1969

Lois Jensen Edwards v. Melvin Leroy Edwards : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

LOIS JENSEN EDWARDS, :

Plaintiff-Respondent, :

vs. : Case No. 11664

MELVIN LEROY EDWARDS, :

Defendant-Appellant. :

BRIEF OF APPELLANT

An Appeal from the Judgment of the
Fourth District Court, State of Utah,
the Honorable, Allen B. Sorensen, Judge

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LOIS JENSEN EDWARDS, :

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BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE

The appellant, Melvin LeRoy Edwards, appeals from the District Court of the Fourth Judicial District's order finding the appellant in contempt of court and sentencing the appellant to ten days in the Utah County jail, and said court's order denying appellant's

petition for change of support and alimony provisions of the parties' divorce decree.

DISPOSITION IN THE LOWER COURT

The District Court found the appellant guilty of contempt and denied his petition requesting lowering of child support and alimony payments.

RELIEF SOUGHT ON APPEAL

Appellant submits that the District Court's order should be reversed and his petition granted.

STATEMENT OF FACTS

On or about December, 1967, the respondent filed her complaint in the District Court of Utah County, State of Utah, asking for a divorce from the defendant-appellant. On the 10th day of May, 1968, the District Court made its order, which in part awarded judgment against the appellant in the amount of $870.00 for delinquent alimony and support

payments; ordered the defendant to convey all his interest to the parties' home to Paul W. Shaffer, the respondent's son by a prior marriage; ordered the defendant-appellant to pay $280.00 as child support and alimony, said sum to be paid on the last of June, and each and every month thereafter.

On August 5, 1968, the appellant filed bankruptcy in the Federal District Court, District of Utah.

On the 21st day of October, 1968, the Utah County District Court entered its Decree of Divorce which in part:

(1) Granted the plaintiff-respondent a divorce from the defendant-appellant.

(2) Granted the plaintiff-respondent custody of the parties' three minor children.

(3) Granted the plaintiff-respondent all the parties' personal property.

(4) Ordered the defendant-appellant to pay $60.00 per child per month child support and $100.00 per month alimony for a total monthly payment of $280.00.

(5) Ordered the defendant-appellant to save the plaintiff-respondent harmless from liability of all debts of the parties.

On January 22, 1969, the Utah County District Court ordered the appellant to show cause why he should not be held in contempt for failure to keep his child support and alimony payments current and his failure to hold the respondent harmless from all the parties' debts.

On or about the 11th day of February, 1969, the appellant filed his petition requesting the District Court to:

(1) Lower the child support from $180.00 per month to $150.00 per month.

(2) Release him from any obligation to pay any alimony.

(3) Give him custody of the parties' children for three months out of each year.

(4) Release him from any obligation to pay the parties' debts acquired during their marriage.

On the 15th day of April, 1969, the Court heard the above-mentioned appellant's petition and respondent's order to show cause.

On the 2nd day of May, 1969, the Utah County District Court made its order which:

(1) Ordered the defendant-appellant in contempt of court and sentenced him to ten days in the Utah County jail; stated that he could purge himself of the contempt finding by securing a release of the lien upon furniture in plaintiff's possession.

(2) Denied defendant's petition for change in support and alimony provisions

of the divorce decree.

(3) Awarded plaintiff judgment against the defendant for $75.00 in attorneys fees.

On the 15th day of April, 1969, it was agreed in open court by the attorneys for the respondent and appellant that the appellant was $480.00 in arrears for back alimony and child support, and that the appellant had paid $3,160.00 to the respondent since May, 1968, to April, 1969, for child support and alimony, not including April, 1969 (T. 17).

