

1978

## Shirley W. Adams v. Charles W. Adams : Brief of Plaintiff Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF

STATE OF UTAH

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SHIRLEY W. ADAMS

Plaintiff and  
Appellant,

vs.

Case No. 15,613

CHARLES W. ADAMS

Defendant and  
Respondent.

---ooo0ooo---

BRIEF OF PLAINTIFF APPELLANT

---ooo0ooo---

Appeal from the Judgment of The  
Fourth District Court for Utah County,  
Honorable J. Robert Bullock, Judge

---ooo0ooo---

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be modified to reduce alimony to the sum of \$1.00 per year.

### RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant prays that the judgment of the Trial Court be reversed and that this Court direct the Trial Court to enter its order awarding the back due alimony together with interest thereon, to restore the alimony obligation to its former level and to award Plaintiff-Appellant reasonable attorney's fees.

### STATEMENT OF FACTS

The parties were married on May 13, 1954 and divorced on March 27, 1970 with the divorce becoming final three months thereafter. The Divorce Decree was modified on the 16th of June, 1970, the 17th of January, 1972 and again at the request of Defendant-Respondent on March 31, 1972. The last modification of the decree awarded custody of the minor children of the parties to the Defendant-Respondent and terminated the Defendant-Respondent's child support obligation.

From the date the decree was last modified in March 1972 until the time this action was brought in November 1977, the Defendant-Respondent never paid any alimony except for the sum of \$707.50 which is not a part of this appeal. (T., 5) It is undisputed that the Plaintiff-Appellant did not claim alimony or make any representations whatever to Defendant-Respondent with regard to the payment of alimony during that same period of time. (T., 12, 13, 14)

The Trial Court's finding that a substantial change of circumstances had occurred since the date of the last modification of the decree was based on the fact that Plaintiff-Appellant no

longer has custody of the minor children and has no obligation to support them. (T,25)

### ARGUMENT

#### POINT ONE

THE DOCTRINE OF ESTOPPEL MAY NOT BE RAISED AS A DEFENSE TO PAYMENT OF ALIMONY WHEN THE ONLY RELIANCE BY THE HUSBAND IS UPON THE WIFE'S SILENCE OR FAILURE TO PURSUE HER CLAIM.

Plaintiff-Appellant assigns as error the statement of the Trial Court in its Findings of Fact No. 5, that:

"Plaintiff knew or should have known...that the Defendant did not recognize any obligation to pay alimony, and at that time Plaintiff had a duty to inform Defendant that she claimed alimony..."

Plaintiff-Appellant also assigns as error the Trial Court's Finding of Fact No. 6 in its entirety and further asserts that not only is the doctrine of estoppel improperly applied by the Trial Court but that the arbitrary choice of six months as a period at which time the estoppel would begin to run has no basis in law or in fact.

The Trial Court has created a duty which was nonexistent and which is directly contrary to previous holdings of this Court. In Openshaw v. Openshaw, 105 Utah 574, 144 P2d 528, 531 (1943) this Court stated that in order for the doctrine of estoppel to be raised successfully as a defense against the payment of alimony, the Defendant must have shown more than mere inaction or delay.

"In this case we have searched the record in vain for any evidence which would even tend to show that plaintiff misled defendant to his detriment,



or in any other way did anything to injure defendant, make it difficult or impossible for him to comply with the order of the court, or persuaded him not to apply to the court for reduction of the award. The evidence adduced to the effect that on the few occasions when he visited the children and their mother in California, the plaintiff did not harass him for payment of arrearages, is not sufficient ..." (emphasis added)

This court has uniformly held that there must be more than mere silence over a period of time in order to raise an estoppel which would protect the husband where a divorce decree orders the payment of child support and alimony. French v. Johnson, 16 Utah 2d. 360, 401 P2d 315 (1965) is A FORTIORI to the instant case. The facts as stated by this Court are that:

"On March 18, 1954, Johnson was ordered to pay support money to his former wife for their child. He defaulted, and in February, 1964, 10 years later, plaintiff brought proceedings against him.

The district court relieved defendant of past payments because the plaintiff had been dilatory in requesting payments and producing her forwarding addresses to defendant.

Johnson defends by asserting estoppel or laches. Defendant relied on his wife's silence."

