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Karen Diane Anderson Baggs v. Dennis R. Anderson : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

KAREN DIANE ANDERSON BAGGS,
Plaintiff and Appellant,

vs.

DENNIS R. ANDERSON,
Defendant and Respondent.

Case No.
13422

APPELLANT'S BRIEF

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

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STATEMENT OF THE KIND OF CASE

This is an action to domesticate a Wyoming divorce decree and obtain judgment for support arrearages thereunder.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment for plaintiff, later modified, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks judgment for all support arrearages as a matter of law, and attorney's fees, or that failing, a new trial.

STATEMENT OF FACTS

On June 24, 1970, plaintiff and defendant were divorced in Natrona County, Wyoming. Plaintiff was awarded custody of the three minor children of the parties, and defendant was directed to pay the sum of $200.00 per month for support of said children. Defendant made those payments through September, 1971. During parts of September and October, 1971, plaintiff was taken ill. As a result of lost work, she was in desperate economic condition and contacted defendant inquiring of the October payment and advising him of her difficulty. T. 10-12. Plaintiff called defendant several times during the month of October, and finally he agreed to make up the October payment and make the November payment if she would meet with him on November 1, 1971. T. 12, L. 8-20. At that time defendant paid $400.00 and promised to make a $200.00 payment for December, 1971, in return for plaintiff relieving him from further support obligations. T. 12, L. 18-20; T. 193, L. 26-30; T. 194, L. 1-4. Plaintiff had no intention of relieving him from his obligation, but signed the agreement simply to get the money she needed so badly. T. 13, L. 2-21. About two weeks later, defendant agreed with plaintiff's fiance, Mr. Ritchie Baggs, that he would allow Mr. Baggs to adopt the children but was not giving anything else. T. 14, L. 9-17. Plaintiff and Mr. Baggs were married November 19, 1971, defendant paid $100.00 toward his obligation for December, 1971, and no further payments were made. At no time were the support arrearages used as a lever

to compel adoption or vice-versa, T. 68, L. 22-30; T. 69, L. 1-20.

As a result of Mr. Baggs' employment, it was necessary for him to be away for three months beginning March 6, 1972, and plaintiff was apprehensive that defendant may make things difficult for her with Mr. Baggs away. T. 15, L. 15; T. 15-16, L. 30, 1-4. Accordingly, plaintiff and Mr. Baggs determined to forego any action against defendant until they could be together to the outcome. T. 41, L. 19-22. Upon Mr. Baggs' return, he consulted counsel to proceed to adopt the children, T. 41-43. When defendant refused to proceed with the adoption, plaintiff felt he should make up support payments, T. 16, L. 10-30, and defendant was made aware of plaintiff's demand for support payments on July 17, 1972. Formal demand was made on defendant July 25, 1972, which he acknowledged and refused. Formal demand was again made September 14, 1972, whereupon defendant agreed to begin payments and make up arrearages, Record on Appeal P. 44, Pre-Trial Order pp. 52-54. On September 27, 1972, plaintiff filed a complaint against defendant seeking to domesticate the Wyoming decree and obtain an order directing defendant to pay support arrearages. Further negotiations were conducted until December 14, 1972, when defendant was served. On January 5, 1973, Default Judgment was entered against defendant, said judgment being set aside February 20, 1973.

On May 8, 1973, trial was held, the Wyoming decree was domesticated, and plaintiff was granted judg-

ment for *all support arrearages* (emphasis added) on May 25, 1973, Record on Appeal 55-56. On May 31, 1973, defendant moved for amendment of judgment which was heard on June 20, 1973. On June 29, 1973, the court amended its judgment, disallowing support arrearages from December, 1972, through July, 1973, *fifty-two* (52) *days after trial* (emphasis added). Plaintiff's motions for reconsideration were denied on July 30, 1973.

In the meantime, defendant was earning $700.00 per month through June, 1972, $908.00 per month through November, 1972, and $1,066.00 per month from December, 1972, to trial, May 8, 1973, and has no other dependents. T. 59, L. 10-30; T. 60, L. 1-5. He borrowed money *before* the November 1, 1971 agreement to pay Mrs. Baggs. T. 64. L, 12-20 (emphasis added). Following the agreement he borrowed money for new furniture to be repaid at $25.60 per month, T. 65, L. 13-16. "Later on" during the summer of 1972 he purchased a new automobile for $3,750.00 to be repaid at $118.00 per month. T. 54, L. 7; T. 64, L. 1-9. He further moved to a $175.00 per month apartment from a $40.00 per month apartment. *After* he became aware of plaintiff's demands for support arrearages he again borrowed $1,200.00, T. 64, L. 21-30; T. 66, L. 1-5. Thus, from November 1, 1971, to July, 1972, defendant obligated himself for only $278.60 per month, while *making from* $700.00 - $1,066.00 *per month* (emphasis added).

ARGUMENT

POINT I.

THE NOVEMBER 1, 1971 AGREEMENT DID NOT RELIEVE DEFENDANT OF HIS CHILD SUPPORT OBLIGATION.

