

2000

Laura Thompson v. Brent Thompson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LAURA THOMPSON,	:	
	:	
Petitioner/Appellant,	:	
	:	
vs.	:	Appeals Case No. 20000677CA
	:	
BRENT THOMPSON,	:	District Civil No. 814901295
	:	
Respondent/Appellee.	:	

Priority No. 15

APPELLANT'S BRIEF

Appeal from Judgment of the Third Judicial District Court
Of Salt Lake County, State of Utah
The Honorable Homer F. Wilkinson
Third District Court Judge

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
STATUTES DETERMINATIVE OR CENTRAL TO THE APPEAL	3
STATEMENT OF THE CASE	4
Nature of the Case	4
Course of Proceedings	4
Disposition in Court Below	7
STATEMENT OF FACTS	8
SUMMARY OF ARGUMENTS	10
ARGUMENT	11
Point One	
THE DISTRICT COURT ERRED IN REJECTING THE COMMISSIONER'S RECOMMENDED DECISION GRANTING THE PETITIONER'S MOTION FOR JUDGMENT	11
A. Introduction	11

B.	The Doctrine Of Equitable Estoppel is Inapplicable In Cases Where A Valid Support Order Exists	15
C.	The District Court Erred In Finding That Respondent Proved The Elements Of Equitable Estoppel Assuming The Doctrine Were Available	19
D.	The District Court Erred In Calculating The Judgment Assuming The Doctrine Of Equitable Estoppel Was Available And That The Respondent Proved Its Elements	23

Point Two

THE PETITIONER SHOULD BE AWARDED HER ATTORNEY'S FEES AND COSTS BELOW AND ON APPEAL	24
CONCLUSION AND RELIEF SOUGHT	25
ADDENDUM	26, 28
CERTIFICATE OF SERVICE	27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Baggs v. Anderson</u> , 528 P.2d 141, 144 (Utah 1974)	23
<u>Ball v. Peterson</u> , 912 P.2d 1006 (Ut. App. 1996)	16
<u>Brinkerhoff v. Brinkerhoff</u> , 945 P.2d 113 (Ut. App. 1997)	16
<u>Brooks v. Brooks</u> , 881 P.2d 955 (Ut. App. 1994)	16
<u>Childs v. Childs</u> , 867 P.2d 942 (Utah Ct. App. 1998) <u>cert. den.</u> 982 P.2d 88 (1999)	3, 25
<u>Cummings v. Cummings</u> , 821 P.2d 472 (Ut. App. 1991)	16, 21
<u>Dent v. Dent</u> , 870 P.2d 280, 282 (Utah Ct. App. 1994)	1, 2, 15
<u>Karren v. State Department of Social Services</u> , 716 P.2d 810 (Utah 1986)	16, 17, 18, 21
<u>Larsen v. Larsen</u> , 561 P.2d 1077 (1977)	18
<u>Marshall v. Marshall</u> , 915 P.2d 508 (Ut. App. 1996)	25

<u>Stettler v. Stettler</u> , 713 P.2d 699 (Utah 1985)	16, 21
<u>State Department of Human Services v. Irizarry</u> , 945 P.2d 676, 678 (1997)	2, 20, 22
<u>Whitehead v. Whitehead</u> , 836 P.2d 814 (Ut. App. Ct. 1992)	16

STATUTES

Section 30-3-10.6 U.C.A. (1953)	3, 15, 16, 18, 19
Section 78-2a-3(h) U.C.A. (1953), as amended	1
Rules 3 and 4 – Utah Rules of Appellate Procedure	1

JURISDICTION

Jurisdiction exists over this matter pursuant to Rules 3 and 4 of the Utah Rules Of Appellate Procedure and Section 78-2a-3(h) U.C.A. (1953), as amended. This is an appeal from an Amended Judgment & Order entered June 13, 2000, granting the Respondent's Objection To Commissioner's Recommendation entered on September 30, 1998. The Petitioner's Notice Of Appeal was filed on July 7, 2000.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred by rejecting the Commissioner's recommended Judgment & Order granting the Petitioner's Motion For Judgment. This issue is reviewed for correctness and given no deference on appeal. Dent v. Dent, 870 P.2d 280, 282 (Utah Ct. App. 1994). This issue was briefed and preserved before both the Commissioner and the District Court. (R. 486, 527, and 534).
2. Whether the District Court erred by holding that the doctrine of equitable estoppel was applicable in cases where a valid child support order existed. This is a question that this Court reviews

for correctness. Dent v. Dent, 870 P.2d 280, 282 (Utah Ct. App. 1994). This issue was briefed and preserved before both the Commissioner and the District Court. (R. 486, 527, and 534).

3. Whether the District Court erred in finding that the Respondent proved the elements of equitable estoppel assuming the doctrine was applicable. The question of whether equitable estoppel was proved is a mixed question of fact and law. State Department Of Human Services v. Irizarry, 945 P.2d 676, 678 (1997). This issue was briefed and preserved before both the Commissioner and the District Court. (R. 486, 527, and 534).

4. Whether the District Court erred in calculating the judgment due Petitioner assuming the doctrine of equitable estoppel was applicable and the Respondent proved its elements. The question of whether equitable estoppel was proved is a mixed question of fact and law. State Department Of Human Services v. Irizarry, 945 P.2d 676, 678 (1997). This issue was preserved before the District Court. (R. 560, 566, 577, 580, 568).

