1965

Margaret L. Jorgensen v. Cleon A. Jorgensen : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MARGARET L. JORGENSEN,
Plaintiff-Respondent

vs.

CLEON A. JORGENSEN,
Defendant-Appellant

No. 10953

RESPONDENT'S BRIEF

Appeal from the judgment of the First District Court of Cache County

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARGARET L. JORGENSEN,
Plaintiff-Respondent

vs.

CLEON A. JORGENSEN,
Defendant-Appellant

No. 10353

RESPONDENT'S BRIEF

STATEMENT OF CASE

This matter arose upon an order to show cause to reduce to judgment in favor of Plaintiff back due alimony and support money in the sum of $557.03, and for contempt for failure to pay said money; and upon Defendant's Motion for Modification of the Divorce Decree, eliminating such support payments.

DISPOSITION IN LOWER COURT

The Defendant was not found in contempt as the same was not pursued by the Plaintiff, and a judgment for $557.03 was entered for past due alimony and support money (see Judgment on Order to Show Cause dated March 22, 1965, R-33-34) and the balance due under the terms of a mortgage of $1700.00 was ordered to be paid at the rate of $70.00 per month as alimony, plus interest

thereon in the sum of 7% per annum. Judgment for $75.00 attorneys fees was entered against the Defendant. The Court found that the Defendant was no longer obligated to support his minor children and reduced the amount of support and alimony from $100.00 per month to the $70.00 per month as alimony, until $1700.00 principal had been paid.

STATEMENT OF FACTS

It is agreed with the statement of Appellant that a divorce was granted on June 24, 1963, and the Findings contained the seven provisions as set forth in Appellant's Brief. In addition thereto, the Court found that the Defendant should support his family (See Finding No. 10 R-8) and Finding 11 provided:

> "11. That the parties have entered into oral stipulation in Court that the Defendant pay all of the debts and obligations of the parties incurred during the said marriage, particularly the mortgage due on the home property in Hyde Park, Cache County, Utah, and that he would protect the said home from foreclosure by any person whomsoever and would immediately bring all payments up to date, together with back taxes and other obligations on the said home." (R. 8).

In the Supplemental Findings of Fact and Conclusions of Law of June 9, 1964, the Court found that the Defendant had recently filed a Petition for Bankruptcy and listed the debt on the home (mortgage payment which he previously stipulated he would pay) as a dischargeable debt. (See Finding No. 4 R. 17). That Plain-

iff should be awarded a judgment in the sum of $840.00 as *back alimony* and support money, the sum the Defendant was in *arrears on the payment of the said mortgage,* and in addition thereto, the Plaintiff should be awarded as support and alimony for herself and her family the sum of $100.00 per month. . . (See Finding No. 5 R. 17).

Paragraph No. 3 (R. 18) of the Conclusions of Law provided:

> "Except as these Findings and Conclusions modify the previous orders of this Court, all previous orders not herein specifically amended are to remain in full force and effect."

Judgment was entered accordingly (R. 19). There is no appeal from this Order.

In Plaintiff's Affidavit for Order to Show Cause of February 12, 1965, Plaintiff alleged that Defendant had failed to make the payments as previously ordered of $100.00 per month, and that he was in arrears in the sum of $557.07 (which previous Order provided for the payment of $100.00 per month as alimony and support payment). Paragraph 7 of the Affidavit stated: (R. 24).

> "That the Defendant should be required to appear before this Court on a day certain to show cause, if any he may have, why he should not be required to pay the sum of $100.00 per month as provided in the said Decree upon Order to Show Cause, which sums are to be used by the Plaintiff to pay the mortgage indebtedness on the home and why he should not be punished for contempt of Court for wilful disobedience of the Order of this Court; and why he should

not be required to pay Plaintiff's attorneys reasonable attorneys fees for representing her in this action. *That Judgment be entered according as to all matters that are just and equitable in the premises."*

At the hearing on the said Order to Show Cause on February 23, 1965, Counsel for Defendant represented to the Court that the Defendant would like to file a Petition for Modification of the Divorce Decree, which was filed that day (R. 26) alleging that the children had now reached of age and it was agreed that the matters be heard together. Defendant testified as to said matters and the Court made its Findingss and Conclusions, following the evidence, which included the following: (R. 30-31).