Even though ten years had elapsed and Plaintiff may not have produced her forwarding address to the Defendant this Court held that:

"The facts show no representations, either explicit or implicit, by plaintiff to defendant with respect to discontinuation of payments ... Mere silence over a period of time will not raise as estoppel..." (Id. p. 315)

In Baggs v. Andersen, 528 P2d 141, 143-144 (1974) the holding of French v. Johnson, supra. was reaffirmed and the duty of the Defendant-Respondent to prove more than mere silence

or delay was again emphasized.

"An essential requirement is that there must be some conduct of the obligee (plaintiff), which reasonably induces the obligor (defendant) to rely thereon and make some substantial change in his position to his detriment ... This requirement is not satisfied by the mere fact that he indulged in the pleasant and emphoric assumption that he would not have to meet his obligations... Likewise, the mere passage of time, or the failure of a creditor (plaintiff) to bedevil the debtor for payment does not create an estoppel. (emphasis added)

The Trial Court's decision flies in the face of this Court's previous rulings on the same subject. Affirmation of the Trial Court's decision would require this court to reverse itself in each of the previously cited cases. It would create a new and separate duty to aggressively pursue alimony and child support or risk losing those vested rights. It would shift the duty to collect support on the Plaintiff-Appellant.

This court should reverse the Trial Court's ruling and direct that judgment be granted in favor of Plaintiff-Appellant and against Defendant-Respondent in the amounts prayed for at the hearing before the Trial Court.

#### POINT II

THE EQUITABLE DOCTRINE OF ESTOPPEL SHOULD NOT BE ALLOWED TO PROTECT A PERSON FROM HIS OWN MISTAKE OR INADVERTANCE.

It is an equitable principle that where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it. Pompton twp. v Cooper Union, 101 U.S. 196 (1879), Orleans v. Platt, 99 U.S. 676 (1878), Magee v. Manhattan L. Ins. Co., 92 U.S. 93 (1875), Gray V. Jacobsen, 56 App. DC 353, 13 F2d

959 (1926), Valley Bank and Trust Co. v. Gerber, 526 P2d 1121  
(1974), Hanson v. Beehive Sec. Co., 14 Utah 2d 157, 380 P2d 66 (1963)

The Defendant-Respondent was present in court with his attorney when the decree was last modified. (T-10) The Plaintiff-appellant was not present nor represented by counsel. (T-10) Defendant-Respondent secured custody of his children and modified the decree to eliminate his duty to pay child support. (T-14) Why Defendant-Respondent neglected, omitted, or refused to further modify the decree with regard to alimony is a matter of conjecture. Whatever the reasons for Defendant-Respondent's failure to apply to the court for a modification of alimony, there is no justification which would allow him to invoke an equitable doctrine to remedy or change his own error, inadvertance, or perhaps previous intention.

The record clearly demonstrates that even if the Defendant-Respondent in good faith believes that his alimony obligation was terminated and therefore was an innocent party, nevertheless it was through his agency that the loss occurred. The Defendant-Respondent understood his burden to proceed in order to obtain custody of his children and in order to relieve himself of a duty to pay child support. He retained counsel and bore the legal expenses incident to meeting that burden. He must have or should have known that the burden to further modify the decree regarding alimony payments was also his burden. Conversely, Plaintiff-Appellant could not have been the party through whose agency the loss occurred because she was not even present at the time when, or the place where, the decree was modified and the record is clear.

and undisputed that she made no representation either explicit or implicit to the Defendant-Respondent with respect to discontinuation of payments.

This court should order that Defendant-Respondent must bear any loss created by his own mistake or inadvertance.

### POINT III

#### ALIMONY AWARDS MAY NOT BE RETROACTIVELY MODIFIED.

The method by which a party may be relieved of a duty to pay support imposed by a divorce decree has been clearly defined. There is no discretion left to attempt an alternate method. Utah Code Ann. §30-3-5 (1953) vests continuing jurisdiction in the District Court of Utah:

".....to make such subsequent changes or new orders with respect to the maintenance and support of the parties...as shall be reasonable and necessary..."

Osmus v. Osmus, 114 Utah 216, 198 P2d 233, 235-236 (1948)

emphasizes the absolute duty to apply to the court for relief from an order of support in a divorce decree.

...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. (Emphasis added).

