

1983

## **Robert G. Naylor v. Julia Lee Naylor : Brief of Respondent**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ROBERT S. HAYLOR, :  
Plaintiff Appellant, :  
v. :  
JULIA LEE NAYLOR, : Case No. 19050  
Defendant-Respondent. :

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**BRIEF OF RESPONDENT**

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**NATURE OF THE CASE**

This is a divorce action in which the plaintiff husband appeals from the granting of his former wife's petition to increase and continue alimony and to increase child support.

**DISPOSITION IN LOWER COURT**

Following a day-long trial, the Honorable Scott Daniels increased the appellant's alimony obligation by \$100 to \$600 per month, ordered that alimony be continued for an additional five-year period, and increased child support by \$150 to \$400 per month. (Tr. at 75, R. at 224.) Present Findings of Fact and Conclusions of Law (R. at 129-32) as well as a Final Order (R. at 140-42) were entered by the District Court. The appellant's motion filed by appellant (R. at 121-23) was denied (R. at 143-44).

## RELIEF SOUGHT ON APPEAL

Defendant-respondent Dale Lee Naylor respectfully requests that this Court affirm in its entirety the Order of the District Court and award to her the additional counsel fees she has incurred as a result of this appeal.

## STATEMENT OF FACTS

On February 9, 1978, the Honorable David K. Winder, then judge of the District Court in Salt Lake County, entered a Decree of Divorce terminating the eleven and one-half year marriage between the parties. (R. at 43-46.) During that marriage, plaintiff-appellant (hereinafter "Dr. Naylor") attended medical school, obtained his doctor's degree, completed his residency and internship, and became a practicing physician. (Tr. at 11, R. at 160A.) The original Decree provided for alimony to defendant-respondent (hereinafter "Mrs. Naylor") of \$500 per month for a period of five years (Decree 13, R. at 44) and awarded child support in the amount of \$250 a month for Dr. Naylor's son, who was placed in the custody of Mrs. Naylor (Id.).

At the time of the original Decree, Dr. Naylor had just begun practicing medicine and was determined by Judge Winder to be earning \$2,600 per month. (Findings 15, R. at 35.) Mrs. Naylor, on the other hand, was a hair stylist and was found to have net earnings of \$702 per month at the time of the original Decree. (Id.) Both parties contemplated at that time that Mrs. Naylor's income would substantially

increase so that testimony would not be necessary beyond the initial five years following the original Decree. (Findings ¶1(b), R. at 130; Memorandum Decision R. at 135. Tr. at 10, R. at 160.)

Unfortunately, Mrs. Naylor's income did not increase as anticipated. It was her unrefuted testimony at trial that her actual current income was only \$720 per month before taxes (Tr. at 7, R. at 157, and Exhibit D-2) as compared with a net income of \$702 per month at the time of the original Decree (Findings ¶5, R. at 35). Moreover, inflation, combined with the fact that the parties' son has now reached his teens, has resulted in a substantial increase in monthly household expenses for Mrs. Naylor. It was her unrefuted testimony that her current monthly expenses were in excess of \$2,000 per month. (Tr. at 8, R. at 158 and Exhibit D-1.) Thus, at the time of the modification hearing, Mrs. Naylor faced a substantial monthly deficiency between her available income and her expenses, which had resulted in her having had to borrow more than \$13,000 from her parents by the time of trial. (Tr. at 9, R. at 159.)

On the other hand, Dr. Naylor has enjoyed a dramatic increase in income since the original Decree. He has become a "partner" (technically a shareholder) in his professional corporation (Tr. at 50, R. at 190) and receives a base pay of \$5,000 per month (Tr. at 36, R. at 185). Dr. Naylor also receives substantial annual bonuses from his professional corporation, which amounted to at least \$24,000 in 1980 and at least \$20,000 in 1981. (App. Br. at 4.) Contrary to the assertion in

his Brief (App. Br. at 4). Dr. Naylor repeatedly testified at the modification hearing that he anticipated that his 1982 bonus would be comparable with those he had received in earlier years (Tr. at 37 and 67, R. at 186 and 216). In addition to his taxable income, which was \$75,000 in 1979, \$84,000 in 1980, and \$83,500 in 1981 (Tr. at 59, R. at 208), Dr. Naylor receives substantial tax free pension and profit sharing contributions (Tr. at 71, R. at 220). These contributions are made by the professional corporation, are not deducted from his salary, and total approximately 25 percent of that salary. (Tr. at 71, R. at 220.) Thus, Dr. Naylor's total income at the present time, considering his base salary, his bonuses, his pension contributions and his profit sharing contributions, are approximately \$100,000 per year, a dramatic increase over the \$2,600 per month found by Judge Winder at the time of the original Decree.

