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Case No. 7944

IN THE SUPREME COURT
of the
STATE OF UTAH

BONNIE GALE,
Plaintiff and Respondent,

— vs. —

FLOYD C. GALE,
Defendant and Appellant.

FILED
FEB 18 1953
Clerk, Supreme Court, Utah

APPELLANT'S BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

BONNIE GALE,
Plaintiff and Respondent,

vs. — Case No. 7944

FLOYD C. GALE,
Defendant and Appellant.

APPELLANT'S BRIEF

STATEMENT OF FACTS

This is an appeal from a Judgment entered November 21, 1952, modifying a previously entered Decree in respect to support money payments by increasing the total which appellant was ordered to pay from $100.00 to $140.00 a month (R. p. 7). Under the original Decree of the court, appellant was ordered to pay the sum of $100.00 a month for the support of his minor children at such time as he resumed employment or was able to resume employment (R. p. 7). For many years prior to the time

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of the divorce, appellant had been employed as a bus driver with the Greyhound Lines, but for some time prior to the Divorce Decree appellant had been very ill and was undergoing treatment at the State Hospital at Provo, Utah, (R. p. 22), although he was out of the hospital at the time of the divorce (R. p. 25). Prior to appellant's sickness, he had been bringing home approximately $300.00 per month net pay from his job, and it was on this basis of his income that the Decree was made (R. p. 23). In the first part of August of 1951, appellant returned to work for the company and ever since that time has made the payments ordered under the Decree (R. p. 31). On or about November 7, 1952, respondent filed a Petition for Modification of Decree and the same was set for hearing by an Order to Show Cause on the 18th day of November, 1952 (R. p. 11).

STATEMENT OF POINTS

UPON WHICH THE APPELLANT RELIES

POINT I.

RESPONDENT'S PETITION FOR MODIFICATION OF THE COURT'S DECREE DOES NOT STATE OR ALLEGE ANY FACTS OR ANY SUFFICIENT GROUNDS UPON WHICH THE RELIEF PRAYED FOR IN SAID PETITION COULD BE GRANTED, AND APPELLANT'S MOTION TO DISMISS MADE AT THE OUTSET OF THE HEARING ON THE ORDER TO SHOW CAUSE AND RENEWED AT THE CONCLUSION OF THE EVIDENCE AND TESTIMONY AT SAID HEARING SHOULD BE GRANTED.

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POINT II.

THE EVIDENCE TAKEN UPON THE HEARING OF RESPONDENT'S PETITION TO MODIFY DECREE DOES NOT SUPPORT THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT ENTERED IN SAID MATTER ON NOVEMBER 21, 1952.

POINT III.

NO MATERIAL, SUBSTANTIAL OR PERMANENT CHANGE OF CIRCUMSTANCES WAS SHOWN BY RESPONDENT AT THE HEARING ON HER PETITION FOR MODIFICATION.

POINT IV.

IT WAS ERROR FOR THE COURT TO ORDER THE APPELLANT TO PAY INCREASED SUMS IN VIEW OF HIS ADDITIONAL OBLIGATIONS UNDERTAKEN IN RELIANCE UPON THE ORIGINAL DECREE OF THE COURT.

ARGUMENT

POINT I.

RESPONDENT'S PETITION FOR MODIFICATION OF THE COURT'S DECREE DOES NOT STATE OR ALLEGE ANY FACTS OR ANY SUFFICIENT GROUNDS UPON WHICH THE RELIEF PRAYED FOR IN SAID PETITION COULD BE GRANTED, AND APPELLANT'S MOTION TO DISMISS MADE AT THE OUTSET OF THE HEARING ON THE ORDER TO SHOW CAUSE AND RENEWED AT THE CONCLUSION OF THE EVIDENCE AND TESTIMONY AT SAID HEARING SHOULD BE GRANTED.