The Trial Court's ruling creates an alternate method of modifying a divorce decree other than that prescribed by statute and it has the effect of retroactively modifying the divorce decree in this case. This is a result which this court has specifically forbidden in Larsen v. Larsen, 561 P2d 1077, 1079 (1977)

In this jurisdiction alimony and support payments become unalterable debts as they accrue; therefore, a periodic installment cannot be changed or modified after the installments have become due... (emphasis added)

In Larsen v. Larsen Id. this court again reaffirmed the method by which a decree can be modified. The parties were free to make application to the Court for a changed circumstances hearing. This court refused to let the parties alter the decree by any other method.

The Trial Court has invoked an equitable doctrine to retroactively modify a divorce decree, a result specifically forbidden by this court, thereby protecting Defendant-Respondent from his own mistake or inadvertance. Such an application of equity is itself inequitable and should not be allowed.

#### POINT IV

IN ORDER TO JUSTIFY A REDUCTION OF ALIMONY, THE MOVING PARTY MUST PROVE CHANGED CONDITIONS ARISING SINCE THE LAST MODIFICATION OF THE DECREE.

In Hampton v. Hampton, 86 Utah 570, 47 P2d 419, 420 (1953) this court stated:

"It is well settled in this court that in order to secure a change in a decree for alimony the moving party must allege and prove changed conditions arising since the entry of the decree which require, under rule of equity and justice,

a change in the decree, Chaffee v. Chaffee, 63 Utah, 261, 225 P. 76; Rockwood v. Rockwood, 65 Utah, 261, 236 P. 457." (emphasis added)

This statement was reaffirmed in Gardner v. Gardner, 111 Utah 286, 177 P2d 743 (1947) and again in Osmus v. Osmus supra.

The Trial Court used as its basis for finding a substantial change in circumstances the fact that Plaintiff-Appellant no longer had custody of the children and had no obligations for them (T.25) The children of the parties were given to the Defendant-Respondent at the time the decree was last modified in March of 1972. That modification left the alimony provision intact. Since the Trial Court must base its decision upon changed circumstances arising since the entry of the decree it cannot use the fact that Plaintiff-Appellant does not have custody of the children as a basis for that modification.

The change in custody and therefore the change in circumstances used by the Trial Court as a basis for modifying the decree was created by the last modification of the decree. Plaintiff-Appellant submits that the Court must find a substantial change of circumstances excluding the fact that she no longer has custody of the children of the parties, and that there was no showing at the hearing below which would justify alimony being reduced to \$1.00 per year. Unless and until Defendant-Respondent can allege and prove a substantial change of circumstances arising since the last modification of the decree in this case, the alimony award must remain undisturbed and at its former level.

## POINT V

PLAINTIFF-APPELLANT IS ENTITLED TO ATTORNEY'S FEES BOTH ON THE APPEAL AND AT THE TRIAL BELOW.

The Trial Court's decision to estop Plaintiff-Appellant from collecting past due alimony was patently erroneous. There was no evidence of any conduct on her part which would raise an estoppel. Both parties agree that Plaintiff-Appellant was silent with regard to her claims for alimony and that she made no representations implicit or explicit to Defendant-Respondent which would or could have induced him to rely to his detriment thereon. The well established principals of equity provide that where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it. The Trial Court's decision ignores the law clearly stated in Openshaw v. Openshaw supra., French v. Johnson supra., and Baggs v. Andersen supra.

This court has held in Bates v. Bates, 560 P2d 706 (1977) that when a party is compelled to appeal a patently erroneous order, the party is entitled to attorney's fees.

## CONCLUSION

The law is well settled that mere silence on the part of the wife will not raise an estoppel which will bar her claim for unpaid alimony.

Neither should the doctrine of estoppel be used as a tool to protect the party from his own mistake, inadvertance, or previous intention.

Divorce decrees can not be retroactively modified.

In order to secure a change in an alimony award, the moving

party must plead and prove a material change in circumstances

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arising since the last modification of the divorce decree.

Attorney's fees are allowable when a party is compelled to appeal from a patently erroneous order.

For the foregoing reasons Appellant requests this Court to reverse the decision of the Trial Court and instruct it to enter the appropriate order.

Respectfully submitted this \_\_\_\_\_ day of April, 1978.

\_\_\_\_\_  
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I hereby certify that I served the foregoing Brief of Plaintiff-Appellant by delivering two copies thereof, to the office Gary D. Stott, attorney for Defendant-Respondent, 350 East Center, Provo, Utah 84601 this \_\_\_\_\_ day of April, 1978.