1970

# Wanda Martha Short v. Ralph Arlind Short : Respondent's Brief

# IN THE SUPREME COURT
## OF THE
# STATE OF UTAH

WANDA MARTHA SHORT

*Plaintiff and Respondent,*

vs.

RALPH ARLIND SHORT,

*Defendant and Appellant.*

---

RESPONDENT'S BRIEF

---

KIRTON &
OSCAR W.
*Attorneys for*
336 South
Salt Lake City,

JOSEPH P. McCARTHY
*Attorney for Appellant*
302 Judge Building
Salt Lake City, Utah

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

# IN THE SUPREME COURT OF THE STATE OF UTAH

WANDA MARTHA SHORT

*Plaintiff and Respondent,*

vs.

RALPH ARLIND SHORT,

*Defendant and Appellant.*

Case No. 12225

## RESPONDENT'S BRIEF

### NATURE OF THE CASE

The Plaintiff Appellee answers Defendant Appellant's brief occasioned by the trial court's refusal to modify a Divorce Decree at the request of Defendant Appellant. Defendant appellant asked the trial court to absolve him from the necessity of paying alimony.

## DISPOSITION IN LOWER COURT

The trial court denied Defendant appellant's motion to reduce alimony from $75.00 per month to $1.00 per month.

## RELIEF SOUGHT

Plaintiff appellee asks the Court to affirm the Order of the Trial Court refusing to reduce alimony payments from $75.00 per month to $1.00 per month.

The Court should further award judgment against the Defendant appellant in favor of Plaintiff appellee for reasonable attorney's fees and costs incurred in this appeal.

## STATEMENT OF FACTS

This is a contested divorce case. On 4 January, 1967, the Trial Court found that the Defendant appellant treated the Plaintiff appellee "in a cruel and abusive manner" [R p 32] and granted her a divorce.

Defendant asked the Court to modify the Decree by terminating his obligation to pay alimony in September of the same year the divorce was granted—1967. Motion denied.

The following year Defendant made a similar motion. Motion denied by Order issued 23 November, 1968.

On the 29th day of May, 1970, the Defendant was asking for the same modification of the Decree

of Divorce refused twice before as above said. At this time the sworn affidavits before the Court, incident to this instant last request, together with the record as above said, indicated that the Defendant was employed by the same employer as at the time of the divorce and that he had increased his monthly earnings from $575.00 [R p 32 and p 54] at the time of the divorce to $615.00 [R p 62].

The Court further found that the wife was not working at the time of the divorce "but it was reasonably anticipated at that time that it would be necessary for her to work as she was awarded only $75.00 per month alimony and $75.00 per month support money." (R p 62)

It should be noted that the Plaintiff incorporated her reply affidavit in the matter heard in November, 1968, into her reply affidavit in the instant hearing of 1970. Thus the Court had before it all of the facts of the divorce and the yearly attempts of the Defendant to avoid his responsibilities under the Court Decree.

As the Court said it anticipated, the Plaintiff sought and obtained employment immediately after the 1967 divorce. She was so working at the times of the subsequent attempts by the Defendant to do away with alimony. She received cost of living increased in her pay from $322 per month to $389.00. The Defendant increased his earnings as above said. Plaintiff's testimony was to the effect that her modest raises did not keep pace with the actual rise in the

cost of living. The last time the Defendant was in Court and he was making $610.00 per month. This time he was making $615.00 per month. (R p 62).

Since the divorce the Defendant had established himself in adequate living quarters and his living expenses stabilized. (R p 48) There was no claimed change in any of this.

The Court found that there was "no material change in circumstances of the parties" since Defendant had last asked to be relieved of alimony. In point of fact, the record shows no substantial change in circumstances of the parties since the time of divorce. The record shows substantially identical fact situations at the instant hearing and the one that preceded it.

Defendant's motion to modify the Divorce Decree was denied for the third time since the Decree was entered in 1967.

## ARGUMENT

### POINT I

### THE AWARDING OF ALIMONY AND FIXING AMOUNT THEREOF ARE QUESTIONS EXCLUSIVELY IN THE SOUND DISCRETION OF THE TRIAL COURT.

It is well settled law in Utah that the awarding of alimony and fixing the amount thereof are questions, the determination of which rests within the sound discretion of the Trial Court, and, unless it is made to appear that there has been an abuse of discretion on the part of the Court in dealing with the

questions, its judgment and orders granting and fixing alimony will not be disturbed.

Adamson v. Adamson, 55 U 544, 188 P 635
Anderson v. Anderson, 104 U 104 138 P 2nd 252
Blair v. Blair, 40 U 306, 121 P 19
Carter v. Carter, 19 U2 183, 429 P 2 35
Tremayne v. Tremayne, 116 U 483, 211 P 2nd 452

## POINT II

THE CHANGE IN FINANCIAL CIRCUMSTANCES TO JUSTIFY A MODIFICATION OF A DECREE OR ORDER FOR ALIMONY MUST BE MATERIAL AND SUBSTANTIAL.

It is well settled law in Utah that to entitle either party in a divorce action to modification of a decree or order of alimony such a party must claim and prove change in circumstances such as to require, in fairness and equity, the sought change.

