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Richard Ross v. Carol Ross et al : Brief of Respondent and Cross Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD ROSS,

Plaintiff and Appellant,

vs.

CAROL ROSS,

Defendant, Counter-Claimant, Respondent and Cross-Appellant,

and

UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Intervenor and Appellee.

Supreme Court No. 15800 & 15830

BRIEF OF RESPONDENT AND CROSS APPELLANT CAROL ROSS

Appeal from the Third Judicial District Court of Salt Lake County, the Honorable, David Dee, Judge

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CASES

Authorities Cited

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff Richard Ross to modify a California divorce decree, with a counter-claim by Carol Ross for judgement as to arrearages in child support and alimony. The State of Utah, Department of Social Services, joined the action with a claim against plaintiff for reimbursement of welfare paid to defendant.

DISPOSITION IN LOWER COURT

This case was tried by the lower court sitting without a jury which modified the divorce decree in favor of plaintiff and granted judgement for defendant on the counter-claim and order to show cause in the amount of $24,457.00, representing arrearages of alimony and child support, and after giving plaintiff credit for alimony payments in the amount of $5,000.00 as money paid by plaintiff towards a down payment on a home purchased by the two parties. Judgement was also granted for the State of Utah, Department of Social Services, in the amount of $1,544.00 representing reimbursement of welfare paid to defendant, Carol Ross.

Plaintiff appealed that part of the lower court judgement granting defendant $24,457.00 in arrearages and the State $1,544.00 in reimbursement.

Defendant is not appealing the part of the judgement or order modifying the California divorce decree as indicated in

plaintiff's brief, but is appealing that part of the courts decision granting plaintiff credit in the amount of $5,000.00 towards the alimony arrearages.

RELIEF SOUGHT ON APPEAL

Respondent and Cross-Appellant, Carol D. Ross, seeks an affirmance of the judgement of the lower court against the Plaintiff-Appellant Richard Ross for $24,457.00 in arrearages of alimony and child support and further asks that the court overturn the lower courts decision to grant a credit to plaintiff in the amount of $5,000.00 toward alimony arrearages, representing the amount paid by plaintiff toward the down payment of a home purchased by the parties.

STATEMENT OF FACTS

Defendant-Respondent and Cross-Appellant, hereinafter referred to as defendant, or Mrs. Ross, does not agree fully with the statement of facts as presented by plaintiff and will herein recite her interpretation of the facts and will specifically refute facts set forth in plaintiff's brief which she controverts.

The parties final divorce hearing was held on February 19, 1971 in California, wherein defendant was awarded alimony of $150.00 per month and child support of $100.00 per month for each of three children. Plaintiff, Mr. Ross was present at the divorce hearing and heard the court order him to pay

the amounts specified above. (T. 7, 34)

On February 20, 1971, only one day after the divorce hearing, Mr. Ross left the State of California and moved to Dallas, Texas specifically to avoid the obligations of the divorce decree and to hide from Mrs. Ross and any one who would try to enforce plaintiff's obligations under the decree. (T. 9,10,82,155) To be certain that no one would find him plaintiff lived under an alias or an assumed name, Richard Henderson. (T. 6,10,155) He lived in Dallas, Texas for approximately 5 years (T. 10)

Mrs. Ross did not hear from Mr. Ross until October of 1972, at the earliest (T. 60), and Mr. Ross continued to conceal his whereabouts to defendant in their few conversations by telling her that he was living in Colorado rather than Dallas, Texas. (T. 34,60,70)

Plaintiff and his mother Mrs. McKendrick, testified that plaintiff sent to his mother on the average $200.00 a month until August of 1972 for the benefit of plaintiff's children. (T. 13, 82-87) Defendant on the other hand denied ever receiving anything from plaintiff's parents except the usual gifts that grandparents give to grandchildren, such as on birthdays and Christmas. (T. 15,59)

It is undisputed that plaintiff never did send any money directly to defendant as required by the divorce decree, or to the State of Utah on behalf of defendant for either alimony or

child support until approximately March of 1973. (T. 35) Defendant began receiving from plaintiff at that time very small sporadic payments until August 1973 when plaintiff started sending $232.00 a month to the Bureau of Recovery Services, which in October 1973 he reduced to $225.00 a month . (T. 36) These payments were made until plaintiff moved to Salt Lake permanently in February of 1976.

Plaintiff testified that a Mr. Theodore Zambos of the Bureau of Recovery Services, acting as agent of the State and defendant, relieved plaintiff from all back-payment obligations to defendant in October 1973, and for any future obligations above $225.00 a month. (T. 30, 161-164) Mr. Zambos, however, testified that it never was his practice to relieve a defaulting husband from the obligations under the divorce decree, nor did he believe that he had the authority to do so (T. 115,117,119,121)

Certain contacts were made between Mr. and Mrs. Ross from October 1972 through December 1975, including telephone conversations and a visit by plaintiff to Salt Lake City in February 1973. (T.34,60,62-4) During some of those telephone conversations and the February 1973 visit there was some discussion about child support payments wherein Mrs. Ross specifically asked Mr. Ross if he was going to pay the amount that the court in California had ordered him to pay and Mr. Ross responded that he would never pay that amount. (T. 34. 67)

Defendant testified that she never protested the amount she received other than to plaintiff, as she felt that it was "hopeless". (T. 135)

In December of 1975 plaintiff came to Salt Lake to spend Christmas with the children and in early February 1976 he moved to Salt Lake and has been a resident ever since. There was some discussion in the Christmas visit of 1975 concerning plaintiff moving to Salt Lake permanently so that he could be around the children, but defendant testified that she was very skeptical about plaintiff's return,(T. 48) and did not urge plaintiff to come. (T. 140)

Prior to plaintiff's move to Salt Lake and since the time of the divorce the parties never actually discussed "back-payments" or arrearages of child support and alimony. (T. 18, 19, 44, 48,68,133-34) Plaintiff did however testify that in their conversations defendant led him to believe that he did not owe her for back-payments. (T. 162) This testimony, however is inconsistent with his earlier testimony that back-payments were never discussed. (T. 17, 18)

Mrs. Ross testified that she was never willing to make any concessions concerning the back-payments of alimony and child support or the amount that plaintiff was obligated to pay per month in the future. (T. 152)

As plaintiff made preparations to leave Dallas, Texas and come to Salt Lake in January or February of 1976 he apparently

sold a home that he had been making house payments toward of $137.00 a month (T. 23), and prior to his arrival in Salt Lak he had a job secured which he testified paid him approximatel the same salary as he was making in Dallas, Texas. (T. 23, 27

Sometime after plaintiff's arrival in Salt Lake, plaintiff and defendant lived together in the same house where defe dants parents, Mr. & Mrs. Fred Robinson, were residing, altho the parties did not remarry. (T. 21, 46-48) Plaintiff and de dant lived with the Robinson's until September of 1976 and du that period of time Mr. Ross paid $400.00 total to Mr. Robins (T. 95), while Mrs. Ross was at the same time paying her fath $200.00 a month. (T. 21-22) All of the food expenses and mos of the other household expenses that Mr. Ross took advantage of were paid during that period of time by Mr. Robinson. (T.

