of occurrence of sexual intercourse over time period rather than proof of its frequency is of primary importance." Id at 1132. The intent of the Illinois legislature was to provide for the termination of an ex-spouse's obligation to pay future maintenance whenever the spouse receiving the maintenance has entered into a conjugal relationship with another by legal or other means. Id at 1134. The Utah legislature had a similar intent when enacting the Utah statute that closely resembles the Illinois statute.

The Utah court has not been confronted with a situation like this case. Therefore, the court may want to rely on the Halford case since the facts closely resemble the case and the Illinois statute parallels the Utah statute which was enacted for the same purpose. Under the Halford decision Mr. Wacker is entitled to a termination of the alimony payments because Mrs. Wacker has clearly acted in the manner contemplated under the statute.

CONCLUSION

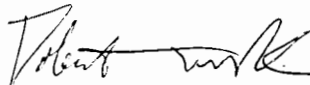
Based upon the facts before the court, petitioner respectfully submits that provisions of Utah Code Annotated

provisions 30-3-5(3) are applicable, and that the conduct of the plaintiff was exactly that contemplated by the legislature in enacting that provision. Thus, the trial court committed error in failing to grant defendant's motion for termination of alimony. This court should therefore reverse the trial court and enter an order terminating the provisions of the Decree of Divorce requiring defendant to pay to plaintiff alimony in the sum of \$500.00 per month.

DATED this 15th day of April, 1983.

Respectfully submitted,

McRAE & DeLAND



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MAILED OR HAD DELIVERED two copies of the foregoing Appellant's Brief this 19th day of April, 1983, to John C. Beaslin, Attorney for Respondent, 185 North Vernal Avenue, Vernal, Utah 84078.