5. Is the Petitioner entitled to additional fees and costs incurred below after the Respondent objected to the Commissioner's

recommendation and entitled to attorney's fees and costs on appeal?

This issue is a question of law for the Appellate Court to consider.

Childs v. Childs, 867 P.2d 942 (Utah Ct. App. 1998), cert. den. 982

P.2d 88 (1999). The issue of attorney's fees for legal work before the

Trial Court was briefed and preserved before the Commissioner and

the District Court. (R. 486, 527, and 534).

STATUTES DETERMINATIVE OR CENTRAL TO THE APPEAL

Section 30-3-10.6 U.C.A. (1953) provides:

"(1) Each payment or installment of child or spousal support under any child support order, as defined by Section 62A-11-401, is, on and after the date it is due:

- (a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);
- (b) entitled, as a judgment, to full faith and credit in this and any other jurisdiction; and
- (c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2)

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

(3) For purposes of this section, 'jurisdiction' means a state or political subdivision, a territory or possession of the United States,

the District of Columbia, and the Commonwealth of Puerto Rico.

(4) The judgment provided in Subsection (1)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-312.5”

STATEMENT OF THE CASE

Nature Of The Case. This is an action seeking recovery of past due child support for two children, Kelly and Gentry, and attorney's fees under a decree of divorce entered on March 8, 1982. The Petitioner had actual custody of both children until April 1992, when Gentry started living with the Respondent. Kelly turned 18 on April 19, 1996 and graduated in June, 1996. Gentry turned 18 on November 24, 1997.

Course Of Proceedings. The Petitioner filed a Motion and Order to Show Cause on August 8, 1996, seeking a judgment for past due child support and attorney's fees pursuant to a Decree Of Divorce entered on March 8, 1982. (R. 402). The Respondent responded by denying he was in arrears and asserted the defenses of laches, waiver, and estoppel. (R. 412).

On October 22, 1996, the Respondent filed a Petition To Modify Decree seeking to obtain custody of Gentry, who then resided with him, and corresponding child support. (R. 415). The Petition was served on the Petitioner on November 11, 1996. (R. 420).

Both matters were certified by Commissioner Thomas N. Arnett for evidentiary trial on November 24, 1997. (R. 463). On June 24, 1998, the District Court, Homer F. Wilkinson, remanded the two matters back for a recommended decision by the Commissioner with instructions that the parties proceed by submitting affidavits and supporting memoranda.

On July 23, 1998, the Petitioner filed a Motion For Judgment along with supporting affidavits and memoranda. (R. 484, 486, 502, 507, and 511). The Motion sought the sum of \$24,896.34 for child support arrearages for the period of July, 1988 through July, 1998, and attorney's fees and costs. Commissioner Thomas N. Arnett heard the Petitioner's Motion For Judgment on September 18, 1998. Commissioner Arnett recommended that the Petitioner's Motion For Judgment be granted and recommended that she be awarded

judgment for \$24,896.34 in arrearages, \$2,552.88 in attorney's fees, and \$68.92 in costs. (R. 545).

The Respondent objected to Commissioner Arnett's recommendation on September 30, 1998. (R.527). The Respondent objected to that portion of the judgment that included child support for Gentry while residing with the Respondent. Id. He claimed that Commissioner Arnett should have applied the doctrine of equitable estoppel for the period he had Gentry. He requested that "the matter be returned to the Commissioner for an evidentiary hearing whether Respondent meets the factual criteria for equitable estoppel." (R. 531).

The District Court heard the Respondent's objection on November 6, 1998. The minute entry reflects, "The objection to the recommendation is argued before the court and the same is submitted. The court find (sic) that the objection is well taken and grants the same." (R. 552). On February 9, 1999, the Court entered an order setting aside the judgment and entered a judgment against the Respondent for \$5,970.00. (R. 558). The sum of \$5,970.00 reflects an amount the Respondent conceded was due. (R. 580).

Due to the confusion over the effect of the District Court's ruling, and the issues it included, additional proceedings were held in the form of trial requests and pre-trials. (R.564, 566, 568, 581). On May 8, 2000, the District Court engaged in a telephone conference with counsel and concluded that his decision on November 6, 1998 included all claims of the parties and that a final judgment and order should be entered. (R. 586). A corresponding final judgment and order was entered on June 13, 2000. (R. 586).

Disposition In Court Below. The District Court sustained the Respondent's objection to Commissioner Arnett's recommended judgment of for \$24,896.34 in arrearages, \$2,552.88 in attorney's fees, and \$68.92 in costs. The District Court based its decision on the premise that divorce decree regarding child support could be retroactively adjusted and that the Petitioner was equitably estopped from claiming child support for Gentry while with the Respondent. It entered an Amended Judgment & Order on only the conceded amount due, \$5,970.10, without consideration of any other arguments or claims of the Petitioner. It rejected the Commissioner's recommendation to award fees and costs to the Petitioner.

STATEMENT OF FACTS

The parties were divorced on March 8, 1982. (Decree, R. 50). The Petitioner was awarded custody of the parties' two minor children, Kelly and Gentry. Kelly was born on April 19, 1978, and Gentry was born on November 24, 1979. (Affidavit of Petitioner, Par. 3, R. 502). Paragraph two of the Decree required the Respondent to pay child support in the amount of \$300.00 per month. (Decree, R. 50).