The Petition for Modification of Decree (R. p. 8), filed in the court below by respondent did not allege any facts whatsoever which would fairly appraise the appel-

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lant of what facts respondent intended to rely on in the hearing on said Petition for an increase in support money. The Petition alleged as a conclusion that the appellant had "bettered his financial condition and is able to pay a more reasonable sum for the support of said minor children in accordance with present living costs; that the requirements of the four children have increased since the entry of said Divorce Decree". In no particular did said Petition allege or set forth or state in any way that there had been a material or substantial *and permanent* change of conditions from those which existed at the time of the entry of the original Decree. Nowhere were there any facts alleged to show in what way the circumstances or requirements of the said children had increased or were different from what they were at the time of the entry of the Decree and there were no facts alleged as a basis of respondent's conclusion that the appellant had "bettered his financial condition". It has long been the law in this state that a petition for modification of alimony or support awarded in a Divorce Decree must state *facts* sufficient to authorize its modification, *Chaffee* vs. *Chaffee,* 63 U. 261, 225 P. 76. In *Cody* vs. *Cody,* 47 U. 456, 145 P. 952, at page 954 in the Pacific Reporter, in regard to the interpretation of the statute whereby the court derives its power to modify a Divorce Decree, the court uses the following language:

> "What was contemplated by the statute was that where a court had granted a divorce decree and had allowed alimony, or had made distribution of property and disposal of children, either party

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> could thereafter come into court and allege that since the entry of the original decree material and permanent changes had taken place."

It is apparent from a reading of respondent's Petition for Modification that it does not state or allege facts or grounds upon which relief could be granted and appellant's Motion to Dismiss (R. p. 13), made at the outset of the hearing and before any evidence was taken should have been granted. At the conclusion of the evidence offered on the hearing of the Petition, appellant renewed his Motion to Dismiss (R. p. 39), and the Motion should have been granted again at that time because it is obvious from a reading of the transcript of the evidence below (R. pages 17 - 42) that respondent did not even sustain the conclusions alleged in her Petition that the appellant had "bettered his financial condition", nor is there one single word of evidence in this record to show that the requirements of the four minor children have increased any or at all since the entry of the divorce decree as it was alleged in respondent's Petition for Modification (R. p. 8).

The appellant was forced into court to defend this Petition for Modification and increase without any indication or idea as to what facts he would be required to meet. It is clearly the law in this jurisdiction as set forth in the *Cody* and *Chaffee* cases supra that a party should not be subjected to proceedings for the reopening and modification of prior divorce decrees except on pleadings which allege facts and grounds which show that there

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has been a material or substantial *and permanent* change of the circumstances of either of the parties or both of them since the entry of the original decree.

POINT II.

THE EVIDENCE TAKEN UPON THE HEARING OF RESPONDENT'S PETITION TO MODIFY DECREE DOES NOT SUPPORT THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT ENTERED IN SAID MATTER ON NOVEMBER 21, 1952.

The Findings of Fact and Conclusions of Law (R. p. 14), entered by the court below on November 21, 1952, in paragraph 2 of the Findings of Fact, recite that since the entry of said Divorce Decree the financial condition of the appellant has been bettered that he is now gainfully employed. This is the only finding of a factual nature whatsoever to support the court's order increasing support payments. There is no finding as to what the appellant's financial condition was at the time of the divorce decree; there is no finding in regard to the requirements of the minor children at the time of the decree or at the time of the hearing on the Order To Show Cause why the support payments should be increased; there is no finding that the appellant's financial condition has been bettered materially or substantially and permanently; as a matter of fact, the record is utterly devoid of any findings of fact which would lead to the conclusion that the moving party below, the respondent, had alleged and proved changed conditions arising since the entry of the decree which require under the rules of equity and

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justice a change in the decree, which test has been held to be the applicable test by which the court is to determine whether or not a decree will be modified in every single case in this court in which the question has been under consideration; as stated in *Osmus* vs. *Osmus,* found at 198 P. (2d) 233 on page 236 of the Pacific Reporter:

> "It is a principle now firmly established in this jurisdiction that to entitle either party to a modification of a decree of alimony or support money, that such party plead and prove a change in circumstances such as to require, in fairness and equity, a change in the terms of the decree."

and see also earlier Utah Cases therein cited.