In September of 1976 plaintiff and defendant bought a home together and plaintiff subsequently moved out of the hom two months later. (T. 48) From September 1976 to December 19 plaintiff paid the mortgage payments on the home. Mr. Ross testified that he always considered the home bought by the parties as his home and Mrs. Ross to have no interest therein (T. 25-26, 175), and in fact Mr. Ross brought a lawsuit again Mrs. Ross to quiet title and remove her from possession of th home. (T. 182)

Over the seven years since the divorce plaintiff has gi gifts and provided other benefits to the children and defenda

Mrs. Ross testified, however, that much of the payments claimed by plaintiff at the trial were made out of a joint checking account owned by the parties or from plaintiff's own account into which he had deposited defendants earnings. (T. 45,146)

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR OR ABUSE ITS DISCRETION IN FINDING THAT THE DOCTRINES OF ESTOPPEL AND LACHES DID NOT APPLY IN THE INSTANT CASE TO RELIEVE PLAINTIFF FROM CHILD SUPPORT AND ALIMONY ARREARAGES.

Plaintiff contends that the doctrines of "estoppel" and "laches" should apply in the instant case to relieve him from alimony and child support arrearages. It is defendants position, however, that plaintiffs reliance on these doctrines is inappropriate for the following reasons: (1) The standard on appeal or scope of review requires that this court affirm the lower courts ruling that the doctrines were not applicable, (2) The equitable estoppel doctrine requires "representations: from defendant to release the arrearages which were not found in the instant case, (3) Laches cannot be found from mere silence alone on the part of the defendant, (4) Plaintiff has not suffered a substantial detriment, and (5) Any alleged agreement between palintiff and Recovery Services did not constitute estoppel or laches on the part of defendant.

A

Standard on Appeal

Plaintiff has correctly defined within his brief the scope of review and the standard to be applied to this case by this court. Since the case involves enforcement of a divorce decree obligation it is an equity case. However, as this court has noted before on numerous occasions the Supreme Court must affirm the trial court unless its decision was obviously and clearly against the weight of the evidence and there was a clear abuse of discretion. Hall v. Hall, 7 Utah 2d. 413, 326 P.2d. 707 (1958)

Another important principle of appellate review is that the Supreme Court will, in an equity case respect the trial courts opportunity to observe the demeanor and determine the credibility of the witnesses in a situation where there is conflict in the testimony. In Corbet v. Corbet, 24 Utah 2d 237, 472 P.2d 430, (1970), the court stated:

> "We recognize the correctness of the defendants assertion that under § 9 of Article VIII, Utah Constitution, this court may review the facts in equity cases. Nevertheless, it is well established that we make allowance for the advantaged position of the trial judge in close proximity to the parties and the witnesses; and we do not disturb his findings and judgement merely because we might have viewed the matter differently, but would do so only if it appeared that the evidence clearly preponderates against them, or that he has so abused his discretion or misapplied the law, that an injustice has resulted. 472 P.2d at 432, 433

See also Greener v. Greener, 116 Utah 571, 212 P.2d 194 (1949), and Reimann v. Baum, 115 Utah 147, 203 P.2d 387 (1949),

As is already obvious from the statement of facts there are several places in the record of this case where there is a conflict in the testimony. It is especially important to note that there is a conflict as to whether defendant made certain representations that the arrearages of alimony and child support as an obligation of Mr. Ross were relieved or forgiven. The trial court apparently chose to believe the testimony of Mrs. Ross after observing her demeanor and determining her credibility as compared to Mr. Ross.

B.

An Application of the Doctrine of Equitable Estoppel Requires Representations from Defendant to Release or Forgive Arrearages which were not Present in the Instant Case

1. The Applicable Law and Defendants Conduct

The other briefs filed in this case note that the elements of estoppel generally include some action on the part of one party to induce another into a position where he suffers some substantial detriment or damage. J.P. Koch, Inc. v. J.C.Penny Co, Inc., 534 P.2d 903 (Utah 1975), Larsen v. Larsen, 5, Utah 2d. 224, 300 P.2d 596 (1956), Baggs v. Anderson, 528 P.2d 141, (Utah 1974). Plaintiff's application of the estoppel doctrine to the facts of the instant case seems to

depend entirely on the case of Larsen v. Larsen, supra. The most that can be said about that case, however, is that the language in "dictum" required certain "representations" or actions on the part of the former wife which would induce the former husband not to pay the arrearages and change his position to his detriment. It should be observed, however, that Larsen was not a definitive holding for or against either party but a remand to the trial court for further findings on the issues of estoppel and laches.

The remand of the case and subsequent Utah cases reveal that the facts as found in the instant case are not the kind of "representations" sufficient and necessary to invoke the doctrine of estoppel.

The facts in Larsen itself can be clearly distinguished from those herein. In Larsen the former wife brought an acti to enforce back-payments and arrearages against the former husband covering a period from 1946 to the filing of the acti in July 1955. The former husband alleged and testified that had attempted to make payments of child support as required b the divorce decree but that such payments had been refused by former wife and she allegedly told him that all she wanted from her former husband is that he should refrain from trying see her or the child. The first representation from the former wife apparently came when Mr. Larsen approached her a

to what his responsibilities would be to the child if he decided to go on a mission for his church and she allegedly told him that she would not require him to pay for the child while he was on the mission. Mr. Larsen further testified that he telephoned his former wife a few years later upon his return from the mission and was told that he was not to interfere with their lives. Additional facts include that the former wife married and her new husband was providing support for the child, and that based on the representations of the former wife Mr. Larsen also remarried and took on other obligations with a new family. The lower court failed to make findings on the issue of estoppel and entered a judgement for the plaintiff and as already noted the Supreme Court remanded.

In plaintiff's brief it is not mentioned that upon remand the trial court held that the doctrine of estoppel applied to only part of the past-due arrearages in child support but that the former husband was still obligated for a five year period, 1950-1955, and that the equitable doctrines did not apply for the last five years. Mr. Larsen once again appealed to the Supreme Court, which affirmed the trial court in the case of Larsen v. Larsen, 9 Utah 2d 160, 340 P.2d 421 (1959). This latest opinion from the court is very brief and does not indicate which of the facts as they were revealed in the first opinion supported the finding that the doctrine of estoppel applied to the first three years but not the last five years

of the divorce period.

Plaintiff's reliance on Larsen should encompass the fin result before a proper comparison to the facts of the instan case can be made. In Larsen there were fairly clear "repres tations" which are not found in the instant case or were at least not accepted by the trial court. (Finding of Fact No. The former wifes statements and requests in Larsen that Mr. L leave them alone is quite a bit different from the hopeless condition of Mrs. Ross herein, who was left alone with the children one day after the final divorce hearing. Mr. Ross l California to hide out in Dallas, Texas and took on an alias assumed name to be certain that no one could find him. (T. 9, 82,155) Of course because of the final result in Larsen the same kind of "representations" would not necessarily be suffi cient to support the doctrine of "estoppel", even assuming th were present herein.

