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Robert G. Naylor v. Julia Lee Naylor : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT G. NAYLOR

Plaintiff-Appellant

vs.

JULIA LEE NAYLOR

Defendant-Respondent

Case No. 19050

BRIEF OF ~~RESPONDENT~~ *App*

APPEAL FROM ORDER OF THE THIRD DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

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BRIEF OF APPELLANT

STATEMENT OF NATURE OF THE CASE

Plaintiff-appellant appeals from an order of the Third Judicial District Court for Salt Lake County, State of Utah, granting defendant-respondent's Motion to Modify a Decree of Divorce entered on February 9, 1978. Appellant claims that the court, in modifying the Decree of Divorce, exceeded its discretionary power, and that its order increasing and extending an award of alimony was such as to manifest a clear abuse of discretion.

DISPOSITION IN LOWER COURT

Respondent's Motion to Modify the Decree of Divorce was tried to the lower court, and the lower court granted respondent's motion, thereby modifying the alimony provision of the divorce decree so as to increase monthly alimony payments, and to extend the period of time said payments are to be made. This appeal is filed, challenging that order.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Order of Modification reversed, and also seeks to have this court determine that the provision of the Decree of Divorce providing for the payment of alimony for a fixed period and for a fixed amount is a judgment of the court and not subject to modification.

STATEMENT OF FACTS

Plaintiff-appellant filed an action for divorce on May 19, 1977, to which defendant-respondent filed an Answer and Counterclaim for divorce. The matter was heard by the Honorable David K. Winder, based upon a stipulated agreement of the parties, as stated in the court's Findings of Fact and Conclusions of Law (R 34-38).

Judge Winder entered a specific Finding of Fact (No. 5, R-35), wherein he found:

"5. That plaintiff has recently become a practicing surgeon in Salt Lake City, Utah, and earns \$2,600.00 net per month; that defendant is employed as a hair stylist and earns \$702.00 net per month; that the sum of \$500.00 per month as alimony for a five (5) year period and \$250.00 per month as child support until the minor child reaches the age of 21 years or no longer lives with defendant or until the further order of the court, whichever event first occurs, is a reasonable sum to be awarded defendant under the circumstances said alimony and child support payments to commence on the 1st day of December 1977, and continue on the like day each month thereafter."

the court likewise entered findings whereby the property of the marital estate was distributed.

Based upon the findings of the court, a Decree of Divorce was entered which provided, in part, as follows (R-44):

"3. Plaintiff be and he is hereby ordered and required to pay to defendant the sum of \$500.00 per month by way of alimony and \$250.00 per month as child support; said alimony payments shall commence on December 1, 1977, and terminate after the November payment in 1982. Said child support payments to commence on the first day of December 1977, and to continue on like days each month thereafter until said child reaches the age of 21, or no longer resides with defendant, or further order of the court whichever occurs first."

On November 10, 1981, defendant-respondent filed her Petition for Modification of Support and Alimony Award, requesting both an increase in the amounts of the award, and an extension for the payment of alimony beyond the five year term set by the court (R 49-52). Defendant alleged a substantial change in the financial circumstances of the parties as the basis for her petition.

At the time of the entry of the Decree of Divorce, plaintiff was employed as a surgeon by the Western Surgical Association with, as the court found, a net monthly income of \$1,000.00. At the time of the hearing of the modification petition, plaintiff was employed by the same association, with a

monthly net income of \$3,170.00 (Ex. 7); however, plaintiff, since the entry of the divorce decree, had purchased an ownership interest in the association which afforded to him the right to participate in any profit of the association. This included both profit-sharing and pension program plans, and annual bonus if the association profit permitted. In 1979, plaintiff's bonus was approximately \$15,000; in 1980, approximately \$24,000; and in 1981, approximately \$23,500. Even though these bonuses were paid for these three years, plaintiff testified that there was no guarantee of the bonuses and, in fact, testified that because of additional members to the association, there was concern as to whether or not the bonuses would be paid in the future (T-70). Thus, the payment of such additional sums was not a certainty.

Defendant continued to sustain herself by her continued employment as a hair stylist, and her income was about the same each year.

The court found that at the time of the divorce, the parties anticipated that the income of each would increase (R), and that the defendant expected that she would be able to meet her own needs financially within the five year period for which alimony was awarded (R-130). The court further found that this had not occurred, and that the same was a material change of circumstances.

The court further found that the plaintiff's income had increased and that this likewise was a material change of circumstances.