Further, on the hearing held on April 15, 1969, appellant testified, and no testimony or other evidence was given to contradict his testimony, that he had paid or incurred monthly debts since the date of the divorce decree approximately as follows:

(1) T. 18 Gas for place of residence $ 18.00

(2)	T. 19	Telephone bill used in business	$ 20.00
(3)	T. 19	Light for place of residence	12.00
(4)	T. 20	Second-hand washing machine payment	15.00
(5)	T. 20	Car payment on 1958 Plymouth	14.00
(6)	T. 21	Utah Central Credit Union to pay back money, part of which was borrowed to pay child support or alimony	24.00
(7)	T. 23	Gas and oil for car used to go to work	30.00
(8)	T. 23	Clothing	15.00
(9)	T. 23	Rent for place of residence	45.00
(10)	T. 24	Attorney fees	30.00 app.
(11)	T. 24	Car repair	30.00
(12)	T. 23	Food at home and on the road while driving truck for Pacific Intermountain Express	120.00
		TOTAL OF ABOVE MONTHLY BILLS	$374.00

At the above-mentioned hearing, it was

agreed that the appellant owed the following obligations (T. 26, 27):

(1) T. 25 Tom Taylor, attorney fees	$103.00
(2) T. 25 LaVoy O. Taylor, attorney for bankruptcy	250.00
(3) T. 26 Bankruptcy Court	110.00
(4) T. 26 Utah Central Credit	318.00
(5) T. 26 Fidelity Finance	412.00
(6) T. 26 Internal Revenue Service	149.00
(7) T. 26 Back support	480.00
(8) T. 26 Plaintiff-respondent's attorney fees	200.00
TOTAL STIPULATED DEBTS OF DEFENDANT-APPELLANT	$2222.00

At the above-mentioned hearing, the appellant testified that he would like to pay $50.00 a month on the above obligations, which are beyond his regular monthly bills.

Thus, the record shows the appellant's financial status is as follows:

INCOME

Average income per month since date of divorce decree	$545.00

EXPENSES

Average monthly bills and living expenses	374.00
Amount appellant would like to pay on obligations other than monthly bills	50.00
Total monthly expenses	$424.00
MONTHLY INCOME	$545.00
MONTHLY EXPENSES	424.00
AMOUNT LEFT OVER TO PAY SUPPORT AND ALIMONY (T. 28)	$121.00
Court ordered support and alimony of	$280.00

The appellant was for the six months preceding the date of the divorce decree earning approximately $650.00 per month take-home pay (T. 30), and since the divorce, has

earned approximately $500.00 per month take-home pay (T. 27), at his place of employment, Pacific Intermountain Express, Salt Lake City, Utah.

The appellant's income has dropped in the last year due to the fact the respondent has garnisheed his wages (T. 55), and the fact that he has not had the necessary ready cash to make long trips for said employer, or the money to pay for his meals or rooms on such trips (T. 31); and in fact, on some trips, the appellant has not had enough money to buy anything to eat or to pay for a place to sleep (T. 34).

At the time the divorce decree was entered in this action, the respondent was not working (T. 51); at the time of the hearing in April, 1969, the respondent had been working for about two months at the Utah

State Hospital, earning $199.00 take-home pay (T. 52).

The respondent admitted that she had been told by the appellant that he would be fired from his job if she garnisheed his wages, but she did garnishee his wages anyway, and she implied or admitted that if he did not make his full payments of $280.00 child support and alimony, she didn't care if he lost his job (T. 56).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY OF CONTEMPT.

The appellant has paid $3,160.00 to the respondent for alimony and child support since May, 1968, to April, 1969 (T. 17). Further, the record of the contempt proceeding is replete with evidence indicating that, through no fault of his own, the appellant cannot afford to pay the amount specified in the decree for child support and alimony. The appellant has met his burden of showing his inability to pay. DeYonge v. DeYonge, 103 Utah 410, 135 P.2d 905 (1943). In order to hold appellant in contempt, it must be shown that he was either able to pay or willfully refused to comply with the order of the court. In absence of such a finding, the order is void. Id. at 413, 135 P.2d at 906. Appellant had

made his best efforts to pay (T. 17), but is presently unable to do so (T. 18-26). Appellant further argues that under the evidence, it is conclusively shown that in spite of his best efforts at all times, he was unable to comply with the court's order to pay $280.00 per month to his wife. In Limb v. Limb, 113 Utah 385, 195 P.2d 263 (1948), the court states:

> If appellant is correct as to the effect of his testimony, then he was not guilty of contempt for a person who puts forth every reasonable effort to comply with a court order and still is unable to do so, is not guilty of contempt on account of such failure. Id. at 389, 195 P.2d at 265.