Further, the Larsen case must be examined in light of later opinions from the Supreme Court that have cited and/or distinguished Larsen. In Hall v. Hall, supra, the former wi left the State of Utah not too long after being awarded chi support from a divorce decree. Evidence at the trial revealed defendant tried to deliver support money to plaintiff but co not contact her even by a private detective. The court noted that, "it must be conceded that plaintiff kept herself pretty much beyond reach."

The trial court granted judgement to defendant for the

back payments owed by defendant in Hall, and the former husband appealed relying on the first Larsen v. Larsen opinion as grounds for overturning the ruling of the lower court. The Supreme Court affirmed the trial court and apparently limited the Larsen opinion to the requirement that the wife give certain "representations" that the husband will not be obligated for the back-payments. The court stated:

> "Plaintiff stated 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 that time. Here any similarity to the Larsen case disappears. Such statement does not reflect any representation to defendant that he would not be held accountable for the support money, as was the basis of the Larsen decision." (Emphasis added) 326 P.2d at 709.

A similar case to Hall is McClure v. Dowell, 15 Utah 2d 324, 392 P.2d 624 (1964), wherein the defendant made regular payments based on an Alabama divorce decree but could not make the payments for two years solely because the plaintiff concealed herself and the children due partly to a trip to Europe. The trial court awarded the past-due child support and defendant appealed saying he was relieved of such payments relying on the first Larsen v. Larsen case. The Supreme Court affirmed the lower court indicating that they did not think the Larsen case appropo, and noted defendant should have sought relief in the Alabama forum. 392 P.2d at 625.

Plaintiff in his brief argues that the overall conduct

of Mrs. Ross together with plaintiff's testimony concerning the alleged understanding between plaintiff and defendant as to back child support is enough to apply the doctrine of "estoppel" to the instant case. However, the actions of the former wives in both Hall and McClure seem far more aggregio than any actions or conduct of defendant in the instant case. For example plaintiff emphasises over and over again in his brief that defendant did not contact any State Officials when she was aware of plaintiff's address and he points further to her conduct in never having filed an action earlier to enforc the arrearages or never having lodged any formal protest or complaint. Certainly, however, defendant never did conceal herself from plaintiff as in Hall and McClure, but on the contrary it was Mr. Ross who hid himself from Mrs. Ross for a period of almost two years. Mr. Ross did not have the righ to believe he was relieved of any support obligations in the instant case merely because Mrs. Ross did not file an earlier action or report his whereabouts to the State of Utah. Plain tiff's only relief as suggested in McClure , was to modify th California decree.

Another important case since the original Larsen opinio is Smith v. Bray, 11 Utah 2d. 217 357 P.2d 189 (1960) wherein the lower court granted a judgement for delinquent support money payments for a period of 8 years to the former wife. I that case the former husband testified that he was requested

to stay away by his former wife and he further testified that he was "led to believe that they did not want anything from him." The former husband appealed the lower courts ruling and again attempted to rely on the first Larsen v. Larsen, opinion. The Supreme Court affirmed the lower court, noting simply that the instant case amply supported the courts finding that there was no "laches or equitable estoppel". It is important to note that there was a conflict in the testimony in that case and that the former husband felt that he was led to believe that the support obligations would not be required of him.

The facts in the instant case are somewhat identical to the facts in Smith. Mr. Ross testified that the general conversations between plaintiff and defendant in the early part of 1973 led him to believe that defendant would not "hassel" him for back alimony and support as long as he took care of the kids. (T. 172-3) This testimony of plaintiff is as firm as he ever becomes in the trial concerning an understanding between plaintiff and defendant that all past alimony and child support obligations were forgiven. Earlier in the trial plaintiff gave the following testimony:

> "Q. (By Mr. Williams) Alright. Now from 1971 through to 1975, Mr. Ross, did you and your former wife ever discuss the amount or the fact that you owed some back payments of alimony and child support?
>
> A. No.

Q: Never discussed that from 1971 to 1975?
A: The conversations we had led me to believe that I did not owe her any back alimony.

Q: I am not asking you that. I am asking did you ever have a conversation with her about the amount that she or that you had an obligfor back-payments of alimony and child support.
A: No.

Q: You never discussed it. O.K. (T. 19)

Although the testimony is somewhat confusing plaintiff admits that the two parties never actually discussed the fact of back payment or arrearages of alimony and child support and from all the testimony given by plaintiff it appears clear that if he was led to believe that he did not owe the back-payments it was not based on any "representation" of Mrs. Ross.

Mrs. Ross' testimony, on the other hand, clearly reveals that the parties never actually discussed back payments and the only time the subject of support was discussed related to whether Mr. Ross was going to pay the amount required of him under the divorce decree and his constant response that he would never pay that amount. (T. 34,67,135) As to whether there was ever a discussion concerning "arrearges" Mrs. Ross testified as follows:

"Q: (By Mr. Williams) In fact you have already testified here today haven't you, that you never did have a conversation about back-payments with the plaintiff until you were living together? Isn't that true?
A: Yes. (see T. 48)

Q: Well, what concessions were you willing to make about back-payemnts at that time (late December 1975 and early January 1976), if any?
A: I wasn't willing to make any concessions. How can you forgive something like that? That's a lot of debt. He owed me a lot of money.

The testimony of Mrs. Ross is credible for many reasons including the fact that one day after the divorce hearing she found herself alone in terms of supporting herself and the children and plaintiff deliberately concealing his whereabouts to defendant until sometime in 1973.

Mrs. Ross further testified that from the time that she first came in contact with Mr. Ross after the divorce until the time that he moved to Salt Lake in February of 1976 that there was never an agreement or understanding between the two parties that he need not pay her any alimony, or that he need not worry about paying more than the $225.00 a month that he was paying since October 1973. (T. 44)

On page 16 of plaintiff's brief he states that defendant was not "truthful" in testimony that she gave earlier in the trial and refers to a dialogue betweem Mr. Sykes and her to prove her alleged inconsistency about conversations between

plaintiff and defendant concerning "back-payments". An obvious reading of the dialogue however reveals that the parties talked only about the future child support Mr. Ross was going to pay and did not relate to "back-payments" at all.