During the period of 1982 to 1988, the Petitioner was required to file numerous Motions for Orders to Show Cause in an effort to compel the Respondent to pay child support. For example, she filed an Order to Show Cause on delinquent support on 4/23/84 (R. 170) that resulted in a judgment of \$1,800.00 on 5/14/84 (R. 217), on 6/10/84 (R. 226) that resulted in a judgment of \$3,000.00 on 8/14/84 (R. 233), on 8/15/84 (R. 235) that resulted in a stipulation for judgment of \$600.00 (R. 256), on 2/26/85 (R. 267) that resulted in a judgment of \$900.00 (R. 288), on 7/11/85 (R. 333) that resulted in a judgment of \$1,400.00 on 8/26/85 (R. 346). Following the judgments the Petitioner was required to execute upon the Respondent's property to satisfy the judgments and sometimes the Respondent would bring himself

current. This pattern continued through 1988 when the Plaintiff was required to file another Motion for Order to Show Cause on 6/13/88 (R. 390) and she received a judgment for \$1,900.00 (R. 399).

The Respondent then moved from Utah to Nevada in 1989. (Affidavit of Petitioner, Paragraph 7, R. 502). The Petitioner had very little contact with the Respondent and he continued to fail or refused to pay child support. Id. On February 15, 1989, the Petitioner filed a Reciprocal Support Action and enlisted the services of the Office of District Attorney, State of Nevada, Clark County, Nevada. Id.

The Petitioner had remarried. (Id., Paragraph 8). In the spring of 1992, the Petitioner was pregnant and going through a divorce. Id. In April, 1992, the Petitioner and Respondent agreed that Gentry could live with the Respondent in Nevada through the summer and the commencement of school, at which time the Respondent would return Gentry to the Petitioner.¹ Id.

¹These facts are set forth in the Affidavit of the Petitioner in support of her Motion For Judgment. (R. 502). The Respondent did not file an affidavit contesting these facts. However, he filed an Affidavit of Gentry that suggested, from Gentry's point of view, he was given a choice to live with the Petitioner or the Respondent and he chose the Respondent. (R. 521). The Petitioner suggests, as argued infra, that Gentry's point of view is not material.

At the end of the summer, the Respondent refused to return Gentry to Petitioner. (Id., Paragraph 9). The Respondent threatened to arrest the Petitioner if she attempted to come and get Gentry in Nevada. Id. She lacked sufficient means to retrieve Gentry from the Respondent. Id.

Kelly remained with the Petitioner. Kelly turned 18 on April 19, 1996, and graduated in June, 1996. Id.

The Petitioner filed the present Motion for Order to Show Cause on August 3, 1996. (R. 402). The Respondent did not file an answer but filed a “Notice of Affirmative Defenses” that included the doctrines of laches, waiver and estoppel. (R. 412)

On October 31, 1996, the Respondent filed a Petition To Modify Decree seeking legal custody of Gentry and seeking child support. (R. 415). It was served on the Petitioner on November 11, 1996. (R. 420).

SUMMARY OF ARGUMENTS

The Petitioner respectfully argues that Commissioner Thomas N. Arnett’s recommended decision granting the Petitioner’s Motion For Judgment should not have been rejected by the District Court. The District Court, Homer F. Wilkinson, erred as a matter of law in

accepting the Respondent's unsubstantiated argument of equitable estoppel and retroactively modifying the Decree of Divorce. Even if the principle of equitable estoppel was a viable theory in Utah in divorce actions, the facts in this case did not support the Respondent as a matter of law. And, even applying the doctrine of equitable estoppel, the District Court miscalculated the proper amount due. The Petitioner respectfully submits that she is entitled to a reinstatement of the Judgment & Order recommended by Commissioner Arnett and an award of additional fees and costs below as well as attorney's fees and costs incurred on appeal.

ARGUMENT

Point One

THE DISTRICT COURT ERRED IN REJECTING THE COMMISSIONER'S RECOMMENDED DECISION GRANTING THE PETITIONER'S MOTION FOR JUDGMENT

A. Introduction.

This case was initially set for trial on July 16, 1998. (R. 478). On June 24, 1998, the District Court struck the trial date and remanded the case to the Commissioner for a recommended decision. (R. 483). The District Court instructed counsel to prepare

affidavits and memoranda regarding their relative positions for the Commissioner to make a recommended decision. Id.

Thereafter, on July 23, 1998, the Petitioner filed her Motion For Judgment requesting that the Court enter a judgment for \$24,896.34 in past due child support, \$2,552.88 in attorney's fees, and \$68.92 in costs. The Motion was supported by the Petitioner's Affidavit (R. 502) and a detailed accounting concerning the arrearages. (R. 495). This accounting is attached as Exhibit A.

The Petitioner's accounting reflected all of the relevant events and facts described in the Statement Of Facts, supra. The accounting covered the period of 7/1/88 to 7/31/98 and started with the judgment rendered in July 1988, in the amount of \$1,900.00. It included all payments received by the Clark County District Attorney's Office from July, 1988 through July, 1998.

The accounting took into consideration the fact that Kelly turned 18 on April 19, 1996. (R. 495, 500 and footnote 4 to the accounting).