The appellant produced for the court below by Exhibit I and Exhibit II a complete summary of every cent earned by appellant both gross and net. In Exhibit I for the 12-month period prior to his illness and the divorce, and by Exhibit II for the 15-month period since the divorce to the time of the hearing on the Petition for Modification. Exhibit I shows that for the 12-month period prior to the divorce appellant's net monthly income was $329.25. Exhibit II shows that for the 15-month period since the divorce appellant's net monthly income averaged $309.28. So that the evidence clearly shows that actually at the time of the hearing on the Petition for Modification appellant was making or had been making a net of $20.00 a month less than what he was earning at the time prior to the divorce and his illness.

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Appellant is a bus driver for the Overland Greyhound Lines and has been for the past nine or nine and one-half years (R. p. 28). The drivers for that company are paid upon the basis of a certain rate per mile and at the time of the divorce appellant was receiving by reason of his length of service with the company, seniority, etc., the sum of seven and one-fourth cents per mile driven, and at the time of the hearing for modification he was still at this same rate of pay (R. p. 28). The drivers for that company, according to the length of time they have been there, may bid on the various runs or lines which runs or driving periods to various towns last for approximately three or four months before they are up for rebid (R. p. 28). The runs are different in time and miles and therefore the income which a driver makes depends upon the particular run which he is able to secure every three or four months when the runs come up for bid. These various runs are bid on by the various drivers under a system of seniority at the company which means that drivers according to the length of time they have been there may bid on the various lines (R. p. 28). Appellant's seniority allows him to be in such a bidding position in relation to the other drivers that he can secure for himself the equivalent of a Salt Lake to Pocatello run which puts him in a position that he knows by virtue of his seniority status that he can secure a run during each bidding period which will insure that he makes about a net of $300.00 per month (R. p. 29). At the time of the hearing on the Petition for Modification and for approximately three months prior thereto (R. p. 25) appellant

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had been on the Salt Lake to Idaho Falls and return run which is the longest paying run on the division (R. p. 29) and which accounts for the fact that at the time of the hearing the appellant was actually receiving a higher income than at any time since or before the divorce, but it was only a temporary and not a permanent increase. Appellant got that higher paying run at the last bidding because no one with greater seniority happened to bid and that run was contemplated for a rebid on the first of December, 1952, and appellant had no assurance that he would be able to bid on that higher paying run (R. p. 29). So it can be seen that the monthly income of drivers for the Greyhound Lines will vary over the months during the year according to what run they are able to bid in on, but that there will be an average net income which a man is able to make because of his length of time with the company and it is submitted that at the time of the hearing for modification below that appellant's monthly net income was still only $309.28 per month even including in the averaging to arrive at that figure the 2 or 3 preceeding months during which appellant had received his highest monthly income, so that the only possible way that a fair and accurate determination of what appellant's monthly income is, is to average it out in the way in which it was done in Exhibit I and Exhibit II, and it is apparent from these Exhibits and the other testimony and evidence adduced at the hearing that there has been no material or substantial *and permanent* "betterment of appellant's financial condition", since the time of the original decree.

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POINT III.

NO MATERIAL, SUBSTANTIAL OR PERMANENT CHANGE OF CIRCUMSTANCES WAS SHOWN BY RESPONDENT AT THE HEARING ON HER PETITION FOR MODIFICATION.

That there must be a permanent as well as a material change in circumstances in order to entitle a party to a modification is amply supported by the cases of *Chaffee* vs. *Chaffee,* supra, and *Carson* vs. *Carson,* 87 U. 1, 47 P. (2d) 894. In the *Carson* vs. *Carson* case, supra, at page 896 of the Pacific Reports, this court said the following:

> "In a proper case the amount of alimony awarded in a decree of divorce may be changed, R. S .Utah, 1933, 40-3-5. (Now 30-3-5, U.C.A. 1953). The party to a divorce, however, is not entitled to a modification of the decree of divorce in the absence of a showing that there has been a material and permanent change of conditions since the entry of the decree," and further cases cited therein.