Mrs. Ross does not deny that the parties talked about child support but is very emphatic about the fact that all the conversations related to payments Mr. Ross was going to make in the future. Hence there is never any inconsistency in her testimony. Prior to the conversations referred to, plaintiff had made absolutely no efforts to pay defendant any "alimony" or "child support" and the conversations between the two at that time referred to what Mr. Ross was going to start providing for the children and as Mrs. Ross testifi Mr. Ross was very adamant about the fact that he would never pay the amounts set forth in the decree. (T. 34, 67, 135)

One final decision handed down after the original Larse opinion that is worth noting is French v. Johnson, 16 Utah 2d 358, 401 P.2d 315 (1965). In that case plaintiff brought pro ceedings against defendant to collect back-payments for a ten year period. The lower court relieved the defendant of past payments applying the doctrines of "estoppel" and "laches". The former wife appealed and as noted in the Supreme Courts opinion the case of Larsen v. Larsen was discussed at great length. The Supreme Court reversed the lower court and state

> "The facts show no representation, either explicit or implicit, by plaintiff to defendant with respect to discontinuation of payments, and it is doubtful if such circumstances would be of prime importance. Mere silence over a period of time will not raise an estoppel where there is no legal or moral duty to speak. The court did not condition the payments upon a request for such by plaintiff." (emphasis added) 401 P.2d at 315-316.

In the instant case the lower court undoubtedly chose to believe Mrs. Ross when there was conflicting testimony as to whether certain representations were given. In the absence of representations plaintiff can only point to "mere silence" on the part of defendant and as clearly noted in French Mrs. Ross never had a legal or moral duty to seek after the unpaid amounts as the divorce decree did not award alimony and child support payments contingent upon the request of the former wife.

2. The Effect of the Alleged Reconciliation

Finally it should be considered whether the supposed reconciliation between plaintiff and defendant in February of 1976, resulting in their living together until November of 1976, constitutes enough of an implied representation or understanding that the prior obligations in arrears for alimony and child support would be forgiven or cancelled by defendant. Defendant testified that she never did urge plaintiff to come to Salt Lake City to live with his family again, and in fact was always skeptical about plaintiff's desire to move back in with the

family. (T. 47, 148) Part of defendant's testimony on this point is as follows:

> "Q: Will you please tell us what your reaction was, your feelings were, about Dick Ross moving back to Salt Lake?
> A: I was very skeptical about it. There had been a lot of things happen in the past. I had to struggle and scratch for a long time." (T. 47)

Further Mrs. Ross testified that they did not even start living together as "man and wife" until plaintiff had been living in the Robinson's home for about a month. (T. 14 It is obvious that defendant was willing to try the relation- ship again, but it is also obvious from her testimony that s was not willing to concede and forgive Mr. Ross that easily.

Mrs. Ross had no reason to forgive all of the arrearage merely because plaintiff was going to move back in with the family. For two years Mr. Ross had concealed his whereabout to the family and when he started making payments it was on own terms as he made it very clear to Mrs. Ross that he woul never pay the amount set forth in the decree. (T. 34, 67)

If the alleged reconciliation of the parties is suffic for an application of the doctrine of "estoppel" such holdin would apparently allow a former husband like Mr. Ross to rel a past obligation of many thousands of dollars by a simple g of reconciliation without anything permanent. Under the plaintiff's theory the back-payment obligation would be eras

whether the former husband left the day after the alleged reconciliation or many years later. Of course the reconciliation in the instant case was for a relatively brief period of time.

As further grounds for relieving plaintiff of his obligations under the divorce decree or to further show the need for estoppel he tries to impress this court with the alleged "inequities" dealt to him by the original divorce action, and the gains of Mrs. Ross by the decree. This court has stated before that it will not look to those matters in a case where the wife is seeking a judgement for back-payments in alimony and child support. In Osmus v. Osmus, 114 Utah 216, 198 P.2d 233, (1948), the court stated:

> "The fact that plaintiff received $5,000.00 for the equity in the home did not excuse the defendant from complying with the order of the court. The existence of independent means might be a factor to be considered by the court in fixing alimony or in considering a petition for modification of the decree,... but no discretion is left, to a divorced husband, to determine whether he should or will comply with an alimony decree..." 198 P.2d at 235-236.

C

The Doctrine of Laches is not Applicable to the Instant Case

Although plaintiff states that he is relying on the doctrine of "laches" to justify his failure to pay much of his obligations, he does not cite any authority in his brief for

the application of the doctrine except as it may be intermingled with the doctrine of "estoppel". Defendant has already cited the case of French v. Johnson, supra, wherein the court reversed the lower courts decision to relieve the former husband on the basis of estoppel and laches. A much earlier case that is similar to French is Openshaw v. Openshaw 105 Utah 574, 144 P.2d 528 (1943). In that case defendant had failed to make payments regularly to the court as required under a modification decree and plaintiff filed an application for a judgement covering unpaid installments for a period of 8 years. The lower court granted a judgement for the plaintiff in an amount substantially less than the total amount in arrears partly because the court through its own motion invoked the doctrine of laches on behalf of defendant. The Supreme Court reversed and stated:

> "But mere inaction or delay short of a period of limitations, in the enforcement of payment of an obligation already accrued, without more, is insufficient upon which to predicate laches.
>
> .....
>
> 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 upon which to conclude that she was guilty of laches." 144 P.2d at 530-531.

Whether or not Mrs. Ross harassed or hasseled plaintiff to a great degree during the telephone conversations concerning

support obligations, is irrelevant under the facts and law as applied in Openshaw. Clearly, she is not guilty of "laches".

Further a demand upon the plaintiff for back-payments is even less relevant when he states that he will never pay the amount he was ordered to pay in the decree. (T. 34,67,135) In 24 Am Jur 2d. 865 §758 it is stated:

> "Likewise a demand is not necessary if the party ordered to make the payment asserts that he will never obey the decree."

The court in Openshaw v. Openshaw, supra, recognized that because of the actions of the former husband that it may well have induced the belief upon the part of the wife that efforts to enforce judgement for the past due alimony would be frivolous. Defendant testified that she felt her "protest" would be "hopeless". (T. 135)

As with the doctrine of "estoppel" plaintiff has failed to demonstrate sufficient facts suggesting that defendant was guilty of "laches" and that plaintiff should be therefore relieved from his divorce decree obligations.

D

Plaintiff Has Not Suffered A Legal Detriment

As noted earlier and as fully represented in plaintiff's brief an essential element in applying the doctrines of "estoppel" or "laches" is that there must be some substantial legal detriment suffered by the one relying on the doctrine.

This element was noted in the case of Baggs v. Anderson, supra:

> "An essential requirement is that there must be some conduct of the obligee which reasonably induces the obligor to rely thereon and make some substantial change in his position to his detriment." (emphasis added). 528 P. 2d at 143.

Even assuming that the appropriate actions or representations are present that would indicate the application of the equitable doctrines, plaintiff's reliance therein must fail for lack of sufficient detriment.

Again, an examination of Larsen v. Larsen, supra, is valuable as a comparison to the facts of the instant case, especially since plaintiff places so much relience on the language of that opinion. As already noted Mr. Larsen had been told by his former wife that he need not provide support money, and as a result he gave up his earning capacity for several years to serve a mission for his church. Further upon his return he was given more representations about his need to provide support and he subsequently remarried and undertook other obligations that he would have never undertaken had he known he was obligated for the prior accrued support money.

