

2001

# Karen Diane Anderson Baggs v. Dennis R. Anderson : Brief of Respondent

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

DEC 6 1975

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

KAREN DIANE ANDERSON BAGGS,  
*Plaintiff and Appellant,*

vs.

DENNIS R. ANDERSON,  
*Defendant-Respondent and  
Cross Appellant.*

Case No.  
13422

BRIEF OF RESPONDENT  
AND CROSS APPELLANT

Appeal from the Judgment of the Second Judicial  
District Court for Weber County, State of Utah, the  
Honorable Calvin Gould, Judge.

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Clerk, Supreme Court, Utah

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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KAREN DIANE ANDERSON BAGGS,  
*Plaintiff and Appellant,*

vs.

DENNIS R. ANDERSON,  
*Defendant-Respondent and  
Cross Appellant.*

Case No.  
13422

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BRIEF OF RESPONDENT  
AND CROSS APPELLANT

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STATEMENT OF NATURE OF CASE

Appellant brought suit against Respondent to domesticate a Wyoming Divorce Decree and to obtain judgment for accrued child support and attorney's fees.

DISPOSITION IN LOWER COURT

On January 5, 1973 Appellant obtained judgment by default domesticating a Wyoming Decree of Divorce and obtaining judgment for accrued child support in the sum

of \$1,900.00, together with Court costs of \$24.30 and attorney's fees of \$300.00. Said judgment was set aside March 5, 1973, and the case was tried before the Honorable Calvin Gould, sitting without a jury, on May 8, 1973. On May 25, 1973 judgment was granted domesticating the Wyoming Divorce Decree and awarding Appellant child support accruing from December, 1971 through April, 1973, in the sum of \$3,300.00. Each of the parties were ordered to pay his own costs and attorney's fees. Said judgment was thereafter amended on June 29, 1973, disallowing the child support accruing prior to July 25, 1972, and awarding judgment in favor of Appellant for child support accruing from July 25, 1972 through April 25, 1973, in the sum of \$1,800.00 with the provision that Appellant was enjoined from garnishing or executing against Respondent's assets or from otherwise enforcing said judgment so long as Respondent pays at least \$100.00 per month on said judgment.

### RELIEF SOUGHT ON APPEAL

Respondent and Cross Appellant seeks affirmation of the judgment denying Appellant child support accruing from December, 1971 through July 25, 1972, together with the decision that Appellant is not entitled to attorney's fees herein. Said Respondent and Cross Appellant seeks reversal of that portion of the judgment awarding Appellant child support which accrued between July 25, 1972 and December 14, 1972.

## STATEMENT OF FACTS

Defendant-Respondent and Cross Appellant, hereinafter referred to as Respondent, does not agree fully with the Statement of Facts as presented by Appellant and will herein recite his interpretation of the facts and will specifically refute facts set forth in Appellant's brief which he controverts.

On June 24, 1970, Respondent was awarded a Decree of Divorce against Appellant in Natrona County, Wyoming. Appellant was awarded custody of the three minor children of the parties, together with \$200.00 per month child support. Respondent paid said child support regularly until October, 1971, when Appellant made plans to remarry. Sometime prior to November 1, 1971, Respondent met with Appellant's fiancée, Richie Baggs, and discussed the role each would play regarding the children of the parties in the future. Mr. Baggs advised Respondent that he did not want Respondent to visit the children thereafter nor did he want his assistance in the form of child support (T - 50-51). On November 1, 1971, Appellant and Respondent met and agreed that Respondent would not visit the children in the future and he would be relieved of all child support obligations (T - 52 & R - 52). Two written memorandums of said agreement were signed by both of the parties, one being on the last page of a copy of the Wyoming Divorce Decree and the other being on a paper napkin. Contrary to Appellant's Statement of Facts, there is no evidence that she did not intend to relieve Respondent of his obligation

of child support. On the contrary, Appellant testified that she was sober at the time she entered into the agreement and knew what she was doing (T - 32). There was no coercion or force of any type used to induce her to enter into the agreement (T - 52). When Appellant signed the memorandum, she clearly knew she was signing a release and even copied it over on a napkin so she would have it available to know what she had signed (T - 35).

To this point there had been no discussion between the parties regarding adoption of the children by Appellant's future husband. Approximately one week before Appellant's remarriage on November 19, 1971, the parties met at lunch with Appellant's fiancée, Richie Baggs, and there was some discussion at that time regarding the possibility of a future adoption of the children by Mr. Baggs. Respondent did not at that time reject the idea (T - 61) but there was no serious discussion or any real conversation about an adoption until June, 1972 (T - 23).