The accounting did not deduct any child support for Gentry when he started living with the Respondent in April, 1992. As footnote 3 to the accounting indicates, providing any reduction for Gentry would

have been tantamount to an improper retroactive modification of a support order contained in a decree of divorce. (R. 495, 497). Instead, the accounting reflected, in footnotes 5 and 6, that an adjustment to child support could have been made as of the date the Petitioner was served with the Respondent's Petition To Modify Decree seeking custody of Gentry, and an order of support, on November 11, 1996, in accordance with Utah's Civil Liability For Support Act. (R. 495, 500-501). The Respondent was granted credit of \$309.20 per month commencing December, 1996, until Gentry turned 18 on 11/24/97. (R. 495, 501, footnote 7). Commissioner Arnett heard the Petitioner's Motion For Judgment on September 18, 1998. (R. 526). The Respondent did not contest the accounting but instead argued that the Petitioner was equitably estopped from asserting child support for Gentry while living with the Respondent. The Respondent did not file an affidavit from himself contesting the Petitioner's facts but instead filed an affidavit from Gentry (R. 521) that suggested, from Gentry's point of view, that he was given the choice of residing with either party and chose to live with the Respondent in

1992. Commissioner Arnett rejected the Respondent's argument of equitable estoppel and granted the Petitioner's Motion For Judgment.

The Respondent filed an Objection To Commissioner's Recommendation. (R. 527). The Respondent did not file any further affidavits or submit any additional evidence relating to his theory of equitable estoppel. Instead, he argued that Commissioner Arnett erred in not recognizing the equitable estoppel theory in divorce cases and that the doctrine "should prevent Petitioner from collecting child support for a child she did not support." (R. 527, 530). The Respondent requested that the District Court reject the recommended judgment " and the matter be returned to the Commissioner for an evidentiary hearing whether Respondent meets the factual criteria for equitable estoppel." Id.

The District Court heard the Respondent's objection on November 6, 1998. There, the District Court sustained the Respondent's objection. The minute entry reflects, "The objection to the recommendation is argued before the court and the same is submitted. The court finds the objection is well taken and grants the same." (R. 552). The transcript of the hearing shows that the

Respondent argued that the equitable estoppel theory should be applied for the period that Gentry was with Respondent. (T. p. 3-4). The Court ruled that the respondent's objection was well taken as to the time period the child was with his father. (T. p. 7).

**B. The Doctrine Of Equitable Estoppel Is Inapplicable
In Cases Where A Valid Support Order Exists.**

The Petitioner argued before the District Court that the doctrine of equitable estoppel was inapplicable in cases having a prior support order as a matter of law. The District Court disagreed. This is a question that this Court reviews for correctness. Dent v. Dent, 870 P.2d 280, 282 (Utah Ct. App. 1994).

In 1987, the Utah Legislature enacted Section 30-3-10.6 U.C.A. (1953), as amended. Subsection (1) provides that "Each [child support] order...is, on and after the date it is due...(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2)." Subsection 2 then provides that a child support order may be modified only "with respect to any period during which a petition for modification is pending, but only from the date notice of the petition was given to the obligee...." Since 1987, the

Utah Courts have been uniform that, in actions where a child support order has been issued, a child support order may not be retroactively modified. Cummings v. Cummings, 821 P.2d 472 (Ut. App. 1991); Whitehead v. Whitehead, 836 P.2d 814 (Ut. App. Ct. 1992); Brooks v. Brooks, 881 P.2d 955 (Ut. App. 1994); Ball v. Peterson, 912 P.2d 1006 (Ut. App. 1996); and, Brinkerhoff v. Brinkerhoff, 945 P.2d 113 (Ut. App. 1997). Even prior to the enactment of Section 30-3-10.6, Utah Court's were loath to retroactively modify a child support order. Stettler v. Stettler, 713 P.2d 699 (Utah 1985); and, Karren v. State Department Of Social Services, 716 P.2d 810 (Utah 1986).

And, indeed, the rule against retroactive modifications of support orders applies even where an obligor has the actual physical custody of children and is required to pay support for that child. In Stettler v. Stettler, *supra*, a mother had the actual physical custody of a daughter, after the parties' stipulated for a transfer of custody, during a period of time that the original decree required the mother to pay support for her daughter. The parties did not alter the original decree's requirement that the mother pay child support for the daughter. The lower Court enforced the support order in the original

decree and entered a stipulated judgment of past due child support against her for that same time period notwithstanding the fact she had actual physical custody. She asked on “equitable grounds alone” for a retroactive judgment for child support from the father for that same time period but the District Court rejected her request. *Id.*, p. 702-703. The Trial Court’s decision was affirmed on appeal.

The decision in Stettler, *supra*, was upheld in Karren v. State Department Of Social Services, *supra*. In Karren, the father was awarded custody of two children and the mother was awarded custody of one in 1972. The father was ordered initially to pay the mother child support for the one child but that order was later modified abating his obligation to pay her support. By 1976, all three children resided with the father and he received public assistance. The State Department of Social Services, by assignment, sought a judgment retroactively against the mother on behalf of the father. The Supreme Court rejected the State’s request:

“In the present case, as in *Stettler*, a valid court order existed setting forth support obligations regarding plaintiff’s children. Though either party could have sought a modification of that order when physical custody of the children changed, neither attempted to modify the decree. Thus, under the holding in *Stettler*, plaintiff’s former husband would be barred from

obtaining support from plaintiff retroactively for periods in which he had custody.”