1. That Defendant was required to support his wife and family under the Decree of Divorce and pay the mortgage on the said home. That the minor children are now over the age of 18 years.

2. That the Plaintiff is entitled to have a judgment entered in her favor for back alimony and support money in the sum of $550.00.

3. That the Defendant filed a Petition for Modification of the Decree in Open Court, and he is no longer required to support his minor children.

4. That alimony should continue as hereinafter set forth.

5. That Defendant, pursuant to the Decree of Divorce, on the 24th day of June, 1963 was ordered to pay the mortagage presently existing on the family home property at Hyde Park, Utah. The Court finds that he failed to make said payments and that there has been more than $1400.00 de-

linquency accrued upon the said loan. The Court finds Defendant took out bankruptcy and listed the mortgage as one of the dischargable debts, which was in direct contravention to the Orders of this Court. The Defendant should be ordered to pay the said mortgage through alimony payments. That there is now due, in addition to the amounts that have been and are now reduced to judgment, in the sum of $1400.00, and additional $1700.00, which should be paid as alimony at the rate of $70.00 per month, plus interest on the unpaid balance in the sum of 7% per annum. . "

6. That Plaintiff is without funds to pay counsel and should be awarded $75.00 for the same.

Judgment upon Order to Show Cause incorporating the above was signed by the Court on March 22, 1965 (R. 23-24).

STATEMENT OF POINTS

1. Plaintiff claimed no increase in alimony and none was granted.

2. That continual refusal and effort of the Defendant to avoid payment of the mortgage (which payments were to be made in lieu of alimony and support payments) when he agreed and stipulated he would pay the same, by allowing him to pay only $1.00 per month alimony would be inequitable and unjust.

3. That even if the Court erred in designating the remaining payments on the mortgage all alimony, such error was harmless as bankruptcy would not relieve him of the responsibility of payment of the same.

ARGUMENT

POINT I:

The record shows that at the time of the hearing on Order to Show Cause on February 23, 1965. that Defendant was required to pay as support and alimony the sum of $100.00 per month (See Judgment on Order to Show Cause dated June 9, 1964, R. 10). That the purpose of the hearing on February 23, 1965 was to reduce the arreage of $557.07 to judgment and to require Defendant to show cause, if any he may have, why he should not be required to pay the $100.00 per month as ordered on June 9, 1964 (for alimony and support).

Defendant appeared at the hearing with counsel and made objection to the payment of support money, claiming the minor children had reached the age of 18. The Court permitted the Defendant to file a Petition for Modification and testify concerning the changed circumstances. (See transcript of Proceedings on Order to Show Cause, page 3).

After the defendant testified in support of his petition for modification the Court said (see transcript Page 10-11).

> "The Court: That's all. Well, the court proposes to find the defendant, in order to thwart the original decree of this court relating to the payment of the mortgage, took bankruptcy and listed the mortgage as his debt, and that in order to force him to make the payments contemplated by the original decree, notwithstanding the bankruptcy act, the court now direct that he pay $1700 additional at the rate of $70

per month, these payments to be applied in payments of the mortgage which he was originally ordered but refused and wilfully attempted to thwart this court by taking bankruptcy on. But on all support payments, they are cancelled."

Thereupon the court made his Findings an Conclusions and entered judgment (R. 30-34).

It will be noted that as the result of the hearing, the amount that the Defendant was required to pay to the Plaintiff was reduced from $100.00 per month to $70.00 per month until a principal sum of $1700.00 (remaining balance due on mortgage above the $1400.00 judgments) was paid.

The Findings and Judgment of the Court was merely a reincorporation of the previous Orders of the Court with relation to the payment of the mortgage, which the Defendant agreed and stipulated he would pay at the time of the hearing on the merits of the Divorce on June 24, 1963 (R. 8) in lieu of alimony and support payments.

The Plaintiff, at no time, sought to have the previous Orders of the Court modified, but to the contrary as set forth in her Affidavit of February 12, 1965, she requested a hearing where the Defendant could present any evidence as to why he should not be required to pay $100.00 per month as alimony and support money. Defendant filed a Petition for Modification, objecting to the payment of support because the children had reached the age of 18 years. The Court heard the evidence, and then reduced the monthly payments from $100.00 to $70.00 per month; The reduction of $30.00 being what the Court felt was

the support payment which was terminated and taken out of the $100.00 per month payment, as the result of the children reaching the age of 18 years.

