1959

Darwin W. Larsen v. Wallene P. Larsen : Brief of Appellant

Utah Supreme Court

Harvey A. Sjostrom; Attorney for Appellant;

In the Supreme Court of the State of Utah

DARWIN W. LARSEN,
Plaintiff and Appellant,

-vs-

VALLENE P. LARSEN,
Defendant and Respondent.

Appellant's
Brief

Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Cache

Hon. Stewart M. Hanson, Judge

HARVEY A. SJOSTROM,
Attorney for Appellant.

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STATEMENT OF FACTS

This is the second time an appeal has been taken by appellant in ths matter.

The principal points urged upon appellant's first appeal were, one: That estoppal was a good defense for alleged delinquent child support under the facts of this case and, two: That if a third party voluntarily and without any thought of reimbursement from the natural father adequately supported the child that no recovery can be had against the divorced husband by the divorced wife.

This Court in its decision rendered July 31, 1956, said that estoppal was a good defense if proven and 2: That if a third party (The defendant's second husband

in this case) adequately and voluntarily supported the child that it was also a good defense to any action by the divorced wife for alleged back support money. On these two questions the Court said:

"So in this case if the trial court finds from the evidence that appellant would not have left his job and gone on a mission for his church but for such representations that she would not require him to pay such installments if he would just leave her and the child alone, and that the appelant in reliance upon her representations complied with her request and that thereafter she supported the child and if such payments are collected from him she wll be entitled to them for her own use and benefit, and that it would be a great hardship on him to now force him to make such payments, she would now be estopped from forcing him to pay such past due installments as accrued during the time he was filling such mission.

If the child has been the beneficiary of equivalent support and education so that the mother is entitled to receive all of said past due support money, she should be free to release, compromise or waive that which is hers. But if the child has been provided bare shelter and food, and denied the benefit of proper clothes and dental and medical care, then the mother should not be free to waive that portion of past due support money that the child has not received. The authorities cited above hold that this doctrine is applicable to this extent. It is

the prerogative of the trial court to determine these facts and if he finds that facts exist to justify equitable estoppel, he should apply that doctrine and relieve the father from payment of the installments to the extent indicated.''

This Court then reversed the lower court's judgment and sent the cause back for the trial court to find on these two questions only and no others.

The lower court in making its findings found ''that from the month of June 1947, to and including the 31st day of December 1950, the plaintiff is relieved of payment of said support money for the reason that defendant's present husband adequately and voluntarily supported said child without any thought of reimbursement.'' The lower court further found, Quote, ''That for a period of 28 months, beginning in February 1947, plaintiff served on a foreign mission for the L. D. S. Church, and for the period from June 1947, until the end of his mission the defendant had promised the plaintiff to waive support money for their child, and plaintiff, relying on such representations, went on said mission, changing his financial position, which he would not have done except for such representations.'' (When the Court mentions February 1947, we are sure the Court means February 1948.) Trans. Supplement 14.

It will be noted from these findings that the lower court not only found payment by a third party, but estop-

pel for the period between February 1948 and the time appellant came home from his mission, but also found that from June 1947 to December 1947 that a third party (Mr. DeCarlo, defendant's second husband) supported voluntarily and without thought of reimbursement.

It will be further noted that the court below did not make an express finding on the question of estoppel or whether a third party (Mr. DeCaro) did voluntarily or involuntarily support said child after appellant came home from his mission, but the court did make a finding that since the plaintiff came home from his mission and for a period of 30 months thereafter he drew from the Veterans Administration $30.00 per month upon his representation that he had a dependent and that plaintiff converted the same to his own use. The Court then found that defendant was entitled to judgement against plaintiff in the sum of $1890.00 together with interest in the sum of $835.36, making a total of $2725.36 and thereafter entered judgment against plaintiff in the total sum of $2725.36 and in favor of defendant. (Trans. Supp. 18)

STATEMENT OF POINTS

Statement of Points upon which Appellant Relies for Reversal of Judgment and Decree.

1. The Court erred in failing to find under the instructions of the Supreme Court on whether a third par-

ty (Mr. DeCaro) from the time appellant came home from his mission and to the time respondent requested and received resumption of monthly support money and in failing to find that the support money contributed by respondent's second husband was voluntary and without any thought of reimbursement from appellant.

2. The Court erred in finding outside of the Supreme Courts instructions, to-wit: The Court found that appellant applied for and received $30.00 per month for a period of 30 months after coming home from his mission and that he converted the same to his own use.

3.The Court erred in finding (assuming for purposes of argument only that above points are not well taken) that there was any interest due or owing respondent from appellant.

4. The Court erred in finding that said child of parties is in need of dental care costing approximately $1000.00 for the reason that it is an immaterial finding and if material there is no evidence that such need accrued during the alleged delinquency period or that the said child was not adequately cared for during said period, and that finding it too indefinite.

5. The Court erred in its conlusion of law that defendant is entitled to judgment against plaintiff in the sum of $2725.36 or any sum whatsoever.

6. The Court erred in awarding judgment against

the plaintiff in the sum of $2725.36 or any sum whatsoever.