Karren v. State Department Of Social Services, supra, p. 812. The Utah Supreme Court in Karren also upheld the ruling of Larsen v. Larsen, 561 P.2d 1077 (1977) that a retroactive modification of a child support order was never appropriate “no matter what the circumstances may have been since the divorce decree.” Id. The Supreme Court stated, “Thus, only prospective modification of a support obligation is proper.” Id.

Utah’s statute, Section 30-3-10.6, and the above decisions make sense. A retroactive modification of a support order would violate principles of due process. In addition, it would be impossible to apply under the present child-support system. One would need the financial information of the parties as of the date the retroactive application would be made in order to calculate the proper child support. Then, if the financial conditions changed during the retroactive period in question, would one party or another have the right to another adjustment during the period in question?

In the present case, the Respondent's ultimate argument is that he is entitled to a retroactive adjustment of child support for Gentry going back to April, 1992, when he obtained his actual custody. He never sought a modification of the Decree of Divorce in this matter seeking either custody or a child support order. Even if a retroactive adjustment were possible in principle, it would be impossible to apply given Utah's child support calculation system under Utah's Uniform Civil Liability For Support Act. And, indeed, it very well could be possible that the Respondent still would have owed the Petitioner for support, given a split custody arrangement, and given his high income during that period of time as compared to Respondent's.

The Petitioner respectfully submits that the District Court erred in considering equitable estoppel in this case. The District Court's ruling violated Section 30-3-10.6 and the cases cited above.

C. The District Court Erred In Finding That Respondent Proved The Elements Of Equitable Estoppel Assuming The Doctrine Were Available.

The District Court's finding that the Plaintiff was equitably estopped from claiming child support for Gentry was wrong as a matter of law even assuming that the doctrine was available to the

Respondent. The question of whether equitable estoppel has been proven is a mixed question of fact and law. State Department Of Human Services v. Irizarry, 945 P.2d 676, 678 (1997).

In Irizarry, a paternity case involving “reimbursement” of child care expenses instead of child support, where no prior order of child support was involved, the Utah Supreme Court held that a party may be equitably estopped from claiming reimbursement for child care expenses. It ruled that a party must prove the following elements in order to invoke the doctrine of equitable estoppel: (1) an admission, statement or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and, (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. Irizarry, supra, p. 680.

In the present case, the Respondent demonstrated none of the elements. The only affidavit submitted by the Respondent was that of Gentry who stated, from his point of view, that he was given a choice to live with his mother or father and he decided on the latter. (R. 521). His affidavit showed that he continued to live with his father until

1998. Id. Although he states that he visited with the Petitioner in Salt Lake, Gentry fails to identify when he did so. Id. Gentry's affidavit is immaterial concerning what the parties "agreed" to do with Gentry in April, 1992, and is immaterial to the Petitioner's affidavit testimony that the Respondent refused to return Gentry when school was to start in the fall of 1992.

The Respondent did not file an affidavit contradicting the Petitioner's version of what happened in 1992. Her Affidavit, stating that Gentry temporarily went to live with the Respondent in April, 1992, while she was going through a divorce, is uncontradicted. (R. 502, 504, Paragraph 8). Her Affidavit, stating that the Respondent refused to return Gentry, and threatened to arrest her if she tried to obtain him, is also uncontradicted. Id.

Gentry did indeed live with the Respondent from April, 1992, until he turned 18. The mere fact that Gentry resided with the Respondent is not sufficient to invoke equitable estoppel as a matter of law. Cummings v. Cummings, supra; Stettler v. Stettler, supra; and, Karren v. State Department Of Social Services, supra.

The Respondent's facts do not establish equitable estoppel, as found by the District Court, as a matter of law. The District Court erred in finding equitable estoppel based on these facts. There is nothing in the record that suggests the Petitioner made an admission, statement or act inconsistent with her claim of custody over Gentry.

Moreover, there is no evidence in the record that the Respondent reasonably changed his position in reliance on the Petitioner's representations to his detriment. Irizzary, supra, p. 680. One must ask, how did the Respondent change his position in reliance on some unidentified representation of the Petitioner if such were made. Here, the undisputed evidence is that the Respondent had not paid the Petitioner *any* child support for the period of 12/90 through 12/92, until the State Of Nevada commenced garnishment proceedings. See Exhibit A, attached. He was \$12,251.00 in arrears in April, 1992. The Respondent failed to pay child support for either child before Gentry commenced living with him and failed to pay it after. So, how did the Respondent's position change? Had the evidence shown he had been faithfully paying the required \$300.00 per month in child support until April, 1992, then \$150.00 thereafter,

one could determine his position may have changed. But those facts are not present in this case. Here, the Respondent did nothing to change his position. As stated in Baggs v. Anderson, 528 P.2d 141, 144 (Utah 1974), detrimental reliance is not established “by the mere fact he indulged in pleasant and euphoric assumption that he would not have to meet his obligations....” The mere passage of time, or the failure of the Petitioner to hound him like a creditor, does not create an estoppel. Id.

The Petitioner respectfully submits that the District Court erred as a matter of law when it decided that the Respondent had proved the elements of equitable estoppel.

D. The District Court Erred In Calculating The Judgment Assuming The Doctrine Of Equitable Estoppel Was Available And That The Respondent Proved Its Elements.

The District Court struck the judgment recommended by Commissioner Arnett and substituted a judgment of \$5,970.00. (R. 586). Further, the District Court rejected the Commissioner’s recommendation for attorney’s fees and costs. Id.

