

1983

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

RESPONDENT'S BRIEF

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

JOHN C. BEASLIN
BEASLIN, NYGAARD, COKE & VINCENT
Attorney for Respondent
185 North Vernal Avenue, Suite 1
Vernal, Utah 84078

ROBERT M. McRAE
McRAE & DeLAND
Attorneys for Appellants
1680 West Highway 40, #1190
Vernal, Utah 84078

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CASES CITED

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. WAFFER,

Plaintiff-
Respondent,

: SUPREME COURT NO. 19008

: Civil No. 6733

vs.

EMIL J. WAFFER,

Defendant-
Appellant.

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Defendant appeals from the trial court's determination that although the alimony recipient was residing with a person of the opposite sex there was no conjugal relationship as anticipated by Section 30-3-5(3), Utah Code Annotated, 1953, as amended, and therefore further finding that alimony should continue under the original decree.

DISPOSITION IN LOWER COURT

After a full hearing in the Seventh Judicial District Court in and for Duchesne County, January 10, 1983, the trial court, after hearing evidence from witnesses and the parties, refused to terminate an alimony order under the previous decree under the meaning of Section 30-3-5(3), Utah Code Annotated, 1953, the court expressly finding that the arrangement between

the parties was one of convenience and sharing of expenses and to a certain extent a situation forced upon the plaintiff, recipient by the defendant in the first place.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the order of the trial court affirmed and requests an award of attorney fees, both in the proceedings below and in the appeal of this matter.

STATEMENT OF FACTS

The parties were divorced under a Duchesne County Divorce Decree being entered by the court on October 10, 1978. Plaintiff testified that she left Roosevelt, Utah on the last day of the year 1978 (R. 10). Section 30-3-5(3) was not passed by the legislators until 1979, and the new law became effective on May 7, 1979. Plaintiff did not reside in Utah after 1978. Mr. Draney, attorney for plaintiff in the divorce action, advised plaintiff that she could only lose her alimony rights by remarriage (R. 9). The defendant was awarded his business and the other property of the parties was equitably divided and based on the twenty-one year marriage and other evidence adduced at trial, the plaintiff was awarded alimony in the sum of Five Hundred Dollars (\$500.00) per month. Shortly after the decree was entered the defendant has resided with her children in the State of Arizona. (Further reference to factual testimony pertain to the page number of the reporter's transcript rather than the page number affixed

of the court in the official transcript of proceed-

The defendant transmitted to the plaintiff Herpes by virtue of an extramarital affair, which is an incurable venereal disease (R. 13). The plaintiff further testified that she had psychological problems resulting from having contracted the venereal disease and that she preferred not to be totally involved in a sexual relationship with anyone (R. 13).

Off and on there was a living arrangement with one Dennis Warr, wherein Mr. Warr participated in paying half of the rent and half of the groceries and although he stored his clothing at the party's residence, he did sleep on the couch and pretty much go his own way under a, "financial arrangement" (R 10, 11 & 12).

ARGUMENT

RESPONDENT IS ENTITLED TO A CONTINUING ORDER WITH RESPECT TO ALIMONY BECAUSE THE RELATIONSHIP, IF ANY, IS OUTSIDE THE SCOPE OF SECTION 30-3-5(3), UTAH CODE ANNOTATED, 1953, AS AMENDED.

Respondent's argument is essentially factual and the trial court sitting in a position to hear the evidence correctly ruled that the relationship, if any, between the parties was one of necessity and one which was in fact brought about by the wrong doing of the defendant in the first place.

Therefore, this case falls within the same concept of reasoning as Knuteson v. Knuteson, 619 P.2d 1387 (Utah 1981) (1387). The court construed the amendment to the divorce statute Section 30-3-5(3), Utah Code Annotated, 1953 as amended, strictly and Justice Henroid observing for the first time that for the statute to apply there must be more than a past or temporary residence situation. Justice Henroid observed:

"In our opinion the trial court correctly applied the statute, which seems to be a salutary one, for cases in which it is designed to prevent unconscionable servitude to an undeserving divorced spouse. However in a case where the complaining spouse, in contempt of a court order, creates the very situation upon which he professes his own innocence, the statute is a stranger." (619 P.2d at 1389.)

It is apparent that the trial court sitting in its perspective to view the evidence in the construction of this statute correctly found that in a twenty-one year marriage dissolution and that by reason of the ex-husband's extramarital affairs the wife contracted Herpes Simplex-2 she is, therefore essentially precluded from "fully cohabitating" with another not her own sex with or without the benefit of marriage.

The trial court, therefore, properly viewed the respondent's dilemma as a forced economic situation brought about by the husband's past misconduct and is, therefore, analogous to the Knuteson reasoning and the trial court's

...and there was "no sexual contact" within the perview of the amended statute is entirely correct.

...other recent cases strictly construing the termination of alimony upon the basis of marriage or cohabitation. (see Matter of Vasconcellos, 648 P.2d 1358 (1980, App. 390); In Re Marriage of Molloy, 635 P.2d 928 (1980, App.), 1981).

The courts in both Vasconcellos and Molloy, *supra*, construed the statutes very strictly to require a full marital and sexual relationship before alimony would be terminated.

In the present case the trial court found, after hearing the evidence and observing the witnesses, that the respondent was simply trying to live her life despite health and psychological problems caused by her ex-husband which, in fact, prevent her from engaging in a full sexual relationship.

There is adequate evidence in the record that the relationship between the respondent and Mr. Warr is one merely of convenience and necessity, which necessity is partially brought about by the fault of the appellant in this case (R-13). There is further evidence in the record that if need be the respondent in this case can make other present living arrangements, but in order to do so and it would seem appropriate to apply to the trial court on a subsequent hearing for a further increase in the alimony necessary to sustain her lifestyle.

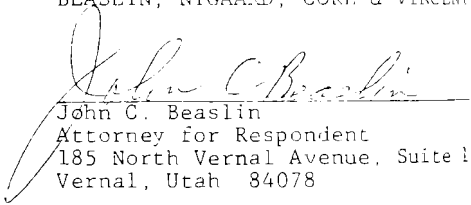
CONCLUSION

It is respectfully submitted that the case at bar falls outside the meaning and in legislative intent of Section 30-3-5(3), Utah Code Annotated, 1953, as amended, and that given the reasons for awarding alimony in the first place this is clearly a case where the alimony should be continued if not sua sponte increased. Appellant also claims a judgment against the respondent for attorney fees in the proceedings at the trial court level and in the prosecution and defense of the appeal herein.

DATED this 9th day of May, 1983.

Respectfully submitted,

BEASLIN, NYGAARD, COKE & VINCENT


John C. Beaslin
Attorney for Respondent
185 North Vernal Avenue, Suite 1
Vernal, Utah 84078

MAILED OR HAD DELIVERED two copies of the foregoing Respondent's Brief this 13th day of May, 1983, to Robert McRae, McRae & DeLand, Attorney for Appellant, 1680 West Highway 40, #1190, Vernal, Utah 84078.