In the instant case Mr. Ross has not suffered any detriment that is anything like the change of position noted in Larsen, and even if he had such a detriment it may not be sufficient to invoke "estoppel" or "laches" inasmuch as this court found in the second Larsen case that estoppel did not apply for the last 5 years that the defendant had not made

payments.

On page 38 of plaintiff's brief he itemizes several things which supposedly suggest a detriment sufficient to invoke the equitable doctrines of laches and estoppel. Of those noted is the fact that plaintiff quit his job in Dallas, Texas to move to Salt Lake. Mr. Ross testified, however, that prior to moving that he already had a job "lined-up" at Ken Garff's in Salt Lake and that he started to work soon after his arrival. (T. 23, 27) Having a job at approximately the same pay as he was making in Dallas was an important consideration to plaintiff before he decided to come to Salt Lake as was confirmed by Mrs. Ross in her testimony. She stated:

> "A: ... He wanted to check and see what wages were like here and see if he could find a job. So I sent him the yellow pages of the phone book. And we had a few telephone conversations and he found work in Garffs. And the wages he said were the same as what he was making there in Texas, so he moved." (emphasis added). (T. 46)

A comparison of plaintiff's income tax returns of 1975 (while still in Dallas) and 1976 (Salt Lake) reveals an increase in earnings of approximately $4,000 in 1976, (plaintiff's exhibits 10 and 11), but the W-2 forms for 1975 show a total amount of earnings in that year that is somewhat more than the 1975 reported income. (Plaintiff's exhibit 10) The documentary

evidence concerning plaintiff's income is difficult to rely o not only because of the difference in the W-2 forms versus t income tax returns, but also because plaintiff testified tha he has performed work "on the side" that was not reported on his income tax returns. (T.224-225)

The important point is that Mr. Ross himself testified that he thought his earnings in 1975, while in Dallas, were about $12,000.00 (T.27), which would put him slightly under his earnings in 1976. Whatever his actual income, he made certain before his arrival that he had a job lined up that offered similar wages, and plaintiff cannot now claim that he suffered a legal detriment in quitting his job in Dallas, Texas.

Plaintiff lists other items of detriment such as renting a trailer to haul his belongings to Salt Lake, pursuading his friend to drive one of his cars to Salt Lake and buying his friend a one-way ticket back to Dallas. He also includes selling his boat and trailer that he testified he could not bring to Salt Lake, and finally moving away from many of his friends. These particular actions clearly do not reflect the kind of detriment or change in position that would allow the doctrine of "estoppel" to apply. Plaintiff does not allege that he suffered any financial loss or gave up any earnings or obligated himself for any support obligations that he was not already required to make under the California divorce decree. The mere fact that plaintiff sold a home and a boat and traile

in Dallas, Texas suggests that he perhaps had the means to pay more support to defendant and the family than he was contributing.

In addition to the detriment claimed by plaintiff one must examine the benefits derived by plaintiff's move to Salt Lake, which is the major action he ties his detriment to. For example, plaintiff sold a home in Texas that required a monthly payment of $137.00 and upon his arrival in Salt Lake he moved into the Robinson home and over a seven (7) month period paid only $400.00 and in return received living quarters, his meals and all of the benefits attached to the Robinson household. (T. 21-23, 93-94) Plaintiff testified that he paid $100.00 a month to Mr. Robinson but only produced four $100.00 checks at trial, (Plaintiff's exhibit 23), and Fred Robinson who was called as a witness by plaintiff testified that plaintiff never paid him anything over and above the four payments of $100.00 submitted as evidence. (T. 95) These facts are particularly interesting in light of plaintiff's testimony that he now spends approximately $150.00 a month himself for food. (T. 22)

Mr. Ross also claimed as an item of detriment that he purchased a home with defendant in September of 1976 and paid most of the down payment of $5,000.00. The very fact that the home was not purchased until September of 1976 and that plaintiff had arrived in Salt Lake some seven months earlier reveals

that this is not the kind of detriment plaintiff can rely on as another element of estoppel, assuming that there was some type of representation or some type of understanding necessary for the other element of "estoppel" or "laches" before the arrival to Salt Lake. Further the home that was purchased was not a gift to defendant, which might be cl to a legal detriment, but was a home for both parties and their children, even though plaintiff did not last long in the home as he was there for approximately two months. (T. 4

Further, plaintiff, testified over and over again at trial that he considered the home as entirely his own and th defendant did not have any interest therein (T. 25-26,175), a he even brought a "quiet title action" to remove defendant from the premises. (T. 182) It is interesting that plaintif should consider the purchase of the home as a detriment whil at the same time becoming very adamant as to the ownership rights therein. Certainly if everything worked out the way Mr. Ross intended, the purchase of the home would be a substantial benefit and gain to him under the market conditions as they existed then and now.

Finally, plaintiff attempts to demonstrate a "detrimen by noting that he paid a personal judgement of defendant. (Plaintiff's brief p. 38). It must be pointed out that this cannot be considered a "detriment" as required for the appli cation of the doctrine of laches and estoppel as he is incurr

no further obligations to defendant over and above that which he already had. The payment of the personal judgement in the amount of $700.00 is only a very small item when compared to the amount of money he had not paid prior to that time in child support and alimony. Interestingly enough plaintiff also claims this payment on the judgement as satisfaction of alimony and/or child support which further verifies the inapplicability of this payment for a "detriment". There is no evidence in the record that defendant agreed to accept the foregoing payment as satisfaction of support obligations.

E

Alleged Agreement Between Plaintiff and Recovery Services Did Not Constitute Estoppel and/or Laches

Defendant agrees with the State of Utah that the doctrines of estoppel and laches are not supported by any alleged agreements between Mr. Theodore Zambos of the Bureau of Recovery Services and Richard Ross. For the sake of avoiding repetition defendant accepts and supports the arguments and points noted by the State of Utah in its brief in support of the overall position that the equitable doctrines cannot be applied from the facts relating to the contacts between Mr. Ross and Mr. Zambos.

Among those points that will be emphasised in the States brief and of which defendant fully supports and agrees with are the following:

1. The assignment given the State by Mrs. Ross was not of unlimited scope but was one restricted in nature and not authorize the compromise of "all claims".

2. Notwithstanding the interpretation of the State's authority under the assignment, there was no agreement expre or implied whereby the State waived its own or Mrs. Ross' arrearages.

3. The court did not error in allowing testimony o Mr. Zambos on cross-examination as to his procedure as an investigator.

Defendant wishes now to only comment about the probable interpretation of the telephone conversations wherein plaintiff claims that there was an agreement with Mr. Zambos to relieve all "past" alimony and child support obligations belonging to Mrs. Ross. Plaintiff has cited verbatim the testimony of Mr. Ross on page 29 and 30 of his brief and the State of Utah adequately discusses the probable interpreations of this conversation in its brief. However, it cannot be over-emphasi that the statements allegedly made by Mr. Zambos to Mr. Ross do not necessarily relieve plaintiff of all past-due obligatio under the divorce decree. The following testimony should aga be examined as given by plaintiff:

> "Q: (By Mr. Sykes) Did Mr. Zambos say with respect -- or was there any conversation at all, any mention of the past-due payments, that the

department had paid?
A: I had asked if I owed anything from what I had already paid her, and he said, No.