In reliance upon the November 1, 1971 agreement, Appellant stopped visiting the children and did not see them again until January, 1973. In reliance upon the agreement he also stopped paying child support (T - 52).

In further reliance upon said agreement, Respondent changed his circumstances materially. He moved from a \$40.00 per month apartment and signed a year's lease on another apartment for \$175.00 per month (T - 53-54). In the summer of 1972, he also purchased a new automo-



bile at a cost of \$3,750.00 with monthly payments of \$118.00 per month (T - 54 & T - 64). In February, 1972, he incurred a debt for \$600.00 on furniture with monthly payments of \$25.60 (T - 65). Then in August, 1972, he incurred a debt Consolidation Loan in the sum of \$1,200.00 with monthly payments of \$90.00 per month (T - 65). Respondent would not have changed his circumstances and incurred said debts had he not understood that he had been relieved of child support payments of \$200.00 per month (T - 54).

In June, 1972, Appellant and her husband retained Attorney James Z. Davis to file a petition for adoption of the children by Mr. Baggs (T - 41). There was no discussion at that time regarding the collection of support arrearages and the Baggs' only purpose in retaining the attorney was to commence adoption proceedings (T - 42, 43). At that point, Appellant and her husband were still acquiescing in the non-payment of support by Respondent and anticipated that Mr. Baggs would adopt the children (T - 44).

During June, 1972, the first serious conversations between the parties about adoption of the children by Mr. Baggs were held (T - 23, 24) and at that time Respondent appeared somewhat hesitant about consenting to an adoption (T - 24). Only after this hesitancy was made known did Appellant make demand for the payment of accrued child support (T - 47). This was done formally by letter from Appellant's attorney to Respondent dated July 25, 1972. From the date of the agreement between

the parties on November 1, 1971, until July, 1972, no request was made of Respondent for child support.

On September 14, 1972, Appellant's attorney again made demand on Respondent for accrued support, and on September 27, 1972, Appellant filed a Complaint against Respondent to domesticate the Wyoming Divorce Decree and to obtain a judgment for accrued child support, but Respondent was not served with process at that time. Thereafter, further conversations were held regarding the possibility of adoption and finally in the early part of December, 1972, Respondent agreed that he would go to Court and consent to an adoption. When Respondent finally got to Court, he could not bring himself to consent to the adoption, and on December 14, 1972, shortly after his refusal to consent to the adoption in Court, Respondent was served with the Complaint which had been filed on September 27, 1972.

During the entire period that Respondent paid no child support to Appellant the children were supported by Appellant's new husband who provided for all of their material needs and was very generous in his financial assistance. The children did not want for any of the necessities of life and Mr. Baggs provided all of their comforts including a new home, two automobiles, and a Country Club membership (T - 20). During this period Mr. Baggs was employed as a stockbroker with Merrill, Lynch, and had a salary of \$700.00 per month until May, 1972, when he was raised to \$800.00 per month (T - 40, 41).

Judgment by default was entered against Respondent on aJanuary 5, 1973, wherein the Wyoming Divorce Decree was made the judgment of the Utah Court and judgment for \$1,900.00 delinquent support was entered against Respondent, together with Court costs of \$24.30 and attorney's fees of \$300.00 (R - 16). Pursuant to Respondent's Motion and hearing thereon, said default judgment was set aside on March 5, 1973 (R - 50). On May 8, 1973, the case was tried in the District Court of Weber County before the Honorable Calvin Gould and on May 25, 1973, said Court domesticated the Wyoming Divorce Decree and granted judgment in favor of Appellant for child support accruing from December, 1971 through April, 1973, in the sum of \$3,300.00. Each of the parties was ordered to pay his own costs and attorney's fees (R - 55, 56). Six days thereafter, on May 31, 1973, Respondent filed his Motion to Amend Judgment which was heard on June 20, 1973, and pursuant thereto the judgment was amended on June 29, 1973, disallowing the support accruing prior to July 25, 1972, on the grounds that Respondent relied on the agreement between the parties that he would not be required to pay support in exchange for not visiting the children and Appellant made no demand for payment of support during said period and Respondent changed his position by increasing his standard of living and incurring additional expenses in reliance thereon. (See Findings, Facts and Conclusions of Law dated February 14, 1974.) Judgment against Respondent was allowed to stand for child sup-

port accruing from July 25, 1972 through April 25, 1973 in the sum of \$1,800.00 and Appellant was enjoined from garnishing or executing against Respondent's assets or from otherwise enforcing said judgment so long as Respondent pays at least \$100.00 per month on said judgment (R - 93).