Under its findings, the court ordered that the alimony award of the court be modified and increased from \$500 per month to \$600 per month, and extended the period of payment through November 1987, or an additional five years. In addition, the court increased child support from \$250 per month to \$400 per month, and awarded defendant an attorney's fee of \$1,000.

STATEMENT OF POINTS

- POINT I: The Court Erred in Extending the Period for Alimony Payment.
- POINT II: The Court Erred in Finding a Material Change of Circumstances and in Increasing Alimony and Child Support.
- POINT III: The Court Erred in Awarding Attorney's Fees to Defendant.

ARGUMENT

POINT I

THE COURT ERRED IN EXTENDING THE PERIOD FOR ALIMONY PAYMENT.

Historically, the major purpose of alimony in Utah is the continuation of the so called "breadwinner" spouse's duty to

support and maintain the other spouse, with the apparent rationale being to save the latter from destitution and from becoming a public charge. See Gramme v. Gramme, 587 P.2d 144; Openshaw v. Openshaw, 1 Ut.2d 49, 269 P.2d 284. Alimony, however, should not be considered as an annuity, and where, as in this case, the wife was, and is, self-supporting, alimony awards should be considered and intended to give the wife time and assistance in becoming self-supporting.

The accomplishment of the purpose of alimony can be by lump sum awards, payable in installments. Bader v. Bader, 18 Ut.2d 407, 421 P.2d 150. Where such is made by the court, the matter is res judicata, it being the effect of the Decree of Divorce to provide a full settlement of the matters between the parties.

Thus, when Judge Winder entered his order in the divorce proceedings, it seems apparent that by awarding to the defendant a substantial portion of the marital assets, and by fixing the period of time and amount of alimony to be paid, that he intended to fix all distributions between these parties. Although he did not use the apparent magical phrase "Lump sum alimony", he certainly did the equivalent by awarding \$500 per month for five years. How more determinative could the words "lump sum" have been? What could be more "in gross" or "lump sum" than the

amount awarded by Judge Winder?

In a similar circumstance, the Michigan Supreme Court held that a divorce decree, when not appealed, became final as to the previous required alimony of \$125 per month for two years, even without the use of the words "in gross" or "lump sum". See Edgar v. Edgar, 366 Mich. 580, 115 NW.2d 286.

Appellant believes there is sound public policy involved in fixing the term and award of rehabilitative spousal alimony, as here provided. It may provide an incentive to use diligence in procuring required training or skill development, so as to enhance one's ability and self-reliance, thereby allowing the recipient to continue in some reasonable approximation of standard of living established during the marriage.

Defendant's continued employment in her profession was as anticipated by the trial court at the divorce; it was her choice to do or not to do, more or less; it was the court's intent to fix the period for her to make whatever adjustment she desired in her life style. An annuity or retirement was never the intent of the court.

Appellant respectfully submits that where alimony is in a fixed sum to be paid for a specific term, it is in fact an award in gross, and should be given the finality of a judgment, and

thus not subject to modification, based upon an alleged change of circumstances. From Judge Winder's Finding of Fact, and considering his distribution of the marital assets, it seems clear that this was precisely his intention.

As this court said in Sorensen v. Sorensen, 20 Ut.2d 360 438 P.2d 180:

" ... The parties should be entitled to rely on the finality of the alimony award in determining the right to receive and the duty to pay."

POINT II

THE COURT ERRED IN FINDING A MATERIAL AND SUBSTANTIAL CHANGE OF CIRCUMSTANCES AND BY INCREASING ALIMONY AND SUPPORT PAYMENTS.

In the case of Christensen v. Christensen, 628 P.2d 1297, this court stated:

"The modification of divorce decrees is a matter of equity, and it is the duty and prerogative of this court to review both facts and the law (cases cited)."

In this light, appellant submits that a review of the facts and the law will indicate that the lower court abused its discretion, or misapplied principals of law, in finding a material and substantial change of circumstances that would permit an increase of both alimony and child support payments.

The matter of income changes was addressed in Dehm v. Dehm, 545 P.2d 525 (Utah 1976), wherein the court stated:

"Although an increase in the income of a divorced wife does not, of itself, determine a reduction of alimony, neither does an increase in the income of a divorced husband, of itself, determine the maintenance of alimony.

"... We do not want to confuse alimony with annuity."

To qualify for a modification of a divorce decree, the party seeking the modification must show a material and substantial change of circumstances. This requires three things:

1. Materiality.
2. Permanency.
3. Unforseeability.

Here, all three requirements are suspect and, in fact, apparently were not considered by the lower court.