Q: That was it?
A: Yeah. Otherwise, I could make payments.

Q: Did he say anything about the amounts accrued prior to the time she went on welfare?
A: No. (T. 164)

The testimony cited above is not inconsistent with the interpretation that plaintiff certainly did not owe anything from what he and already "paid" Mrs. Ross and that Mr. Zambos did not specifically tell Mr. Ross that he was relieved of obligations during the time that she was not on welfare.

Plaintiff's exhibit 16, which is referred to by plaintiff as confirmation of the above mentioned telephone conversation does in no way refer to the "arrearages" of alimony and child support and in fact there is no mention in the exhibit at all concerning "alimony".

Defendant submits that the more logical interpretation of the contact between Mr. Zambos and Mr. Ross is that the State of Utah was arranging with Mr. Ross future payments while Mrs. Ross was on welfare.

POINT II

ANY AGREEMENTS BETWEEN THE PARTIES AND/OR THEIR AGENTS TO MODIFY FUTURE CHILD SUPPORT MUST FAIL FOR LACK OF CONSIDERATION AND FOR REASONS OF PUBLIC POLICY.

Plaintiff alleges that there were certain "agreements" that relieved him of his future obligation to pay the total amount as required by the 1971 California divorce decree. It is first of all claimed that plaintiff and defendant durin the telephone conversations from October 1972 to February 19 and in the Febraury 1973 visit to Salt Lake, agreed or had a understanding to the effect that defendant would not consider plaintiff liable to pay the full amount under the divorce decree if he would simply start paying support for the childre (Plaintiff's brief p. 14) The testimony used to support thes claims is of course chiefly that of plaintiff and the statem he claims were made by defendant are not altogether clear abo what if any obligation plaintiff is relieved of. (T. 15-17) Further there were apparently other telephone conversations claimed by plaintiff in the summer and fall of 1973, December 1975, January 1976, and at various times thereafter that allegedly relieved plaintiff of the total obligations of the divorce decree for the present and future support payments fo the children. (T. 19, 159,160-1, 164-5, 172) Mrs. Ross denie that she ever gave Mr. Ross authority to pay less than the $450.00 per month required by the decree.

One additional alleged agreement that plaintiff relies on a great deal in his brief is the one allegedly made by plaintiff with Mr. Theodore Zambos of the Bureau of Recovery Services of the State of Utah. Mr. Ross claims that he telephoned Mr. Zambos and they "agreed" over the telephone that if he paid $225.00 a month for child support that would be his only obligation for the past and future. (T. 30-31) As already noted in this brief the alleged statements made by Mr. Zambos as testified to by Mr. Ross do not relate to the past obligations but to the future. (T. 30-31) Plaintiff also claims that this conversation and agreement was reaffirmed in a letter sent by Mr. Zambos to Mr. Ross on October 4, 1973. (Plaintiff's exhibit 16)

Plaintiff further alleges that Mr. Zambos had the authority to enter into this agreement with Mr. Ross because Mr. Zambos was acting as the agent of defendant having received an "assignment of collection of support payments" from Mrs. Ross in October of 1972. (Plaintiff's exhibit 4, Plaintiff's brief 27-28)

There should be no question that the agreement allegedly entered into in October of 1973 between plaintiff and Mr. Zambos and the alleged agreements between plaintiff and defendant at various times pertain in some degree to a "modification" of future child support. Plaintiff had an obligation under the 1971 divorce decree to pay $100.00 a month for each of the three children and he has never, since the divorce, paid to

defendant or to the State of Utah on her behalf more than $225.00 - $232.00 per month.

A well settled principle of Utah law is that the former husband and wife may not agree to modify child support obligations of the father as established in the court decree. This principle was made clear in the much discussed case of Larsen v. Larsen, 5 Utah 2d. 224, 300 P.2d 596 (1956):

> "In Price v. Price,4 Utah 2d. 153, 289 P.2d 1044, we held that because the State is interested in the childs welfare the parents cannot effectively release future payments of support money by agreeing with the other to that effect." 300 P.2d at 598.

This principle is very clearly related in Baggs v. Anderson, supra, with facts that are apparently quite similar to the situation as alleged by plaintiff in the instant case. In Baggs the parties were divorced in Wyoming on June 24, 1970, wherein the plaintiff was awarded $200.00 a month for child support. Defendant made payments through September of 1971 but missed the October 1971 payment. Apparently after several phone calls and conversations plaintiff and defendant executed a written agreement on November 1, 1971 that if, "the defendant would pay the October and November payments, (total $400.00 which he then paid) and promised to make the $200.00 payment for December ($100.00 of which he later paid) he would be relieved from the payment of any further support money."

In July of 1972, an action was brought to enforce all of the accrued unpaid child support by the former wife, and the trial court granted a judgement to plaintiff excepting therefrom the amount accruing for half of December 1971 to July 1972 applying the doctrine of "estoppel". The Supreme Court reversed the lower court and indicated that the doctrine of estoppel could not be applied to relieve plaintiff of "future" child support obligations. The court stated:

> "From an examination of the facts here it will be seen that the defendants claim of estoppel relates to the first situation stated above: the right to receive current and future child support. This claim is based primarily on the agreement signed by the parties on November 1, 1971, and statements of the plaintiff and Mr. Baggs which defendant avers had the effect of excusing him from paying future payments of child support. This court has heretofore had occasion to deal with that problem; and has held that the right to receive current and future money belongs to the minor children; and that it is not subject to being bartered away, or estopped, or in any way defeated by the conduct of the parents or others.
>
> .....
>
> ..... We further observe that there are other obstacles to the invocation of that doctrine. A serious one is that we cannot see wherein the defendant gave any consideration for the claimed agreement that he would not have to pay any future support money. That is, he neither gave anything of value, nor suffered any legal detriment for that promise. Under the decree he was already obligated to make the payments of $200.00 a month. Such an agreement to do that which one is already required to do does not constitute consideration for a new promise." (emphasis added) 528 P.2d at 143.

The courts opinion in Baggs makes it quite clear that plaintiff in the instant case cannot enter into an agreement to "modify" any future child support obligations because, (1) it is a violation of public policy, and,(2) must fail because the lack of consideration given. Even if the court finds that some back payments or arrearages were somehow erased, it is clear that Mr. Ross would still be obligated for $300.00 a month child support from the period that the alleged agreement took place. Therefore, his payments from that period were deficient.

POINT III

PLAINTIFF CANNOT SUBSTITUTE BENEFITS TO THE CHILDREN OR THE DEFENDANT IN SATISFACTION OF SUPPORT OBLIGATIONS UNDER THE DIVORCE DECREE.