The Respondent never submitted any accounting of what he believed was due. The figure of \$5,970.00 was based on an amount

that the Respondent “conceded” was due. (R. 577, 580). The District Court merely adopted the figure without verification and despite the Petitioner’s request for an evidentiary hearing on the matter. (Id., and R. 560, 566, 568).

The District Court erred as a matter of law. Even if one were to deduct the sum of \$150.00 for the period of 4/92 through 11/24/97, when Gentry turned 18, the sum to be deducted from the judgment recommended by Commissioner Arnett should have been \$9,900.00 $(66 \times \$150.00)^2$. Without considering a corresponding adjustment of accrued interest, the recommended judgment should have been \$14,996.34 $(\$24,896.34 - \$9,990.00 = \$14,996.34)$. In addition, there was no basis for withholding attorney’s fees and costs.

Point Two

THE PETITIONER SHOULD BE AWARDED HER ATTORNEY’S FEES AND COSTS BELOW AND ON APPEAL

Commissioner Arnett recommended that the Petitioner be awarded attorney’s fees and costs as part of the Judgment & Order.

²This assumes, of course, that the proper sum to be deducted would be \$150.00. This figure is not correct. Had the parties modified the Decree of Divorce in April, 1992, they would have been required to use a split custody worksheet under Utah’s Uniform Civil Liability For Support Act and the figure would have been different.

(R. 545). As of July 17, 1998, those fees were \$2,552.88 and the costs were \$68.92. (R. 507 and 511). Thereafter, the Respondent objected to Commissioner Arnett's recommendation and the District Court did not include any fees and costs in its Amended Judgment And Order. (R. 586). In the event the Appellate Court concludes that the District Court erred in rejecting Commissioner Arnett's recommended decision, Judgment & Order, the Petitioner respectfully submits that she would be entitled to additional fees incurred by reason of the Respondent's objection, or after July 17, 1998.

Also, in the event that the Petitioner prevails on appeal concerning a main issue, she requests that the Appellate Court award her attorney's fees and costs on appeal. Marshall v. Marshall, 915 P.2d 508, 517 (Ut. App. 1996) and Childs v. Childs, 967 P.2d 942 (Ut. App. 1998), cert. den. 982 P.2d 88 (1999).

CONCLUSION AND RELIEF SOUGHT

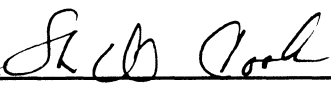
The Petitioner respectfully submits that the District Court erred by rejecting Commissioner Arnett's recommended Judgment And Order. The Petitioner requests that the Judgment & Order (R. 545) be reinstated and that she be awarded the full amount of \$24,896.34 plus

interest accruing thereon. She requests that the Appellate Court grant her a further award of attorney's fees and costs arising after July 17, 1998, when the Respondent filed his objection to Commissioner Arnett's recommended decision, as well as her fees and costs on appeal. She requests that this Court remand with appropriate instructions to implement Commissioner Arnett's recommended Judgment & Order and to determine any additional fees and costs incurred after July 17, 1998 including those on appeal.

ADDENDUM

Child Support Arrearage Calculation – Exhibit A

DATED this 8th day of November, 2000.



STEPHEN W. COOK
Attorney for Petitioner

CERTIFICATE OF SERVICE

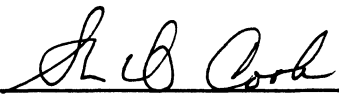
STATE OF UTAH)
)
) :ss
COUNTY OF SALT LAKE)

STEPHEN W. COOK, being duly sworn, says:

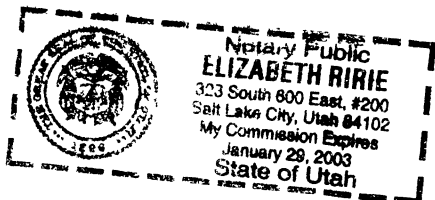
That he is the attorney for Petitioner herein; and that he served the ***APPELLANT'S BRIEF*** upon:

James A. McIntyre
McINTRYE & GOLDEN, L.C.
360 East 4500 South, Suite 3
Salt Lake City, Utah 84107

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 8 day of November, 2000.


STEPHEN W. COOK

Subscribed and sworn to before me this 8th day of November, 2000.




NOTARY PUBLIC

ADDENDUM

Exhibit A

CHILD SUPPORT ARREARAGE CALCULATIONS

Exhibit A

CHILD SUPPORT ARREARAGE CALCULATIONS

Arrearages Balance on Laura Thompson v Thompson, Civil No 814901295
Our File 12496
From 7/1/88 to 7/31/98

Date	Child Supp Due	Alimony Due	Amt Paid	Interest Due ¹	Balance Due ²
7/88	300 00	0 00	400 00	0	1800 00
8/88	300 00	0 00	400 00	0	1700
9/88	300 00	0 00	0 00	0	2000
10/88	300 00	0 00	800 00	0	1500
11/88	300 00	0 00	0 00	0	1800
12/88	300 00	0 00	0 00	0	2100
1/89	300 00	0 00	0 00	0	2400
2/89	300 00	0 00	0 00	0	2700
3/89	300 00	0 00	400 00	0	2600
4/89	300 00	0 00	0 00	0	2900
5/89	300 00	0 00	0 00	0	3200
6/89	300 00	0 00	400 00	384	3484
7/89	300 00	0 00	400 00	0	3384
8/89	300 00	0 00	400 00	0	3284

¹Interest on monthly child support payments is provided by Section 30-3-10 6 U C A (1953), as amended Interest is calculated under Section 15-1-4 pursuant to the statute applicable at the time 12% prior to May, 1993, 5 72% from May to December, 1993, 5 61% from January through December, 1994, 9 22% from January through December 1995, 7 35% from January through December, 1996, 7 45% from January, 1997 through December, 1997, and 7 468% from January through the present The District Court has no discretion to lower, stay, or waive interest Stroud v Stroud, 738 P 2d 649 (Utah App 1987), affd., 758 P 2d 905 (1988).