Hampton v. Hampton (1935) 86 U 570, 47 P 2nd 419
Hendricks v. Hendricks (1936) 91 U 553, 63 P 2d 277
Osmus v. Osmus, 114 U 216, 198 P 2d 233
Gale v. Gale, 123 U 277, 258 P 2d 986

## POINT III

WHERE THERE HAVE BEEN ONE OR MORE PREVIOUS DECISIONS ON MOTIONS FOR MODIFICATION OF A DECREE, THE QUESTION WHETHER THERE HAS BEEN SUBSTANTIAL CHANGE IN THE CIRCUM-

STANCES OF THE PARTIES IS DETERMINED WITH RESPECT TO THE PERIOD COMMENCING WITH THE DATE OF THE MOST RECENT ORDER ON A MOTION FOR MODIFICATION AND NOT WITH RESPECT TO THE TIME SINCE THE ORIGINAL DECREE WAS ENTERED.

It is significant that the statutory authorization granting continuous jurisdiction to the courts to increase or decrease alimony under changed conditions reads in terms of orders as well as decrees. U.C.A. 30-3-5 says:

> "When a decree of divorce is made the court may make such orders in relation to the xxx maintenance of the parties xxx as may be equitable."

The Utah Supreme Court clearly interpreted this statute in the year 1916 and has never changed its position. The Court holds that this section was designed to empower a court that had granted a Decree of Divorce and awarded alimony to increase or decrease alimony under changed conditions alleged by either party so as to reflect justice between the parties. *It was not intended by this section to empower the courts at any time to review their own former decrees or orders respecting the allowance of alimony upon the facts existing at the time they were made.*

> "Although the language is general in permitting 'subsequent changes and new orders' to be made, yet we think it was not thereby intended that the courts could at any time review

their own former orders on decrees respecting the allowance of alimony xxxx

"We do not think the Legislature intended that the courts should review the allowances made by them for alimony in divorce proceedings, but what was intended was that, where material new conditions have arisen after the decrees were made, which conditions were not, and could not have been, considered or passed on by the courts, then, upon proper application and proof, the courts may make 'subsequent changes and new orders' respecting alimony xxxx"

*Cody* v. *Cody,* (1916) 47 U 456, 154 P 952

In applying this rule of law to the instant fact situation it is clear that the trial court could not properly go beyond the last court order to determine a change of circumstances. Had it done so, it would have been reviewing its own former order respecting alimony.

A scholarly treatise on modification of alimony is found in A.L.R. 2nd Vol. 18. The accepted law is restated there with reference to this point. Commencing on page 18 it reads:

"Where there have been one or more previous decisions on motions for modification of a decree, the question whether there has been a substantial change in the circumstances of the parties is determined with respect to the period commencing with the date of the most recent order on a motion for modification and not with respect to the time since the original decree was entered."

This is precisely the point under discussion. Two cases are cited:

*Pribyl* v. *Pribyl* (1928) 250 Ill. App. 349
*White* v. *White* (1941) 312 Ill. App. 383, 38 NE 2d 525 Abstract

In ruling on this identical question the Washington Supreme Court wrote:

> "The order made preceding the one which is now before us not having been appealed from is res judicata, unless there has been, *since that order was entered*, (emphasis added) a material change in circumstances of the parties.
> *Hudson* v. *Hudson* (1941) 8 Wash 2d 114, 111 P 2d 573

This rule of law is followed in all jurisdictions I have taken opportunity to check. Although this is the only point raised in appellant's brief, it is noted that he does not cite a single case in opposition to this well defined rule of law. Appellant's brief is thus without one citation in point. For other cases involving the application of this accepted principle see:

*Blank* v. *Blank*, 55 Ohio App. 388 & N.E. 2d 868
*Snyder* v. *Snyder* 219 Cal. 80 25 P 2d 403
*Sim's* v. *Sim's* 34 Haw. 237, (cited in the *Hudson* case)

## POINT IV

APPELLANT SHOULD BE REQUIRED TO PAY APPELLEE REASONABLE ATTORNEY'S FEES AND COSTS INCIDENT TO THIS APPEAL.

Appellant admits that the record implies that he "seeks modifications to annoy the other party or to require unnecessary payment of attorney's fees to defend against groundless motions." [Appellant brief p 5.] Appellee believes this is true.

Whether this appeal is brought for more than annoyance or not, the Appellee has been put under the obligation of responding thereto. Defendant appellant should reasonably bear the burden he thus caused appellee.

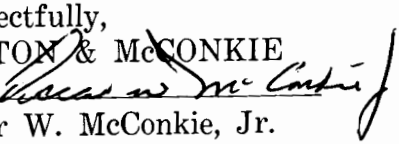
This Honorable Court may determine whether counsel fees should be awarded to appellee, and may allow costs of appeal to appellee, such as filing fees, printing costs and the like.

*Dahlberg* v. *Dahlberg* 77 U 157, 292 P 214

## CONCLUSION

The trial court's Order dismissing Defendant appellant's motion to modify the instant divorce decree should be affirmed.

Plaintiff appellee should be granted reasonable attorney's fees and costs herein incurred, including actual printing costs.

Respectfully,
KIRTON & McCONKIE
By 
Oscar W. McConkie, Jr.
336 South Third East
Salt Lake City, Utah 84111