The Modification of the previous Orders of the Court was the result of Defendant's Petition and application for Modification and not based upon any Modification requested by Plaintiff.

POINT 2:

The record is replete with evidence of the continual refusal of the Defendant to pay the sums which he stipulated he would pay at the time of the Divorce hearing. He stipulated he would pay all the debts of the parties, and specifically the mortgage on the family home, which was awarded to the Plaintiff. The Findings show on their face that this payment would be considered payment of the support and alimony under the Decree, rather than a fixed amount, in that the only words used by the Court in the Findings were that the Defendant would support his family, and the Plaintiff was entitled to alimony (R. 8).

It is apparent on the face of the record that the Defendant never intended to comply with the Orders of the Court. which he agreed to and stipulated to at the Divorce hearing, and that immediately he failed to make the payments on the mortgage and became in default, making it necessary for the Plaintiff on April 23, 1964 to file an Affidavit setting forth the fact that the Defendant was in arrears $840.00 in less than one year's time on the payment of the mortgage (indicating he had paid almost nothing on the mortgage during that time), and alleging

he had filed for bankruptcy and listed the mortgage as a dischargable debt. A hearing was had, at which time Defendant was represented by counsel. The Court found that he was attempting to be discharged of this debt through bankruptcy, and awarded Plaintiff a judgment for $840.00 and ordered Defendant to pay to the Plaintiff $100.00 per month as alimony and support money and awarded Plaintiff attorneys fees of $75.00 (See Findings and Decree of June 9, 1964, R. 16-19).

Within the next nine months the Defendant paid only $342.93, much of which was collected by garnishment proceedings filed by the Plaintiff (See Appellant's Brief, page 3), thus indicating again Defendant's deliberate attitude of refusal to pay as ordered.

It would be a great injustice to the Plaintiff to allow the Defendant to avoid the payment of this mortgage by the Court permitting him to escape this payment by claiming that the children are of age and Plaintiff shall only receive $1.00 per month alimony.

In Osmus v. Osmus 114 Utah 216, 198 P2d 233, a case quite similar to this case, where the wife was awarded $5,000.00 in the home (not ours) and Defendant stipulated to pay $250.00 per month as alimony and support money, the Court said at page 235:

> "The fact that the Plaintiff received $5,000.00 for the equity in the home did not excuse the Defendant from complying with the Order of Court. . . But no discretion is left, to a divorced husband, to determine whether he should or will comply with an alimony decree. So long as such decree stands, it is incumbent upon him to comply with it, or at least to exercise

every reasonable effort to comply with it. If, because of change in the circumstances of the parties, it appears that the decree is inequitable, or impossible to comply with, he may petition for modification. But so long as that Decree stands, the husband must comply with it, or make every reasonable effort to do so, and this is true regardless of how the financial situation of his former wife may have improved. Any failure to comply or to make a reasonable effort to comply is contempt, and punishable as such."

At page 237 the Court continues:

"Courts are not to be trifled with by litigants. This is particularly true in divorce cases, which, although not ordinarily involving problems of great legal magnitude, quite frequently involves social problems of the utmost delicacy and importance – problems of such nature that the state, as well as the litigants, has an interest in their solution. *A freedom-seeking spouse* MAY NOT, IN HIS EAGERNESS TO BE SPEEDILY RELEASED FROM HIS MATRIMONIAL BONDS, MAKE RASH AND RECKLESS AGREEMENTS AND PROMISES, UPON WHICH THE COURT MAY RELY IN FIXING THE AMOUNT OF ALIMONY, AND THEN RETURN A FEW MONTHS LATER AND COMPLAIN THAT THE AWARD FOR ALIMONY IS EXCESSIVE OR UNFAIR. Such is apparently what was attempted in this case."

It seems that the Defendant is attempting, in this case, to get this Honorable Court to permit him to escape his responsibility of paying the mortgage, which he agreed to do, by holding that he no longer has to pay any sum on the mortgage or to the Plaintiff except $1.00 per month alimony. To permit this to occur would, in our opinion, be a travesty and miscarriage of justice.