²On June 30, 1988, the Court entered an Order entering judgement against the Defendant for the sum of \$1,900 for past due child support and ordering that the Defendant pay \$100 00 per month toward arrearages in addition to his ongoing support obligation

9/89	300 00	0 00	0 00	0	3584
10/89	300 00	0 00	350 00	0	3534
11/89	300 00	0 00	350 00	0	3484
12/89	300 00	0 00	0 00	0	3784
1/90	300 00	0 00	350 00	0	3734
2/90	300 00	0 00	0 00	0	4034
3/90	300 00	0 00	0 00	0	4334
4/90	300 00	0 00	700 00	0	3934
5/90	300 00	0 00	0 00	0	4234
6/90	300 00	0 00	0 00	508 08	5042 08
7/90	300 00	0 00	0 00	0	5342 08
8/90	300 00	0 00	0 00	0	5642 08
9/90	300 00	0 00	0 00	0	5942 08
10/90	300 00	0 00	175 00	0	6067 08
11/90	300 00	0 00	175 00	0	6192 08
12/90	300 00	0 00	0 00	0	6492 08
1/91	300 00	0 00	0 00	0	6792 08
2/91	300 00	0 00	0 00	0	7092 08
3/91	300 00	0 00	0 00	0	7392 08
4/91	300 00	0 00	0 00	0	7692 08
5/91	300 00	0 00	0 00	0	7992 08
6/91	300 00	0 00	0 00	959 0496	9251 1296
7/91	300 00	0 00	0 00	0	9551 1296
8/91	300 00	0 00	0 00	0	9851 1296
9/91	300 00	0 00	0 00	0	10151 1296
10/91	300 00	0 00	0 00	0	10451 1296
11/91	300 00	0 00	0 00	0	10751 1296
12/91	300 00	0 00	0 00	0	11051 1296

1/92	300.00	0.00	0.00	0	11351.1296
2/92	300.00	0.00	0.00	0	11651.1296
3/92	300.00	0.00	0.00	0	11951.1296
4/92	300.00 ³	0.00	0.00	0	12251.1296
5/92	300.00	0.00	0.00	0	12551.1296
6/92	300.00	0.00	0.00	1506.136	14357.26515
7/92	300.00	0.00	0.00	0	14657.26515
8/92	300.00	0.00	0.00	0	14957.26515
9/92	300.00	0.00	0.00	0	15257.26515
10/92	300.00	0.00	0.00	0	15557.26515
11/92	300.00	0.00	0.00	0	15857.26515
12/92	300.00	0.00	138.46	0	16018.80515
12/92	0.00	0.00	138.46	0	15880.34515
12/92	0.00	0.00	138.46	0	15741.88515
1/93	300.00	0.00	138.46	0	15903.42515
2/93	300.00	0.00	138.46	0	16064.96515
2/93	0.00	0.00	138.46	0	15926.50515
2/93	0.00	0.00	138.46	0	15788.04515
3/93	300.00	0.00	138.46	0	15949.58515
4/93	300.00	0.00	138.46	0	16111.12515
5/93	300.00	0.00	138.46	0	16272.66515
5/93	0.00	0.00	138.46	1952.72	18086.92497

³Gentry went to visit with the Respondent in April 1992 and was not returned following this visit. Respondent claims that his child support should be reduced to \$150.00 per month because of this fact. Petitioner claims that the Court is prohibited from granting a retroactive modification and a modification may only be granted when a petition to modify has been filed and the Petitioner has been provided notice. Section 30-3-10.6 U.C.A (1953), as amended; Ball v. Peterson, 912 P.2d 1006, 1011 (Utah App. 1996). In this case the Respondent's Petition was filed on 10/22/96 and served on 11/11/96.

6/93	300.00	0.00	138.46	0	18248.46497
6/93	0.00	0.00	138.46	0	18110.00497
6/93	0.00	0.00	138.46	0	17971.54497
7/93	300.00	0.00	138.46	0	18133.08497
7/93	0.00	0.00	138.46	0	17994.62497
8/93	300.00	0.00	138.46	0	18156.16497
8/93	0.00	0.00	138.46	0	18017.70497
9/93	300.00	0.00	138.46	0	18179.24497
9/93	0.00	0.00	138.46	0	18040.78497
10/93	300.00	0.00	138.46	0	18202.32497
10/93	0.00	0.00	138.46	0	18063.86497
10/93	0.00	0.00	73.08	0	17990.78497
10/93	0.00	0.00	65.38	0	17925.40497
11/93	300.00	0.00	138.46	0	18086.94497
11/93	0.00	0.00	65.38	0	18021.56497
11/93	0.00	0.00	65.38	0	17956.18497
12/93	300.00	0.00	138.46	1292.845	19410.57029
12/93	0.00	0.00	138.46	0	19272.11029
12/93	0.00	0.00	138.46	0	19133.65029
1/94	300.00	0.00	138.46	0	19295.19029
1/94	0.00	0.00	23.08	0	19272.11029
2/94	300.00	0.00	115.38	0	19456.73029
2/94	0.00	0.00	138.46	0	19318.27029
2/94	0.00	0.00	138.46	0	19179.81029
3/94	300.00	0.00	138.46	0	19341.35029
3/94	0.00	0.00	138.46	0	19202.89029
4/94	300.00	0.00	73.08	0	19429.81029
4/94	0.00	0.00	65.38	0	19364.43029