The appellant testified that his average take-home pay is $500.00 since the divorce decree (T. 27, 49). His average monthly bills and expenses are $374.00 (T. 18-26). Appellant would like to pay $50.00 per month toward

the $2,222.00 debt which he owes (T. 27-28). This leaves the amount of $76.00 a month to pay the $280.00 that was decreed (T. 28). This is ample evidence of his inability to pay. And in light of the fact that he has put forth every reasonable effort to comply with the order, the appellant should be able to purge himself of contempt. As the court in Wallis v. Wallis, 9 Utah 2d 237, 342 P.2d 103 (1959) said ". . .because his failure to pay the $100 had not been wilful," he was not in contempt. Id. at 239, 342 P.2d at 104.

These two requirements, i.e., (1) inability to pay and (2) reasonable effort to pay, have been established in this case. The appellant has met his burden. The trial court erred in finding him in contempt. A reasonable effort to comply is not contempt. Ozmus v. Ozmus, 114 Utah 216, 222, 198 P.2d 233, 236 (1948).

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN COMMITTING THE APPELLANT TO JAIL FOR TEN DAYS UNLESS HE SECURE A RELEASE OF A LIEN UPON FURNITURE IN RESPONDENT'S POSSESSION.

A judgment for contempt for failure to comply with an alimony and support order must be based upon a finding of fact that the former husband is able to pay or that he willfully refuses to comply with the order, and in the absence of such finding, the judgment is void. DeYonge v. DeYonge, 103 Utah 410, 135 P.2d 905 (1943). It was not within the discretion of the trial court to commit appellant to jail for contempt unless he secure a release of a lien upon furniture in respondent's possession. There was no finding that the appellant was able to pay, nor was there a finding that he willfully refused to pay. In the absence of such finding, the judgment of contempt is void,

and the trial court cannot "allow" appellant to purge himself of a void contempt charge. It is clear from the record that appellant was not able to meet his payments, but that he made every reasonable effort to pay what he could (T. 17, 18-26).

Furthermore, the trial court's order that he secure a release or be found in contempt, in effect, rendered the bankruptcy decree void. The obligation on the furniture had been discharged in the bankruptcy proceeding four months before the divorce decree had been entered. The trial court cannot now order a debt to be paid which has been legally discharged. This argument is further emphasized in Point IV.

POINT III

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S PETITION FOR MODIFICATION OF THE DIVORCE DECREE TO REDUCE THE AMOUNT OF ALIMONY AND CHILD SUPPORT PAYABLE BY THE APPELLANT

TO THE RESPONDENT. THE TRIAL COURT MISAPPLIED THE LAW APPLICABLE TO THE POINT AT ISSUE.

Utah law allows the court, or petition by the parties, to change the amount of alimony and child support from time to time.

> When a decree of divorce is made, the court may make such orders in relation to the children, property, and parties, and the maintenance of the parties and children, as may be equitable, . . .Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper. Utah Code Ann. § 30-3-5 (1953). (emphasis added).

This statute, which makes the determination for modification an equitable proceeding, has been construed ". . .to empower the court to make a modification where there has been substantial change in the material circumstances of either one or both of the parties since the decree was entered." Sorensen v. Sorensen, 20 Utah 2d 360, 361, 438 P.2d 180,

181 (1968). Further, it must be shown that the husband has not caused or contributed to the ". . .existence of the grounds for which modification is sought." Ibid.

Appellant has met his burden of showing substantial change both on his part and on the part of his wife. He has not caused the changes. Since the divorce decree, the appellant's take-home pay has dropped from $650.00 per month to $500.00 per month (T. 30, 49). This has come about through no fault of his own.

> Q. (by Mr. Peterson) Are you telling us now you will earn less money this year than you did last year?
>
> A. I am earning less money this year than last year.
>
> Q. Why is that?
>
> A. Circumstances beyond my control. I don't know why it is.

> Q. What are those circumstances?
>
> A. I don't get called out to work as often as I used to. I don't know what their changes have been or business conditions or what, but I am not just making the money this year that I did last year at this time (T. 46).