The materiality of the claimed change of circumstances, when considered in light of the ruling in Dehm, supra, would indicate that an increase of income alone may not be sufficient. This is projected further when the facts are reviewed. Here, Dr. Naylor was beginning his medical practice and was employed by a medical group at the time of divorce. His net monthly income and his position in practice was acknowledged by the court's Finding of Fact (R-35). His net income at the time of divorce was \$2,600 per month.

At the time of the modification hearing, Dr. Naylor had resigned a member of the medical group by agreeing to purchase

shares of the group. As a member, he was entitled to a salary plus bonus participation in profits shown by the group. As shown by Exhibit 7, his net pay per month has increased to only \$3,170, a rather small increase. Although he had received bonuses for the years 1979, 1980 and 1981 (T-37), and anticipated a bonus for the year 1982 (T-67), the only income he could rely on was the salary he received each month, which, as seen, is not materially or substantially greater than his salary at the time of divorce (T-69).

As found by this court in the 1977 case of Cummings v. Cummings, 562 P.2d 229, the permanency of the claimed change of circumstances must be continuous to be substantial. There must be no indication that the claimed change is likely to reverse itself in the near future.

The appellant testified that the practice of his group was down, and that there was no guarantee that the bonus funds would be available in the future.

It thus becomes evident that the permanent and continuous nature of the source of additional funds to the appellant could, and most likely would, reverse itself in the near future.

In looking beyond the appellant's salary, the court abused its discretion.

At the time of divorce, the change of circumstances must not have been foreseeable; otherwise, the doctrine of res judicata must be applied.

The facts of this case are that at the time the original decree was entered, the court found that the appellant had recently become a practicing surgeon. This implies that the court recognized a future medical practice by the appellant, together with some additional income benefits in the future. This was foreseen by the court and considered by the court. Were the court not to project these matters, any effort by the appellant to better his position would, in effect, work as a penalty.

Recently, this court, in the Case of Georgedes v. Georgedes, 627 P.2d 44, said:

"The purpose of alimony is to 'provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge.'"

Using this as a yardstick, it appears certain that the standard of living was fixed by the original court, and that the future needs were, in fact, foreseen by the court. The claimed change of circumstances was foreseeable by the court and cannot now be claimed

POINT III

THE COURT ERRED IN AWARDING ATTORNEY'S FEES TO
THE DEFENDANT.

At the conclusion of the hearing, the court awarded defendant, the moving party for modification, an attorney's fee of \$1,000, together with her costs.

This was an application by the defendant to increase and extend alimony and support. It was her application to modify the court's order. It was not based upon any fault or actions by the plaintiff. As a matter of fact, plaintiff had followed, without any default, the orders of the court.

Appellant submits that the defendant does not have absolute right to attorney's fees, and is required to make at least a prima facie showing of her need, or of the conduct of the plaintiff, to justify such an award. Neither was done, and fees should not have been awarded. Callister v. Callister, 1 Ut.2d 34, 261 P.2d 944; Gale v. Gale, 123 Ut 277, 258 P.2d 986.

CONCLUSION

From the records and testimony found here, it is clear that the original Decree of Divorce was intended by the court to settle all matters between the parties. The plaintiff conceded property based upon the fixing by the court of defendant's alimony award. The decision by the court included the fixed alimony award, and should be sustained by this court, and the

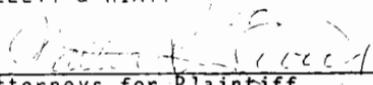
award of the original decree of alimony for a fixed period and amount should be considered as a lump sum award, and not subject to modification.

Additionally, there are lacking the essential elements required in finding a change of circumstances of the nature and type to warrant any modification. Any change in the appellant's financial condition is not material, since his monthly income has increased very little since the divorce decree was entered; any bonus funds received have no indication that they will be paid in the future, or will be permanent by any factor; and any improvement made by appellant was certainly foreseen and anticipated by the court and the parties at the time the Decree of Divorce was entered.

Considering all of the facts and circumstances, the order of the lower court in extending the period of time for the payment of alimony, the increase of alimony and support, and the award of attorney's fees should be reversed by this Honorable Court.

Respectfully submitted this 27 day of June 1983.

ELLETT & HIATT



Attorneys for Plaintiff

I hereby certify that I have delivered two true and correct copies of the foregoing Brief of Appellant to B. L. Dart, Attorney for Respondent, 430 Ten Broadway Building, Salt Lake City, Utah 84101, this _____ day of June 1983.