4/94	0.00	0.00	150.00	0	19214.43029
5/94	300.00	0.00	150.00	0	19364.43029
5/94	0.00	0.00	150.00	0	19214.43029
6/94	300.00	0.00	150.00	0	19364.43029
6/94	0.00	0.00	150.00	0	19214.43029
7/94	300.00	0.00	150.00	0	19364.43029
7/94	0.00	0.00	150.00	0	19214.43029
8/94	300.00	0.00	150.00	0	19364.43029
8/94	0.00	0.00	150.00	0	19214.43029
9/94	300.00	0.00	69.23	0	19445.20029
9/94	0.00	0.00	69.23	0	19375.97029
9/94	0.00	0.00	69.23	0	19306.74029
9/94	0.00	0.00	69.23	0	19237.51029
9/94	0.00	0.00	69.23	0	19168.28029
10/94	300.00	0.00	69.23	0	19399.05029
10/94	0.00	0.00	69.23	0	19329.82029
10/94	0.00	0.00	69.23	0	19260.59029
10/94	0.00	0.00	69.23	0	19191.36029
11/94	300.00	0.00	69.23	0	19422.13029
11/94	0.00	0.00	69.23	0	19352.90029
11/94	0.00	0.00	69.23	0	19283.67029
12/94	300.00	0.00	138.46	0	19445.21029
12/94	0.00	0.00	69.23	0	19375.98029
12/94	0.00	0.00	138.46	1086.992	20324.51278
1/95	300.00	0.00	138.46	0	20486.05278
1/95	0.00	0.00	138.46	0	20347.59278
2/95	300.00	0.00	69.23	0	20578.36278
2/95	0.00	0.00	138.46	0	20439.90278

2/95	0.00	0.00	138.46	0	20301.44278
3/95	300.00	0.00	0.00	0	20601.44278
4/95	300.00	0.00	0.00	0	20901.44278
5/95	300.00	0.00	300.00	0	20901.44278
6/95	300.00	0.00	600.00	0	20601.44278
7/95	300.00	0.00	0.00	0	20901.44278
8/95	300.00	0.00	0.00	0	21201.44278
9/95	300.00	0.00	0.00	0	21501.44278
10/95	300.00	0.00	0.00	0	21801.44278
11/95	300.00	0.00	0.00	0	22101.44278
12/95	300.00	0.00	0.00	2037.753	24439.19581
1/96	300.00	0.00	0.00	0	24739.19581
2/96	300.00	0.00	300.00	0	24739.19581
3/96	300.00	0.00	900.00	0	24139.19581
4/96	300.00	0.00	0.00	0	24439.19581
5/96	300.00	0.00	0.00	0	24739.19581
6/96	150.00 ⁴	0.00	600.00	0	24289.19581
7/96	150.00	0.00	0.00	0	24439.19581
8/96	150.00	0.00	0.00	0	24589.19581
9/96	150.00	0.00	0.00	0	24739.19581
10/96	150.00	0.00	900.00	0	23989.19581
11/96	150.00 ⁵	0.00	0.00	0	24139.19581

⁴Kelly turned 18 on 4/19/96 and graduated in June, 1996

⁵Petition by Respondent filed 10/22/96 and served on 11/11/96.

12/96	-309.20 ⁶	0.00	0.00	1774.231	25604.2267
1/97	-309.20	0.00	0.00	0	25295.0267
2/97	-309.20	0.00	0.00	0	24985.8267
3/97	-309.20	0.00	0.00	0	24676.6267
4/97	-309.20	0.00	0.00	0	24367.4267
5/97	-309.20	0.00	0.00	0	24058.2267
6/97	-309.20	0.00	0.00	0	23749.0267
7/97	-309.20	0.00	0.00	0	23439.8267
8/97	-309.20	0.00	0.00	0	23130.6267
9/97	-309.20	0.00	0.00	0	22821.4267
10/97	-309.20	0.00	0.00	0	22512.2267
11/97	-309.30 ⁷	0.00	0.00	0	22202.9267
12/97	00.00	0.00	0.00	1654.118	23857.04474
1/98	0.00	0.00	0.00	0	23857.04474
2/98	0.00	0.00	0.00	0	23857.04474
3/98			0.00	0	23857.04474
4/98			0.00	0	23857.04474
5/98			0.00	0	23857.04474
6/98			0.00	0	23857.04474
7/98			0.00	0	23857.04474
	TOTALS		16888.38	1039.292	24896.33713

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⁶Assuming the Court would grant the Respondent's Petition to Modify, and assuming further that the Court would grant the Respondent child support retroactive to the date of service of process upon the Petitioner, Petitioner's child support obligation for Gentry begins at \$334.00 less \$24.80 for health care costs.

⁷Gentry turned 18 on 11/24/97 and Plaintiff's support obligation terminates.