There can be no question that the original decree was based on the premise that the appellant was earning an income of approximately $300.00 a month net. The fact was alleged to be so in paragraph 6 of the respondent's original complaint in the divorce action (R. p. 1), and the evidence at the hearing on the Petition to Modify clearly so indicates. Starting at page 22 of the Record the following questions were put to the respondent and the following answers given by her:

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Q. This decreed amount of support money at that time was based on what you knew his income was on his job up until the time he got sick?
A. His sickness had a great effect on it too.
Q. Up to that time he had been bringing home $300 net pay from his job?
A. Yes.
Q. It was on that basis that the decree was made?
A. Yes.
Q. Assuming he had been able to go back to work and earn $300 again and pay you?
A. I asked this lawyer for three hundred to begin with.
Q. I asked you whether or not it was based on the $300?
A. Yes.

The fact that at the time the decree was actually entered the appellant was not working was considered and taken into account at that time by the court because the decree ordered the appellant to pay nothing until he returned or was able to return to work so surely it would be a most specious argument to maintain the position that at the actual date of the signing of the decree the appellant was unemployed and at the time of the hearing on the Petition for Modification he was employed because an examination of the Complaint (R. p. 1) and Stipulation for Property Settlement (R. p. 4) and the Findings of Fact and Conclusions of Law (R. p. 5) and the Decree of Divorce (R. p. 7) in the original action all show that it was recognized that the appellant was not at that time working and the entire Decree was based upon the assumption that the appellant would pay the amount order-

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ed if and when he was able to return to work and the amount to be paid was based upon the assumption that appellant would be able to resume his employment and regain his approximate net income of $300.00 per month, which he had earned prior to the divorce and his sickness, and this was exactly the fact and exactly what happened. Appellant did return to work as contemplated in August, 1951; he did regain his income as it was contemplated he would, and then he commenced the payments under the Decree as ordered by the court.

In effect, what the court below in the original decree actually did was to take cognizance of the fact that the appellant was at that particular moment unemployed and decree that he pay nothing in view of that circumstance and then provided that the decree should become operative upon the happening of a condition subsequent.

POINT IV.

IT WAS ERROR FOR THE COURT TO ORDER THE APPELLANT TO PAY INCREASED SUMS IN VIEW OF HIS ADDITIONAL OBLIGATIONS UNDERTAKEN IN RELIANCE UPON THE ORIGINAL DECREE OF THE COURT.

Appellant's illness at and prior to the time of their divorce was caused by the marital trouble existing between the parties. Appellant did not want the divorce. He made many attempts to reconcile with the respondent for the benefit and welfare of his children and she refused him (R. p. 30), and then in reliance upon the original Decree of the court appellant undertook the obligation of a new marriage (R. p. 31), and that at the time of the hear-

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ing below appellant and his second wife were expecting a child (R. p. 32). Respondent never up until the time of appellant's second marriage ever asked for or indicated to appellant that she needed any more money to support these children. It was only after she learned of appellant's second marriage that she determined to institute the proceedings which resulted in the order from which the appellant appeals (R. p. 31).

If the order of the lower court modifying the original Decree in this case is affirmed by this court in view of the facts and circumstances of this case, it would mean that in the future no man could rely upon a decree of court determining his obligations. It would mean that a man could never in good faith and without any attempt to evade his legal obligations for supporting his children as *determined by the court* attempt to seek some happiness and life for himself by virtue of a new attempt with a new partner at matrimonial happiness. If appellant's income or circumstances had materially and substantially changed for the better in this case, of course, an entirely different situation would be presented and a man could reasonably expect that if his position improved he could be called upon to increase the support payments, but the effect of an increase in a case of this type if permitted by this court could prove disastrous to all parties concerned, and would be most unfair to a man in the appellant's position who attempted to plan for a new marriage in reliance upon the original Decree and without any intent whatsoever to evade his obligations as set forth by that Decree.

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CONCLUSION

It appears that what the court below really attempted to do in this case was to rewrite the original Decree more in conformity with what the court thought that the original Decree should have provided, and it is respectfully submitted that from the earliest cases in this jurisdiction that that is precisely what this court has stated over and over again that the lower court may not do, and that there is nothing contained in this record which justifies under the law of this jurisdiction a modification of the original Decree in this case.

Respectfully submitted,

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