Judge Daniels found that Dr. Naylor's substantial increase in income as well as the increased living expenses encountered by Mrs. Naylor constituted a change of circumstances necessitating modification of the original Decree's alimony and child support provisions. (Tr. at 76, R. at 225 and Findings ¶1, R. 130-31.) Then, based upon the need demonstrated by Mrs. Naylor and Dr. Naylor's demonstrated earnings capability, Judge Daniels ordered that alimony be increased from \$500 per month to \$600 per month and continued for an additional five years and that child support be increased from \$250 to

\$400 per month (Counts 11, R. 131-32.) Additionally, based upon Mrs. Naylor's testimony that her financial circumstances were such that she was unable to pay her own attorney's fees (e.g., Tr. at 12, R. at 181) the District Court ordered Dr. Naylor to pay \$1,000 towards those fees (Order 13, R. at 141). Dr. Naylor's Rule 60(b) motion having been denied, this appeal ensued.

## ARGUMENT

### POINT 1. THE ALIMONY PROVISIONS OF THE ORIGINAL DECREE REMAINED SUBJECT TO MODIFICATION.

The principal argument raised by appellant is that, since the original Decree provided alimony for a specific number of years, the District Court exceeded its power in modifying the alimony provisions of that Decree even if a substantial change in relevant circumstances had occurred. This argument that the alimony provisions of the original Decree (being phrased in terms of a specific number of years) were absolute and immutable is directly contrary to both statutory mandate and the decisions of this Court.

The Legislature has clearly given the district courts the power and responsibility to make such subsequent modification in any Decree, regardless of its original terms, as may be appropriate and equitable. Section 36-3-5, Utah Code Annotated (1953 as amended), clearly states

The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary.

In light of the clear mandate of this statute, the contention of appellant that the District Court lacked the power and jurisdiction to modify his alimony obligation is untenable.

The contention of Dr. Naylor that his alimony obligation is not modifiable because it was based upon a stipulated property settlement was considered and unequivocally rejected by this Court in Callister v. Callister, 1 Utah 2d 34, 261 P.2d 944 (1953). In that case, the husband was a physician who reached a stipulated property settlement with his wife in connection with their divorce. This agreement, which had been approved by the trial court in the original action, included the distribution of the parties' property and provided for fixed monthly payments. Following the entry of the original decree, the husband's health forced him to terminate much of his medical practice and he moved for modification of the decree so as to reduce his monthly obligation. The district court granted this motion and, on appeal, the wife contended that the original decree "requiring monthly payments [was] not subject to modification [since] it was based upon an agreement for property settlement and that the payments required [did] not fall within the accepted definition of alimony . . . ." 261 P.2d at 945-46. Thus, the issue presented was precisely the contention raised

in the matter in the present action. In language as applicable to the present case as the case then before it, this Court held that the monthly payment obligation was modifiable upon the demonstration of a significant change of circumstances, even though based upon a stipulated property settlement agreement:

There is no statement anywhere in the agreement that the monthly payments constituted payment for [the husband's] interest in property decreed to [the wife]. . . . We further hold that these [monthly payment] provisions are not an inseparable part of the agreement relating to division of property and that by approval of the agreement in the decree the court did not divest itself of jurisdiction under the statute to make such subsequent changes and orders with respect to alimony payments as might be reasonable and proper, based upon change of circumstances. We hold this to be true even though the provisions of the agreement should be interpreted to mean that the parties intended to stipulate for a fixed and unalterable amount of monthly alimony. The object and purpose of the statute is to give the courts power to enforce, after divorce, the duty of support which exists between a husband and wife or parent and child. Legislators who enacted the law were probably aware of a fact, which is a matter of common knowledge to trial courts, that parties to divorce suits frequently enter into agreements relative to alimony or for child support which, if binding upon the courts, would leave children or divorced wives inadequately provided for. It is therefore reasonable to assume that the law was intended to give courts power to disregard the stipulations or agreements of the parties in the first instance and enter judgment for such alimony or child support as appears reasonable, and to thereafter modify such agreements when change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract. Under the authorities herein cited such a view should be generally if not universally adhered to

by the courts. If it were held otherwise in this case, in which a husband asks for a reduction of alimony, it would establish a precedent which in future cases might prevent divorced wives in serious distress from obtaining increased alimony from ex-husbands possessed of wealth or ample income to provide for them. We hold that the trial court had power and jurisdiction to modify the decree of divorce with respect to the payments involved herein.

261 P.2d at 948-49 (emphasis added). Accordingly, the District Court had the power and jurisdiction to modify Dr. Naylor's alimony obligation in this case.