First, the agreement is not a valid contract. As noted in plaintiff's affidavit, as well as her testimony, the agreement was extorted from her under duress and thus rendered voidable. T. 13, L. 2-21, Record on Appeal 33-34. Further, it is clear from the affidavits, testimony, and pleadings on file, that plaintiff at no time ratified the agreement.

The agreement must fail for lack of consideration. It is well established that "neither doing nor promising to do any act which one is already legally bound to the promise to do, will furnish sufficient consideration for the counter promise." Simpson on Contracts §58. In the instant case, defendant promises to do absolutely nothing he was not already legally bound to do, as he owed plaintiff $400.00 on the date of the agreement, and would owe her $200.00 for December, 1971, when the $200.00 payment was due under the agreement. T. 62, L. 26-30.

Second, the agreement should not be enforced as it is contrary to Utah law. Under Utah law, a release from the wife of all support obligations is of no effect, since *future* support cannot be the subject of a bargain and sale between husband and wife. *Price* v. *Price*, 4 U. 2d

153 (1955), affirmed, *McClure* v. *Dowell*, 15 U. 2d 324 (1964); *French* v. *Johnson*, 16 U. 2d 360 (1965). See also *Ditmar* v. *Ditmar*, (Wash.) 293 P. 2d 759 (1956).

No cases decided under Utah law, particularly *Larsen* v. *Larsen*, 5 U. 2d 224 (1956), which purported to apply an estoppel theory to *accumulated* support arrearages, stand for the proposition that future payments can be bargained away. In the instant case, defendant is relying on an agreement which related in *no way* to arrearages, but to *future* payments.

The proposition that *future* payments may not be released is well established in other judisdictions, *Cervantes* v. *Cervantes*, 203 S. W. 2d 143 (1947), and *Kelly* v. *Kelly*, 47 S. W. 2d 762 (1932).

It is apparent that the agreement is not even a valid contract and wholly unenforceable between the parties. But even if the court finds the agreement has some kind of validity, defendant should not be relieved from his support obligations thereunder, since the parties cannot bargain away a support obligation, particularly a *future* obligation. Should the court in turn find against plaintiff on both of the aforesaid matters, there can be no doubt that the effectiveness of the agreement terminated July 25, 1972, when defendant was so notified.

POINT II.

DEFENDANT SHOULD NOT BE RELIEVED FROM A PORTION OF HIS SUP-

PORT OBLIGATION ON A THEORY OF ACQUIESCENCE, ESTOPPEL OR LACHES.

At the inception, it should be noted that defendant alleged and the court found plaintiff's acquiescence in only 7 *months* of support payments, while all cases indulging an estoppel theory invariably involve many years of acquiescence. See 137 A. L. R. 884.

The leading Utah Case, *Larsen* v. *Larsen*, 5 U. 2d 224 (1956), although thoroughly emasculated by later cases, involved 9 *years* of no support payments. Even after the case was remanded on the theory that estoppel could be considered, said theory was applied to only 3 years of the period. Even assuming any similarity with the instant case, *Larsen* should have little effect, since *French* v. *Johnson* and *McClure* v. *Dowell.*

In *McClure* v. *Dowell*, 15 U. 2d 324 (1964), the court rejected estoppel in a case involving non-payment of support for a 2 *year* period on a foreign decree as in the instant case. In addition, the court limited *Larsen.* In *French* v. *Johnson*, 16 U. 2d 360 (1965), the court further limited *Larsen* in denying estoppel in a case involving 10 *years* of non-payment of support. In *Hall* v. *Hall*, 7 U. 2d 413, a 1958 case involving 5 *years* of non-payment, in which the wife thwarted the husband's efforts to pay, the court awarded a judgment on arrearages.

Even if the court should consider the instant case as somehow even "qualifying" for consideration of an estoppel defense, it is well established that the defendant

must show that he has been materially prejudiced by the plaintiff's delay in asserting her rights and substantially changed his position in reliance thereon. Time alone will not support such an inference. See 24 Am. Jur. 2d, *Divorce and Separation* §874. In the instant case, defendant has simply not done so, and remains, as always, in a very good position to discharge his obligations. As seen in defendant's own testimony at trial, he changed his position very little indeed for one making from $700.00 to $1,066.00 per month. During the period when plaintiff allegedly acquiesced, defendant bought furniture at $25.60 per month and he may have purchased a new automobile during the period. Even if the court properly found a change of position of sufficient dollar amount to support an estoppel, the courts of Utah have never allowed an obligor to avoid child support because he lived in a luxury apartment and had to pay for a new car.

It is apparent that the instant case doesn't even approach the facts of those cases in which estoppel has been considered; but, even more clearly, defendant has certainly not changed his position sufficient to even qualify for application of the theory.