Defendant petitioned for a Modification and the Court heard the evidence, and reduced the monthly award of alimony and support money from $100.00 to $70.00 as alimony but felt that the Defendant should not be allowed to make agreements, and then return to Court a few months later and complain the award, based upon those agreements was excessive or unfair.

The trial Court has considerable discretion in these divorce matters and unless there is a clear abuse of discretion, this Court should sustain the lower court. In Wilson v. Wilson 5 Utah 2d 76, 296 P2d 977, 981 this Court states:

> "It is true, as Defendant contends, that a divorce proceeding is equitable and that it is within the perogative of this Court to review the evidence and to substitute its judgment for that of the trial court under proper circumstances. The more recent pronouncements of this Court, and the policy to which we adhere, are to the effect that *the trial judge has considerable latitude of discretion in such matters and his judment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion. . .* " (citing cases).

POINT 3:

It is the Plaintiff's position in this matter that even if the Court committed any error, which we feel it did not, by awarding a judgment to the Plaintiff in the form of future alimony payments commensurate with the remaining balance due under the mortgage which he had done in the previous judgments, that such error would be harm-

less, as the Defendant could not escape the payment of the mortgage by bankruptcy.

In 8 B CJS Page 48 it states:

> "Under the Bankruptcy Act, a discharge in bankruptcy does not release the bankrupt from a debt for alimony due, or to become due, or for maintenance or support of his wife or child; claims of this nature come within the exception, even though they have been embodied in agreements between the parties, and even though they have been reduced to judment."

In the Utah case of Lyon v. Lyon, 115 Utah 466, 206 P2d 148, was a case where the parties had lived together for 22 years, and then obtained a divorce, and agreed upon a property settlement and there was no prayer for alimony. The agreement provided for the payment of $5,000.00 and for the payment of a mortgage by Defendant and other provisions. The Defendant unsuccessfully failed in his attempt to modify the Decree, and then took bankruptcy, where he was discharged from all claims and debts except such as excepted from discharge by the Bankruptcy Act. This Court held that the Court would look behind the agreement and admit evidence of conversations leading up to the agreement upon which the Decree was based (evidence admitted to the effect that payment of the mortgage was for the support and maintenance of wife). The record shows, in our case on its face that the mortgage payments were in lieu of alimony and support money."

This Court held, in the Lyon case (Supra) that the mortgage and other payments were in the form of alimony and support and that the Defendant was not discharged of this obligation by bankruptcy.

Therefore, it seems that the responsibility of the Defendant remains to pay the mortgage as he agreed to do, regardless of his discharge in bankruptcy. His continual refusal to pay the same and his bankruptcy would not legally relieve him of this responsibility. The only way he could be relieved of this responsibility is upon proper petition for modification and Finding by the Court that justice demands such a modification. This has not been done, and is a matter entirely outside of this Appeal.

In Tree v. White et al, 110 Utah 233, 171 P2d 398, Headnote 1 states:

> "The Supreme Court would not reverse judgment, though trial court allegedly made arroneous findings, if the findings which should have been made would support the judgment."

At page 399 the Court states:

> " . . . A decision right in result will not be reversed even if the reason stated for it is wrong." (Citing Cases) "The Appellant may not prevail unless there has been error in the result as well as error in the reasoning." (Citing cases).

The fact that the Plaintiff has had practically no support from the Defendant and is compelled to earn her living as a motel chambermaid precludes any further extension of the length of this Brief.

CONCLUSION

In conclusion it is contended that the Order complained of is not an increase in the amount of alimony

required to be paid by the Defendant, but that the Order is merely a judgment determining the amount of delinquency in the former judgments, and in effect, grants the Defendant an extension of time to make payments on the mortgage, which he has failed to make, and which he stipulated he would pay at the time of the hearing on divorce.

The Application of the Defendant for Modification and the Affidavit of the Plaintiff and application for relief therein, are ample pleadings to support the Order of the Court appealed from.

The Defendant's bankruptcy in no way relieved him from the responsibility of the payment of this judgment.

The Order of the Trial Court as made should be permitted to stand, and costs awarded to Plaintiff.

Respectfully submitted,

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