## ARGUMENT

### POINT I.

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT WAS ESTOPPED FROM ENFORCING THE PAYMENT OF BACK INSTALLMENTS OF CHILD SUPPORT ACCRUING FROM DECEMBER, 1971 THROUGH JULY, 1972.

Respondent will answer Points I and II of Appellant's Argument together.

It is recognized by a majority of the Courts in the United States that a husband may not be required to pay past due installments of child support on the grounds of laches or acquiescence on the part of the wife. See 137 A. L. R. 886 where it is stated:

"It would seem, from a perusal of the cases, that it is recognized by at least a majority of the courts that circumstances may be such as to enable a husband to avoid payment of permanent alimony or support and maintenance of children allowed by decree or order of court, or at any rate payment of past due installments

thereof, on the ground of laches or acquiescence on the part of the wife."

This is further emphasized in 57 A. L. R. 2d 1143 where it is stated:

"There is ample authority in support of the proposition that an agreement between divorced spouses by which the former husband, for a valid consideration, is released from his obligations to pay child support to his former wife as previously decreed in the divorce suit, is valid as between the former spouses, and precludes her from enforcing the child support provisions of the decree." (Cases cited)

The annotation goes on to state on page 1144:

"More specifically, it has been held that the former wife may release her husband from his obligations under the child support provisions of a divorce decree so long as the interests of the child are not affected and only an obligation personal to her is involved." (Cases cited including the Utah case of *Larsen v. Larsen*, 5 Utah 2d 224, 300 P. 2d 596 [1956].)

Utah follows the majority rule and in the case of *Larsen v. Larsen*, 5 Utah 2d 224, 300 P. 2d 596 (1956); Rehearing, 9 Utah 2d 160, 340 P. 2d 421 (1959), the facts are remarkably similar to those in the instant case. There, the husband obtained a decree of divorce from the wife, who was awarded custody of their minor child and awarded \$35.00 per month child support. Some years after the divorce was granted the wife sought to obtain

a judgment against the husband for *accrued* child support and the husband alleged that his failure to make support payments was due to the fact that the wife had previously told him that she was married and her new husband would support the child and that all she wanted from the father was that he should refrain from trying to see her or the child. Because of such representations, the father alleged he had remarried and taken on other obligations which he would not have undertaken had he known she would demand all moneys which were payable under the decree.

The trial Court found that the husband had not made the payments as ordered by the divorce decree from June, 1947 until June, 1955, and held that the wife was entitled to a judgment for amounts due for that period for the use and benefit of the child.

The Utah Supreme Court reversed the trial Court and remanded the case for findings on the issues of laches, acquiescence or estoppel.

On page 598 of 300 P. 2d the Court stated:

“In *Price v. Price*, we held that because the state is interested in the child’s welfare the parents cannot effectively release *future* payments of support money by agreeing with the other to that effect. However, this does not mean that a mother may not by her actions or representations, or both, preclude herself from recovering *past due installments* of support money to reimburse her for money which she has spent for the support of the child. Where the father’s failure

to make such payments was induced by her representations or actions and where as a result of such actions or representations the father has been lulled into failing to make such payments and into changing his position which he would not have done but for such representations, and that as a result of such failure to pay and change in his conditions it will cause him great hardship and injustice if she is allowed to enforce the payment of such back installments, she may be thereby estopped from enforcing the payment of such back installments." (Last emphasis added.)

The Court then went on to state that:

"If the child has been the beneficiary of equivalent support and education so that the mother is entitled to receive all of said past due support money, she should be free to release, compromise or waive that which is hers. But if the child has been provided bare shelter and food and denied the benefit of proper clothes and dental and medical care, then the mother should not be free to waive that portion of past due support money that the child has not received. The authorities cited above hold that this doctrine is applicable to this extent. It is the prerogative of the trial court to determine these facts and if he finds that facts exist to justify equitable estoppel, he should apply that doctrine and relieve the father from payment of the installments to the extent indicated."

Upon rehearing, the trial Court held that the wife was estopped from claiming any payments for the period from June, 1947 to and including December 31, 1950,

and judgment was entered accordingly. This judgment was affirmed by the Utah Supreme Court in 1959 at 9 Utah 2d 160, 340 P. 2d 421.