This issue was again before this Court in Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974). In that case, the wife petitioned the trial court to modify the alimony and child support payments based upon the former husband's 50 percent increase in earnings and an inflationary increase in the cost of living. The trial court concluded that these factors constituted a substantial change of circumstances that justified an increase in both alimony and child support. On appeal, the husband contended "that in the original decree [the wife] was awarded the family home in lieu of substantial alimony payments, and such a property settlement should be deemed res judicata and held to preclude any subsequent modification of alimony." 527 P.2d at 1360. After referring to and quoting Section 30-3-5, this Court held:

In accordance with this statute, this court has held that a proceeding to modify a divorce decree is equitable and the same authority is conferred upon the trial court to make subsequent changes as respect to support and maintenance as it

could have dealt with them originally. . . . [I]n a divorce action, the trial court has considerable latitude of discretion in adjusting financial and property interests, and its actions are indulged with a presumption of validity. The burden is upon appellant to prove that the evidence clearly preponderates against the findings as made; or that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion.

527 P.2d at 1360 (footnote citations omitted). In the present case, the evidence presented at the trial clearly supports the trial court's findings of fact; Dr. Naylor does not claim that inequity has resulted; and the District Court's determination that the alimony obligation was modifiable is consistent with firmly established Utah law.

From as early as 1916, in Doe v. Doe, 48 Utah 200, 158 Pac. 781 (1916), to as recently as 1981, in Georges v. Georges, 627 P.2d 44 (Utah 1981), this Court has consistently recognized and adhered to the precept that both alimony and property distributions remain modifiable upon the showing of a substantial change of circumstances regardless of whether the original award was stipulated or litigated. The contention of Dr. Naylor that the District Court lacked the power or jurisdiction to modify his alimony obligation is without merit.

**POINT II. MODIFICATION OF THE ALIMONY AND SUPPORT OBLIGATIONS WAS APPROPRIATE.**

The contention is made by Dr. Naylor in his brief that, even if the District Court had the jurisdiction to modify his support

obligations, modification was not appropriate in this case. He bases this contention upon factual assertions that are contrary to both the evidence adduced at the trial and the findings of fact entered by the trial court.

For example, Dr. Naylor contends (App. Br. at 10) that "his net pay per month is increased to only \$3,170, a rather small increase" over the \$2,600 per month at the time of the original decree. In reality, however, the District Court found that Dr. Naylor's "gross annual income is \$83,000 and based upon his 1981 tax return his net after-tax income is \$75,000 a year." (Findings ¶1(a), R. at 130.) These findings are consistent with Dr. Naylor's own testimony. (Tr. at 59, R. at 208.) The \$3,170 figure mentioned in Dr. Naylor's brief is presumably based upon his \$5,000 per month base pay less state and federal tax withholding. However, the statement is grossly misleading because his brief fails to mention that for 1981, Dr. Naylor received tax refunds totalling \$26,902.47. (See, Exhibit D-5.) Similarly, Dr. Naylor's tax refunds for 1980 totalled almost \$20,000. (See, Exhibit D-4.) Thus, when Dr. Naylor's after tax income is considered (found by the District Court to be \$75,000 a year), Dr. Naylor's net monthly income has actually more than doubled from \$2,600 per month at the time of the original decree to more than \$6,000 at the time of the modification hearing. Moreover, when the pension and profit sharing contributions made on Dr. Naylor's behalf are also considered, his

income has more than tripled since the original decree was entered. There is a substantial change in circumstances.

Additionally, the District Court found that the increase in Mrs. Naylor's income, which the parties had anticipated at the time of the original decree, had not come to fruition. In fact, while her after tax income at the time of the original decree had been \$702 per month, her current income at the time of the modification hearing was only \$720 per month before taxes. (Findings ¶1(b), R. at 130.) Moreover, inflation together with the fact that Dr. Naylor's son has now entered his teen-age years, has substantially increased Mrs. Naylor's expenses, which were approximately \$2,180 per month at the time of the modification hearing. (Findings at ¶1(c), R. at 130-31.)

These precise factors (husband's increased income coupled with increased living expenses due to inflation) were held by this Court to justify modification of alimony and child support obligations in Wiker v. Wiker, 600 P.2d 514 (Utah 1978). In that case, this Court held:

Under present inflationary trends and lapse of time in between awards, the continued illness of [the wife] together with the fact that [the husband's] salary has greatly increased, we cannot say the court abused its discretion.

600 P.2d at 515. Likewise, the District Court did not abuse its discretion in the present case in modifying the alimony and support obligations of Dr. Naylor in view of the fact that his income has greatly increased, the fact that inflation and the age of his son

have increased the monthly expenses incurred by Mrs. Naylor, and the fact that the anticipated increase in her income has not materialized.