Even if the court chooses to not consider the validity of the November 1, 1971 agreement *per se*, but rather to focus upon the agreement as evidence of plaintiff's conduct giving rise to defendant's theory of estoppel, it is apparent that the circumstances surrounding the execution of the agreement, as well as the subsequent acts and representations of plaintiff and her husband, in no

way suggests a pattern of acquiescence; and, in fact, would suggest that plaintiff and her husband were relying on defendant's representations regarding the disposition of the children of the parties. Plaintiff had good and valid reasons for not seeking to enforce defendant's support obligation, with her husband out of town for 3 months and defendant's prior behavior toward her.

To carry a finding of estoppel in a case such as this to its logical extreme, would enable any unscrupulous obligor to effectively avoid his support obligations for any period of time, however short, by simply inducing the obligee to forego enforcement.

POINT III.

PLAINTIFF IS ENTITLED TO REASONABLE ATTORNEY'S FEES FOR HER EFFORTS TO ENFORCE THE TERMS OF THE WYOMING DECREE.

The general view is that where the court has discretion to utilize equitable remedies as well as award suit money, said money may be awarded on a foreign judgment. See 18 A. L. R. 2d 856, and there is *no* evidence in the instant case that plaintiff had any income or assets.

The court may award suit money under 30-3-3 Utah Code Ann. 1953 (as amended). Further, Utah Statutes relating to divorce do not limit the discretion of the court with regard to suit money to domestic cases, and Utah Code Annotations are replete with cases vesting the

court with discretion to award suit money and none of those cases specifically limit said discretion to actions prosecuted under Utah law.

In *Sackler* v. *Sackler*, 47 So. 2d 292 (1950), it was well established that suit money may be awarded on enforcement of a foreign support decree. Further, in *Oravee* v. *Superior Court in and for Los Angeles County*, 252 P. 2d 364 (1953), the court found upon a suit to enforce a foreign decree, "The superior court had jurisdiction to award support money for the support of the minor children, for attorney's fees and costs."

It is well established that a foreign decree must be given full faith and credit. Finally, and, absent a showing to the contrary, it is presumed foreign law is similar to Utah law, *Tolman* v. *Wassom*, 16 U. 2d 258 (1965), *Hunt* v. *Monroe*, 91 P. 269 (1907).

POINT IV.

THE DEFENDANT INDUCED PLAINTIFF TO TEMPORARILY FOREGO ENFORCEMENT OF HIS SUPPORT OBLIGATION BY AGREEING TO ALLOW PLAINTIFF'S HUSBAND TO ADOPT THE CHILDREN.

It is clear from plaintiff's testimony that defendant's representations with regard to the children played no small part in her decision to give defendant a chance to allow her husband to adopt the children. T. 14, L. 9-17.

Fundamental to the assertion of an estoppel is that

the party seeking to assert same must be acting in good faith, 24 Am. Jur. 2d, *Divorce and Separation* §79. In the instant case, defendant knew full well why plaintiff had not sought to enforce the support obligation; and, after inducing her with the agreement to adopt, he refused the adoption and sought to rely on his own misconduct — the very antithesis of estoppel!

POINT V.

THE COURT ERRED IN HEARING DEFENDANT'S MOTION TO AMEND JUDGMENT.

On May 25, 1973, some 18 days after trial, the court awarded plaintiff judgment for all arrearages and defendant made a Motion To Amend on the theory that the court had failed to consider *Larsen* v. *Larsen.*

Pursuant to the requirements of Rule 59, U. R. C. P., plaintiff's Motion does not set forth a ground thereunder not already considered by the court. At trial, the court was made well aware of *Larsen* v. *Larsen*, 5 U. 2d 224 (1956), upon which plaintiff relied in his Motion. T. 77, L. 28-30; T. 78, L. 1-30. While it is clear that hearing and granting a Motion To Amend is discretionary, that discretion may be abused when there is no showing of one of the grounds in Rule 59. *Tangaro* v. *Marrero*, 13 U. 2d 290 (1962). In the instant case, it can be seen that the court was made well aware of the authorities relied upon by defendant at trial and made its ruling

in favor of plaintiff. Defendant's Motion To Amend, then, was improper because defendant was simply asking for reconsideration of his case.

Further, as the facts indicate, the court's ruling on defendant's Motion was made a full 52 days after trial. Without benefit of transcript, it would be unreasonable as a matter of law to attribute to the court any independent recollection of evidence taken in a 2½ hour trial.

CONCLUSION

Plaintiff should have judgment for all support arrearages as a matter of law, and attorney's fees, or that failing, a new trial on the following grounds:

1. The agreement purporting to relieve defendant of his child support obligation is invalid both as a contract and to effectuate a release of future support.

2. Defendant is not entitled to relief from a portion of his support obligation on a theory of acquiescence, estoppel or laches, since plaintiff did nothing upon which defendant could reasonably rely and defendant did not act in good faith.

3. Plaintiff is entitled to reasonable attorney's fees for her efforts to enforce the terms of the Wyoming Decree, because it was necessary that plaintiff enforce said Decree and she was without funds to compensate counsel.

4. Defendant induced plaintiff to forego enforcement of his obligation.

5. The Court improperly amended the original Judgment entered on behalf of plaintiff for her full support obligation.

Respectfully submitted,

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