In the instant case, the children have been well provided with all of their material needs by their mother's second husband and have not been denied the benefit of proper clothes and dental and medical care. Their comforts included a new home, two automobiles and a Country Club membership (T - 20). During this period Mr. Baggs had an income between \$700.00 and \$800.00 per month (T - 40, 41). It is clear in the instant case that the children have been the beneficiary of equivalent support and education so that their mother would be entitled to receive all of the past due support money to use as she sees fit, and accordingly she should be free to release, compromise, or waive that which is hers.

The trial Court herein, in accordance with the *Larsen* case, correctly found that the Respondent relied upon the representations of Appellant and her second husband to the effect that they would not expect Respondent to pay child support in consideration of him not visiting the children and leaving them alone. The Court further correctly found that in reliance thereon Respondent ceased visiting the children, stopped the payment of child support, and changed his circumstances by incurring financial indebtedness which he would not have taken on had he understood he still had a responsibility to support the children.

Appellant's argument that the agreement of Novem-



ber 1, 1971 is not a valid contract, is immaterial inasmuch as it is not necessary that there be a valid contract in order to constitute an estoppel. In the *Larsen* case the Court did not question whether the agreement of the wife to forego the payment of child support in exchange for the husband not visiting the children constituted a valid contract, but the Court rather determined that such a representation by the wife which caused the husband to change his circumstances to his detriment in reliance thereon estopped the wife from later coming back and collecting the accrued support. The trial Court was correct in determining that the same rule is applicable in the instant case.

Appellant's argument that the agreement was extorted from Appellant under duress is not valid. Appellant's own testimony was that she was sober at the time she entered into the agreement and knew what she was doing (T - 32) and Respondent testified that there was no coercion or force of any type used to induce Appellant to enter into the agreement (T - 52). Had Appellant actually been coerced into making the agreement because of her need of money, she could have repudiated the agreement as soon as she received the money, but this she never did. The trial Judge, who was present and able to determine the demeanor of the parties, was correct in determining that there was no duress.

Appellant's argument that under the case of *Price v. Price*, 4 Utah 2d 153, 289 P. 2d 1044 (1955), future support cannot be the subject of a bargain and sale be-

tween husband and wife, is correct. This rule, however, is not applicable in the present case as the question here, as in the *Larsen* case, is whether Appellant is estopped from collecting *accrued* child support. Appellant's Complaint filed in September, 1972, did not seek the collection of *future* support but rather sought to collect child support which had *accrued* prior thereto. Appellant's allegation found on page 6 of her brief that "In the instant case, defendant is relying on an agreement which related in no way to arrearages, but to *future* payments," is just not true.

Appellant's reference in Point II of her argument that plaintiff's acquiescence in the instant case was for a period of only seven months "while all cases indulging an estoppel theory invariably involve many years of acquiescence," is without merit.. In none of the cases cited by Appellant does the Court state that an acquiescence in the non-payment of support must continue for a stated period of time in order to constitute a valid estoppel. Whether the acquiescence is for a period of one month or for a period of ten years is completely immaterial.

Appellant's argument on page 7 of her brief that the case of *Larsen v. Larsen* has been "thoroughly immasculated by later cases" is not true. None of the cases cited by Appellant overrule or in any way modify the holding of the *Larsen* case and it has stood without dispute as the law in this state since 1956.

The case of *French v. Johnson*, 16 Utah 2d 360, 401 P. 2d 315 (1965), cited on pages 6 and 7 of Appellant's

brief holds that the failure of a former wife to *request* support payments from her former husband for a prolonged period does not raise an estoppel and the Court distinguished the *Larsen* case and held that "It (*Larsen*) has no application to the facts of this (*French*) case." (Parenthetical insertions added.) It is interesting to note that two of the Justices (Crockett, J. and McDonough, J.) dissented in the *French* case and concluded that even under the facts of that case the former wife should not have been able to collect delinquent support.

The Utah Supreme Court also distinguished the case of *McClure v. Dowell*, 15 Utah 2d 324, 392 P. 2d 624 (1964), cited on pages 6 and 7 of Appellant's brief, from the *Larsen* case. In the *McClure* case the former husband of the plaintiff did not make support payments for a period of two years because plaintiff concealed herself with the children and defendant did not know where to pay the support. The Utah Supreme Court again distinguished the *Larsen* case and stated that *Larsen* was "inapropos as applied to the facts of this case." The facts of the *McClure* case also make it inapropos as applied to the facts of the instant case.