A

The Applicable Law and Alleged Benefits Conferred Generally

Plaintiff claims that as a matter of equity he should be given credit for many benefits, gifts and contributions made to defendant and to the children over the seven year period since the divorce, that were not payments made as required by the divorce decree to defendant herself. As observed in plaintiff's brief this court has held that a father and former husband may not substitute benefits for the obligations imposed by the

divorce decree. Harris v. Harris, 14 Utah 2d 96, 377 P.2d 1007 (1963), Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1010 (1974). In this respect Utah has apparently followed the majority rule as noted in 47 A.L.R 3d 1031, 1035:

> "..... It can be generally stated that most cases have gravitated towards the view that a father should not be allowed, as a matter of law, credit for expenditures made while the child is in his custody or for other voluntary payments made on behalf of the child which do not specifically conform to the terms of the decree."

In Harris v. Harris, supra, the trial court found the defendant, former husband, in contempt of court for wilful failure and refusal to abide by the order of the divorce decree for the payment of the support money for the minor children. The decree required defendant to pay $100.00 per month as support. Defendant contended that he was in substantial compliance with the court order as he was paying approximately $50.00 a month as support, and in addition he was spending $10.00 a month on the children and carrying certain medical insurance which covered the medical expenses of the children. He was also allowing plaintiff the right to claim the children as dependants on her income tax returns. In regard to this position claimed by defendant the court stated:

> "We must agree with plaintiff that the decree did not authorize the defendant to substitute benefits to the children for the support payment ordered by the decree, and we believe that the trial

> courts conclusion that defendant should be held in contempt is supported by the law and evidence." (emphasis added) 377 P.2d at 1009.

In Stanton v. Stanton, supra, the court stated that the defendant could not "unilaterally" decide that "he would not pay the support money and offset it by favors conferred upon the children." 517 P.2d at 1014

Defendant suggests that the language in Stanton would require not only a mere "consent" from the divorced wife, as suggested by plaintiff, but a firm "bilateral agreement" that the benefits conferred by plaintiff can be used as a substitution of the payments required by the divorce decree, and even then it is not certain whether the dictum in the Stan opinion would relieve the husband as there does not appear to be a case decided in Utah where benefits have been held to be satisfaction for the support obligations.

In any case the facts here do not reveal a bilateral understanding between plaintiff and defendant to substitute an of the benefits claimed by plaintiff as satisfaction of the divorce decree. The items of benefit referred by plaintiff will be discussed in the order they appear in defendants exhibi 2, or as otherwise indicated below. With respect to all of the items mentioned there is no evidence in the record that an of the benefits conferred were agreed or consented to by defen- dant to be used as satisfaction or in substitution of plaintiff obligation under the decree.

Money Sent to Mrs. McKendrick

The payments allegedly sent by plaintiff to his mother in California while plaintiff was hiding out in Dallas, Texas cannot be considered satisfaction of the decree. These payments are itemized in part in defendant's exhibit 2, schedule A. Although plaintiff's mother testified that she used all of the amounts sent to her by her son for the benefit of the children (T. 82-87), Mrs. Ross denied ever receiving anything from palintiff's parents for the benefit of the children except the usual gifts that grandparents give to grandchildren, such as on birthdays and Christmas. (15, 59)

Even assuming all of the money was used for the benefit of the children, of which there is no documentary evidence to support, there is absolutely no evidence in the record that Mrs. Ross in any way agreed to consented to accept the benefits and gifts given to the children bu plaintiff's mother as substitution of the obligations imposed on palintiff in the divorce decree. Mrs. McKendrick, the plaintiff's mother testified that she never did give any money directly in the form of cash to defendant (T. 91), and there is no testimony in the record that plaintiff's mother ever told Mrs. Ross that the alleged benefits conferred were from money supplied by plaintiff.

Checks in Schedule B of Exhibit 2

Defendant has no quarrel with the fact that most of the checks itemized on Schedule B, can be used as satisfaction of the support obligations of plaintiff and have in fact been given credit by the court as admitted to by defendant. However the one check listed to American Airlines and dated June 26, 1973 should not be considered as substitution for the support obligations in the decree, and apparently was not considered by the lower court. Plaintiff explained that this money was used for the time he flew his children down to Texas to spend two weeks with him. (T. 15)

Checks in Schedule C of Exhibit 2

It is interesting to observe that plaintiff claims the $400.00 paid to defendants father, Fred Robinson over a seven month period as satisfaction of support obligations. This money was paid during the time that plaintiff was receiving a rent free home in which to live by the Robinsons, as well as free meals. (T. 21-22.46-48)

Checks in Schedule D of Exhibit 2

All of the checks written on Schedule D relate to the period of time during which plaintiff and defendant were living together with the children. Plaintiff would like the court to believe that the total amount listed on that schedule repre

sents amounts from out of his own pocket and reasonably should be used as substitution of the alimony obligations. However, defendant made it very clear in her testimony that during much of this period of time plaintiff and defendant had a joint checking account and during the rest of the time period Mrs. Ross would simply give to Mr. Ross the money she received from her own employment and he would deposit this money into the account in his name for the overall expenses of the two parties. (T. 49, 145-146)

Checks in Schedule E of Exhibit 2

As in schedule D, most of the checks in Schedule E relate to the period of time that the parties were living together either with the Robinsons or in their own home. The fact that the checks were paid out of the joint funds of the parties applies at least until December 1976.

Checks in Schedule F of Exhibit 2

Plaintiff lists in this schedule payments to various utilities and attempts therein to show a satisfaction of child support obligations. Plaintiff admitted in testimony that he himself took advantage of the natural gas, the garbage collection and the electricity during the time these checks were paid and admitted that therefore much of this money must be considered for his own support. (T. 175) Furthermore, the checks were again paid at the time when the parties mingled their individual sums.

Payments on House

Plaintiff claims satisfaction of the divorce decree obligations by the monthly mortgage payments and other payments in Schedule G. relating to the home purchased jointly by the parties in September of 1976. Plaintiff testified adamantly that he has always considered the home that was jointly purchased by the parties as his home and therefore considered defendant to have no interest therein even though she paid approximately $700.00 towards the down payment and the deed shows her as a lawful joint-tenant of the property. (T.24, 175) Plaintiff also testified that even though he wants to claim the mortgage payments as satisfaction of support obligations he was not willing to allow defendant the opportunity to deduct from her income tax the interest paid on the mortgage payments (T. 26), and was never willing to concede any interest in the home to defendant, and in fact brought a quite title action to remove her from possession of the home. (T. 182) This testimony reflects the inconsistency in plaintiff's testimony and the general lack of welfare or concern toward defendant that plaintiff exhibited. If the mortgage payments and other house payments were in substitution of the amounts required in the decree, plaintiff should have considered the house payments to be made by defendant.

Furthermore, all of the house payments represented a benefit to plaintiff assuming everything worked out as he planned,

because any payment toward the home would have to be considered an investment by him with very little risk.

Plaintiff paid an additional $5,000.00 toward the down payment of the home and this item will be discussed in detail in Point IV of defendant's brief.