ARGUMENT, Point 1 and 2

POINT No. 1. The Court erred in failing to find under the instructions of the Supreme Court on whether a third party (Mr. DeCaro) from the time appellant came home from his mission and to the time respondent requested and received resumption of monthly support money and in failing to find that the support money contributed by respondent's second husband was voluntary and without any thought of reimbursement from appellant.

POINT No. 2 The Court erred in finding outside of the Supreme Courts instructions, to-wit: The Court found that appellant applied for and received $30.00 per month for a period of 30 months after coming home from his mission and that he converted the same to his own use and makes this the basis of its conclusions and judgment.

This Court in reversing the lower court in appellant's first appeal said, that if the child had been adequately and voluntarily cared for by a third party then the mother could release, compromise or waive that which was hers.

There is no evedence in the whole record which shows that during the time we are now considering the child was inadequately cared for and if that be so then

the mother is entitled to no recovery against plaintiff. In connection with this statement it will be noted that the trial court found its findngs of fact that respondent's second husband took adequate care of said child from June 1947 to and including the month of December, 1950, which was the time appellant came home from his mission. And the evdence as far as we have been able to discern is the same from December 1950 to and including the 30 months that said appellant was at school and receiving $30.00 a month from the Veterans Administration because he had the child as a legal dependent. This being true how can the trial court say that for this period the respondent is entitled to judgment? We long since learned that "things equal to the same thing are equal to each other." The fact that appellant received $30.00 per month because he had a legal dependent is outside of the opinion of this Court as therein expressed and is utterly immaterial, incompetent and irrelevant for any branch of this case. One more word on this subject of appellant allegedly converting this money to his own use. It will be observed from copy of letter dated August 7, 1956 and reply of Veterans Administration pp. 6 and 7 of Transcript Supplement that Appellant was entitled to this money on the ground that child was a legal dependant and not on the ground for the reason that he was actually supporting her. There is no evidence in the whole record nor can it be had to show the contrary under the facts of this case. There is also the added

evidence adduced at the second hearing that respondent's second husband applied for and received money from the government for support of said child (Transcript Supplement pp. 8-9)

ARGUMENT - POINT THREE

The Court erred in finding (assuming for purpose of argument only that above points are not well taken) that there was any interest due or owing respondent from appellant.

Assuming for the purpose of argument only that appellant is subject to payment of the principal, we believe it may be properly contended that in as much as no demand for payment during the time under consideration was ever made, and the further fact that the appellant was never permitted to see the child added to the further fact that respondent told him in both conversation and by letter she did not want any money (Tr. 246 and exhibit 19 a letter written in Jan. 1951 after he came home from his mission). Also there is good authority to the effect that before interest can be had a demand must first be made to pay the principal. . : There is no demand shown in the whole transcript. 33 C. J. page 233 section 123.

ARGUMENT - POINT FOUR

The Court erred in finding that said child of parties is in need of dental care costing approximately $1000.00 for the reason that it is an immaterial finding

and if material there is no evidence that such need accrued during the alleged delinquency period or that the said child was not adequately cared for during said period, and that finding is too indefinite.

The Court below in its finding (Tran. Supp. 14-15) found "that the child is in need of dental care costing approximately $1000.00".

If the court below intends that this finding should show that the care received by the child from the second husband was inadequate it does not so do as we have been unable to find any evidence which shows that this inadequacy accrued when appellant was not paying the alleged support money. And if this is so, no proper inadequacy of support can be shown and a judgment cannot be supported. Nor is there a finding showing inadequey of voluntary support during any of the time under consideration.

Also the court in its finding makes no definite finding as to the money needed for dental care but as pointed out uses the word "approximately $1000 00. We believe it is elementary that a definite sum must be found or it will not aid to support a judgment.

Then too, the finding here complained of goes outside of the opinion of this Court and is therefore of no effect.

ARGUMENT - POINTS 5 and 6

5. The Court erred in its conclusion of law that defendant is entitled to judgement against plaintiff in the sum of 2725.36 or any sum whatsoever.

6. The Court erred in awarding judgment against the plaintiff in the sum of $2725.36, or any sum whatsoever.

As these two points are closely allied we take them together in argument.

All we have said in support of points 1, 2, 3, and 4 we reiterate and incorporate here for it is applicable to point 5 and6 for it follows that if these points or any of them are well taken, then it is true that the findings, conclusions and judgment that is adverse to the appellant should not have been made and the case should have been dismissed. But in as much as it was not we ask that the judgment be set aside and the cause dismissed.

CONCLUSION

In conclusion the appellant urges this Court to disallow the judgment herein entered against the appellant and in favor of respondent, and dismiss the matter.

It may be that the members of this Court may desire to refresh their recollections on some points in this case. If that be so then the briefs written by respective counsel on the former appeal is hereby incorporated and made part of this appeal.

An added word: When the respondent called appellant's attention to the fact that their child needed a replacement of two front teeth the appellant agreed to pay for the same even though this need did not arise until after he had resumed payments, when she requested the same. He is still willing to do this even though he has to borrow the money, but he resists any judgement against him.

Respectively submitted,
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