The case of *Hall v. Hall*, 7 Utah 2d 413, 326 P. 2d 707 (1958), cited on page 7 of Appellant's brief is also distinguished from the *Larsen* case. In the *Hall* case the mother of the children concealed her whereabouts from the father and claimed that she did not "seek out defendant to require payment because she was trying to enjoy a peaceful life and it was not worth it to her at the

time." The father in that case attempted to rely on the *Larsen* case to create an estoppel. The Court held that there was no "representation to defendant that he would not be held accountable for the support money, as was the basis of the *Larsen* decision," and the Court refused to find an estoppel. The facts of the instant case are completely different from those in *Hall* but are almost identical to the facts in *Larsen*, as previously indicated.

## POINT II.

THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES FOR DOMESTICATING THE WYOMING DECREE AND FOR HER SUBSEQUENT LEGAL ACTION IN UTAH.

There was no evidence whatsoever presented at the trial of this case in support of Appellant's prayer for \$300.00 attorney's fees in domesticating the Wyoming decree and seeking accrued support. The law does not provide that a woman is inherently entitled to attorney's fees simply because the case is one involving a matrimonial action. The general rule is that a wife is not entitled to an allowance as suit money to maintain her divorce suit where she has sufficient means of her own. See 35 A. L. R. 1101. The financial circumstances of the parties is a factor to be given great weight by the Court. See 24 Am. Jur. 2d 718, wherein it is stated as follows:

“The financial circumstances of the parties have an important bearing on the questions whether attorney’s fees and suit money should be awarded and, if so, how much. The primary rule is that the making of such allowances to a wife depends upon her needs and the ability of husband to satisfy them. For example, if the wife is the plaintiff, the court will award reasonable attorney’s fees and suit money *if she is without funds* and her husband has sufficient means to stand the expense.” (Emphasis added)

In the Utah case of *Alldredge v. Alldredge*, 229 P. 2d 681, 119 Utah 504 (1951), it is stated that:

“The reason for permitting a wife suit money to defend an action for divorce rests on the ground that the wife normally has no separate estate from which to pay for bringing or defending the action . . . Not to allow the wife expenses and counsel fees would in the majority of cases work an injustice by denying her the power to enforce any marital right she may have.”

In the instant case, Appellant has remarried, is living in a new home, has a membership to the Country Club, is able to drive two automobiles, and the Court did not err in finding that she has sufficient means to pay her own attorney’s fees incurred in these proceedings.

It is further stated in 24 Am. Jur. 2d 695, as follows:

“Whether an allowance of suit money and counsel fees shall be paid in the case at bar rests in the judicial discretion of the court, to be exercised in view of the conditions and cir-

cumstances of each case, and an abuse of the discretion is necessarily subject to review. *Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal.*" (Emphasis added)

There is no evidence in the present case that the trial Court abused its discretion in refusing Appellant's prayer for attorney's fees.

### POINT III.

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND THAT RESPONDENT INDUCED APPELLANT TO TEMPORARILY FOREGO ENFORCEMENT OF HIS SUPPORT OBLIGATION BY AGREEING TO ALLOW APPELLANT'S HUSBAND TO ADOPT THE CHILDREN.

The agreement entered into between the parties on November 1, 1971, did not contemplate in any way that there would ever be an adoption of the children by Appellant's new husband. The verbal agreement between the parties was merely that Respondent would forego his right to visit the children and would be relieved of further obligation to pay child support on their behalf. This was confirmed by the written memorandum which provides that Respondent would be absolved of all of his responsibilities under the decree (including child support) and would give up all rights under the decree (including visitation). There was never any discussion be-

tween the parties regarding the adoption of the children until after the agreement was entered into and the discussion of adoption was only of a casual nature until June, 1972, when the first serious discussions about adoption took place (T - 23).

#### POINT IV.

#### THE TRIAL COURT DID NOT ERR IN HEARING RESPONDENT'S MOTION TO AMEND JUDGMENT.

The trial Court entered its order awarding Appellant judgment for all requested arrearages on May 25, 1973. Respondent filed his Motion to Amend Judgment six days thereafter, on May 31, 1973, well within the ten days permitted by Rule 59 (e) U. R. C. P.

Rule 59 (a) requires only that a cause set out therein must be presented in order for the Court to grant a *new trial*. There is no such requirement that one of the causes be shown in order to justify an *alteration or amendment* of judgment pursuant to Rule 59 (e).