**POINT III. THE ATTORNEY'S FEES AWARDED ARE APPROPRIATE BUT RESPONDENT IS ENTITLED TO AN ADDITIONAL AWARD REPRESENTING THE FEES INCURRED IN THIS APPEAL.**

The District Court found that Mrs. Naylor was "without funds with which to pay her attorney" (Findings ¶3, R. at 131) and entered judgment against Dr. Naylor in the amount of \$1,000 as his contribution to those fees. (Order ¶3, R. at 141-42.) The finding of the District Court was based upon the unrefuted testimony of Mrs. Naylor. (Tr. at 12, R. at 161.)

In circumstances where one litigant in a domestic proceeding lacks the financial wherewithal to pay counsel, this Court has repeatedly held that an award of attorney's fees is appropriate. For example, in Allredge v. Allredge, 119 Utah 504, 229 P.2d 681 (1951), it was pointed out that this Court had traditionally adhered to the policy that:

The awarding of counsel fees as well as alimony was in the discretion of the trial court, and that a finding of the trial court would not be set aside in the absence of an abuse of such discretion.

. . . .

It was error for the court to deny the [wife] counsel fees which are a part of her costs pendente

ite and which could have been required before the suit was concluded.

569 P.2d at 826-87. A trial court's failure to award attorney's fees to the wife was likewise reversed in Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534 (1967), and Griffiths v. Griffiths, 3 Utah 2d 82, 278 P.2d 983 (1955). The award of counsel fees to Mrs. Naylor by the District Court was entirely appropriate.

Due to Dr. Naylor's dissatisfaction with the District Court's modification of his alimony and support obligations, Mrs. Naylor has now been burdened with the additional costs of this appeal. This Court has frequently held that, in such circumstances, a further award is appropriate to cover the added costs necessitated by the dissatisfied party's appeal. For example, in Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977), the husband, disenchanted with the trial judge's award, appealed with the usual contention that the property distribution was unfair and inequitable. The original decree was affirmed and the case remanded to the trial court for the assessment of the additional attorney's fees incurred by the wife as a result of the appeal:

Inasmuch as the [wife] has been put to the necessity of defending this appeal, which we have found to be without merit, it is our opinion that she is justified in her request for a further award of attorney's fees . . . .

569 P.2d at 1108. To the same effect is Fletcher v. Fletcher, 615 P.2d 173 (Utah, 1980).

As a result of this appeal, Mrs. Naylor has incurred substantial additional expense. The contentions raised by Dr. Naylor in this appeal are insubstantial and he should bear the cost of this appeal.

#### CONCLUSION

The principal contention raised by Dr. Naylor is that, since the original alimony was for a specific number of years, the District Court lacked the jurisdiction to modify that award. The Legislature has clearly stated that the District Courts retain jurisdiction in all domestic relations matters to make appropriate modifications in the event that there is a significant change in the circumstances of the parties. This Court has consistently adhered to the principle that the alimony provisions of a divorce decree may be modified, upon a showing of substantial change of circumstance warranting that modification, regardless of the nature of the original decree and regardless of whether it was based upon a property settlement and stipulation. Thus, there is no merit to Dr. Naylor's principal contention.

Dr. Naylor also contends that there was not a sufficient showing of changed circumstances, claiming that his income has risen from \$2,600 per month to only \$3,170 per month. This contention simply ignores the evidence presented at the trial court and omits such important factors as to render it grossly misleading. In reality, Dr. Naylor's net, after-tax income at the time of the modification hearing was in excess of \$6,000 per month and, in addition to that amount,

... received substantial benefits including the use of a modern automobile and pension and profit-sharing contributions equaling nearly 25 percent of his gross income. On the other hand, Mrs. Naylor's income has shown no significant increase, although substantial increases were anticipated at the time of the original decree. Moreover, Dr. Naylor's son has now reached his teens and inflation has taken its toll, forcing Mrs. Naylor to borrow more than \$13,000 from her parents in order to meet current expenses. Under such circumstances, the modifications ordered by the trial court were not only justified, they were necessitated.

The District Court awarded Mrs. Naylor \$1,000 toward her counsel fees. That award was proper, since the unrefuted evidence adduced at the modification hearing demonstrated that she was without the financial wherewithall to pay her counsel. Unfortunately, additional fees and costs have been incurred as a result of this appeal. Those fees should also be borne by Dr. Naylor and the award of additional fees should be ordered by this Court. In all other respects, the modification ordered by the District Court must be affirmed.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of August, 1983.

**DART & STEGALL**

By B. L. DART  
B. L. Dart

By John D. Parken

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of August, 1983, I placed two copies of the foregoing Respondent's Brief with The Runner Service to be delivered to Walter R. Ellett, attorney for plaintiff-appellant, 5085 South State Street, Murray, Utah 84107.

Walter R. Ellett