Furthermore, the respondent's earnings have increased from zero to $199.80 per month, take-home pay, through no fault of appellant's (T. 52). In Sorensen, Supra, the court said that the fact the wife owned property which had increased in value after the alimony decree was an important consideration for determining changed conditions. Id. at 361, 438 P.2d at 180. By analogy, the fact that the wife's income has increased is also substantial evidence of change in natural circumstances. This ground is clearly shown in the record. (T. 52).

The change sought by the appellant is both reasonable and proper in light of the changed conditions. Since the hearing on the petition for modification of alimony and child support is an equitable proceeding, the court should closely scrutinize the situation and apply equitable remedies. Sorensen v. Sorensen, 20 Utah 2d at 361, 438 P.2d at 180. The appellant, after deducting his expenses, has $76.00 left with which to pay the decreed amount of $280.00 (T. 18-28, 49). He has requested the court to lower the child support from $180.00 a month to $150.00, and to relieve him from any alimony. This is reasonable in light of the facts that (1) since the time the decree was entered, the appellant has taken a $150.00 deduction per month in take-home pay, and (2) the respondent now earns almost $200.00 per month. At the

time of the decree, she was earning zero (T. 52). There is evidence that the appellant has had to borrow money to pay the support (T. 22). The appellant has made every reasonable effort to pay the support and wishes to continue to pay what he can. If he is required to continue to pay the $280.00, eventually the respondent may not get any support because appellant could very well lose his job because of the garnishment (T. 55), and may not be able to borrow anymore money. Equity demands that the respondent should receive support. But equity also demands that the appellant should not be forced to go further in debt to meet his obligations.

The circumstances of both parties have changed, and they have changed beyond appellant's control. Utah Code Ann. § 30-3-5

(1953) permits subsequent changes from the divorce decree which are reasonable and proper. Based upon the foregoing, it is evident that the trial court erred in denying appellant's application for modification of the divorce decree to reduce the amount payable as alimony and child support.

POINT IV

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S PETITION FOR MODIFICATION OF DIVORCE DECREE TO RELIEVE HIM OF THE OBLIGATION TO PAY THE PARTIES' DEBTS.

Inherent in this argument is the question of whether the divorce court can, after bankruptcy, hold the wife harmless from liability of the parties' debts incurred before the bankruptcy. The appellant admits that alimony and child support are not dischargeable debts under a bankruptcy decree. 11 U.S.C.A. § 35. It is also not contended that any debts incurred after the bankruptcy are discharged,

and the court is within its power to hold the wife harmless for such debts. However, where the husband has been decreed bankrupt prior to his divorce, the divorce court cannot reinstate his obligations which have already been discharged by the bankruptcy referee. "A discharge in bankruptcy shall release a bankrupt from all his provable debts. . ." 11 U.S.C.A. § 35. The appellant was adjudged bankrupt on August 5, 1968. On October 21, 1968, the Utah County District Court entered its decree of divorce. Besides the alimony and child support, the court ordered the appellant to hold the respondent harmless from liability of all the debts of the parties. This decree in effect renders the bankruptcy null and void as to those debts discharged by the referee.

There are cases holding that the bankruptcy does not discharge obligations

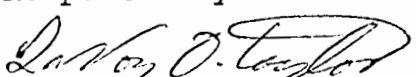
relating to the wife's maintenance and support, i.e., liabilities incurred by the husband and wife. Erickson v. Beardall, 20 Utah 2d 287, 437 P.2d 210 (1968); In Re Baldwin, 250 F. Supp. 533 (1966). However, in these cases, the bankruptcy was effected after the divorce decree. The petitions were for review of the bankruptcy proceedings. Here, the bankruptcy occurred before the divorce decree, and there is no dispute that the bankruptcy referee rightfully discharged the obligations.

The decree should have been modified to exclude the order to hold the respondent harmless. The trial court erred in denying the appellant's petition for modification of said order.

CONCLUSION

The District Court's order holding the appellant in contempt should be reversed. The appellant requests the following be granted: (1) that his child support payments be lowered to $150.00 per month; (2) that he be relieved of any obligation to pay alimony; (3) that he be relieved of the obligation to pay the parties' debts.

Respectfully submitted,



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