Notwithstanding this, Respondent's Motion to Amend Judgment clearly recited that the "judgment is contrary to and against Utah law as set forth in the Utah cases . . ." (R - 82). Rule 59 (a) (6) states that one of the causes for a new trial is "Insufficiency of the evidence to justify the verdict or other decision, *or that it is against law.*" (Emphasis added.) Respondent's Motion to Amend

clearly stated that its cause was that the judgment was *contrary to and against Utah law*.

#### POINT V.

THE TRIAL COURT ERRED IN NOT FINDING THAT APPELLANT WAS ESTOPPED FROM COLLECTING CHILD SUPPORT WHICH ACCRUED FROM JULY 25, 1972 UNTIL DECEMBER 14, 1972.

The trial Court was correct in finding an acquiescence by Appellant in the non-payment of support by Respondent through July 25, 1972 because there was no demand made for the payment of support until that time. Respondent submits that the acquiescence in non-payment by Appellant actually continued until December 14, 1972 when Respondent was served with Appellant's Complaint to domesticate the Wyoming Divorce Decree. Although Appellant made formal request through her attorney for the payment of accrued support on July 25, 1972 and again on September 14, 1972, neither of the parties actually construed this as a demand for support, but rather as a means of pressuring Respondent into consenting to an adoption (T - 55). That Appellant had this intention is clearly evidenced by her answer to the question:

"So you led him to believe along here that what you wanted was a consent to the adoption, and you would not pursue the matter of back support so long as he paid the attorney's fees in connection with the adoption?"



Answer: Yes, sir" (T - 28).

When Appellant's attorney again made written request for the payment of accrued support on September 14, 1972, it is clear that the purpose of this demand was to coerce Respondent into consenting to an adoption as evidence by the fact that on September 29, 1972, Appellant and her attorney executed a release, wherein, for the consideration of \$322.00 attorney's fees for the adoption, they released all claims against Respondent for support arrearages (R - 60 & T - 28). Contrary to Appellant's Statement of Facts there is no evidence that Respondent agreed to begin payments and to make up the arrearages.

The filing of Appellant's Complaint on September 27, 1972 cannot be construed as a demand for the payment of accrued support inasmuch as Respondent was not even aware that the Complaint was filed until he was served with process on December 14, 1972. At the time Respondent went to Court in the early part of December, 1972, to consent to an adoption Appellant was still acquiescing in the non-payment of support by Respondent and expected only that he would pay attorney's fees in connection with the adoption. This is evidenced by Appellant's answers to the following questions:

"Q. Well now, there was an understanding, was there not, finally that he would come into Court and would consent to the adoption. And at that point there was no talk about him having to pay you any money in the way of delinquent amounts, was there?

A. Right.

Q. It was just a matter of him coming into Court and agreeing to the adoption, isn't that true?

A. We did ask him for the attorney's fees we had entailed since June when one day he wanted to sign and the next he didn't.

Q. I see. Your understanding at that point was that you wanted him to pay your attorney's fees in connection with the adoption as well?

A. Yes" (T - 27, 28).

When Respondent finally got to Court he could not bring himself to consent to the adoption.

"Q. What happened when you got here? What was your attitude when you got here?

A. Well, I felt like I was doing the wrong thing and a bad thing, and I couldn't — when I got there, I couldn't do it.

Q. What is your feeling about a relationship with your children at the present time?

A. That I won't sign the adoption papers, and that I want to see them very often" (T - 56).

It is clear from the facts that had Respondent agreed to the adoption at the Court hearing in December, 1972, Appellant would not thereafter have served the Complaint to collect accrued child support and Respondent submits that the first and only conduct of Appellant that was construed by either party as a formal demand for the payment of support was the serving of the Complaint

upon Respondent on December 14, 1972. Up to that point he had continuously been led to believe that he would not be required to pay accrued child support.

### CONCLUSION

The trial Court correctly ruled that Appellant was estopped from collecting child support which accrued between December, 1971 and July 25, 1972, and the Court was further correct in amending its original judgment to this effect. The trial Court further ruled correctly that Appellant was not entitled to attorney's fees in these proceedings.

The trial Court erred, however, in ruling that Appellant was not estopped from collecting child support which accrued from July 25, 1972 through December 14, 1972, and it is respectfully submitted that the facts and law compel a reversal of the trial Court's ruling that Appellant was entitled to child support which accrued during the latter period.

Respectfully submitted,

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