Again it should be mentioned that with respect to all of the items mentioned above there is no evidence that defendant agreed or consented to accept them as "satisfaction" assuming any of them are from plaintiff's own money.

B

Trial Court Did Not Accept Plaintiffs Position on Satisfaction

The trial court in the instant case apparently was not willing to accept all of the aforementioned "benefits" as satisfaction of the support obligations. The decision of the trial court is amply supported by the very recent Utah Supreme Court decision of Ciraulo v. Ciraulo, 576 P. 2d 884 (Utah 1978). The facts of that case are strikingly similar to the ones in the instant case and reveal that some two years after the Ciraulo's were divorced they began living together in Salt Lake and this period of reconciliation lasted for approximately five months. They again reunited in the early part of 1971 and continued to live together as a family until January 1974. Plaintiff's version of the evidence was that the amount of support money unpaid by the defendant was $13,250.00, which undoubtedly related to periods of time that the parties lived

together. Defendant on the other hand, claimed that during the three-plus years they lived together he spent approximate $30,000.00 for the support of the plaintiff and his children. The court in following the trial court did not adopt the defe dants claim for satisfaction. The opinion states:

> "His claim is based on his own testimony as to his income during that period and on his assumption that it was all paid for support of the plaintiff and the children. The difficulty with the defendant's argument is that the trial court was not persuaded to accept his position, nor his version of the evidence. Anyone who has any acquaintence with family living will empathise with the view of the trial court that the defendants position is impractical and unrealistic." (emphasis added) 576 P.2d at 886.

The Supreme Court affirmed the trial court in granting the equity in a home purchased by the two parties in lieu of judgement for back payments in the total amount claimed. In the instant case the trial court correctly refused to accept many of plaintiff's claims for satisfaction undoubtedly becaus of the uncertainty of the amounts as having been actually give from out of plaintiff's own money, and because of the failure of these claims to apply to Utah law.

C

Plaintiff Should Not be Relieved from the Divorce Decree Obligations during the Time that the Parties Lived Together

Plaintiff raises for the first time on appeal the point that he should be relieved of any formal child support and al

obligations of the divorce decree, from February through November of 1976 while the parties lived together, Plaintiff did not seek credit for the entire amount during that period at the trial court level but instead attempted to show some satisfaction of the obligations by the various checks introduced at the trial. The court has reiterated on numerous occasions that it cannot pass on matters raised for the first time on appeal. See for example, Simpson v. General Motors Corporation, 24 Utah 2d. 301, 470 P.2d 399, 401 (1970)

Apart from failure of plaintiff to raise this point in the lower court plaintiff is probably not entitled to the benefit of this claim by reason of Utah law. Although it is not known whether this identical point was raised by defendant in Ciraulo v. Ciraulo, supra, clearly the court did not credit amounts for the period of time the parties in that case lived together.

Further, the case of Stanton v. Stanton, supra, is relevant to this issue as the defendant and father therein was claiming relief from the $100.00 a month obligation that he owed for child support during the period that his son was living with him for three months. The court in Stanton required defendant to pay the $300.00 to plaintiff even though he had paid the expenses of the child while living with him during the three month period. Defendant sees no reason why the instant case be considered any differently.

If the court is inclined to relive plaintiff of obligations simply because the parties apparently reconciled and lived together, defendant submits that the relief should not be afforded during the period that plaintiff and defendant resided in the home with defendants parents, the Robinsons. For the most part during that period of February through September of 1976 the expenses for the home and the meals were paid by Mr. Robinson, with plaintiff's overall contribution of $400.00 and defendants contribution of approximately $1,40 (T. 21, 46-48, 95)

POINT IV

THE TRIAL COURT ERRED IN REDUCING PLAINTIFF'S ALIMONY OBLIGATIONS TO DEFENDANT IN THE AMOUNT OF $5,000.00 REPRESENTING AN AMOUNT PAID BY PLAINTIFF TOWARD A DOWN PAYMENT OF A HOME.

Defendant's Cross-Appeal is not based on any part of the modification proceedings regardless of what plaintiff states in his brief. The cross-appeal is based only on the question of law as to whether plaintiff should be given credit for $5,000 toward alimony as he paid approximately that amount towards a down payment of a home purchased by the parties in September 1976. (Conclusion of law No. 5) Defendant fails to see why the particular payment should be considered any differently than the other payments claimed as satisfaction that were not granted by the trial court.

It should again be observed that plaintiff has considered from the very begining that the home purchased by the parties was his own home and merely a place for the defendant and the children to reside for a period of time, and without giving defendant any interest in the home. (T. 24,-26, 175) It has always been plaintiff's intention therefore, to fully recoup his $5,000.00 payment and to gain whatever equity would accrue as a result of that investment. At the same time that plaintiff filed the instant action to modify the divorce decree he filed the quiet title action already referred to in this brief to remove defendant from possession and any interest in the home. Nothing in the trial courts order provided defendant directly with the use and or ownership of the home.

Furthermore, there is again no evidence that defendant agreed or consented to allow the $5,000.00 payment to be considered satisfaction of the alimony obligations and because palintiff cannot unilaterally confer benefits to the defendant, if indeed this is a benefit, as a substitution for the divorce decree obligations, the court clearly committed error and abused its discretion by allowing this credit to plaintiff.

CONCLUSION

Defendant, Mrs. Ross, contends that the trial courts decision granting her judgement against plaintiff for arrearages in child support and alimony should be affirmed by this court.

Plaintiff has not met his burden in establishing that the doctrines of "equitable estoppel" and/or "laches" apply in the instant case to relieve him from the obligations of the divorce decree. The trial court held and the prepondenrance of the evidence revealed the fact, (1) there were never any "representations" on the part of defendant to relieve or forgi the arrearages. and (2) plaintiff has not suffered a sufficie and substantial detriment to rely on the equitable doctrines.

Further it is clear that plaintiff cannot rely on any alleged agreements entered into between plaintiff and defenda or plaintiff and a representative of defendant through the St of Utah to relieve him from "future support obligations", a such agreements are void for reasons of public policy and fai for lack of consideration.

The trial court did not commit error in refusing to all many items claimed as satisfaction of the divorce decree obli gations of plaintiff inasmuch as the law in the State of Utah does not allow a substitution of benefits or "unilateral" pay to satisfy the divorce decree obligations, and plaintiff did n meet his burden in establishing that said payments were actual made by him.

Finally it is defendants position that the trial court d commit error in allowing a credit towards the payment of alim in the amount of $5,000.00 representing the amount plaintiff p toward the down payment of a home purchased by the parties in

September of 1976.

Respectfully submitted,

STRONG & HANNI

By R. Scott Williams
R.SCOTT WILLIAMS
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MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies of the foregoing Brief to Robert B. Sykes, Attorney for Plaintiff-Appellant, 320 South 300 East, Suite 2, Salt Lake City, Utah 84111 and Steven G. Schwendiman, Attorney for Utah State Department of Social Services, 150 West North Temple, Salt Lake City, Utah 84103, this 20th day of November, 1978.

R. Scott Williams