

1960

Lois Fulmer Bray Smith v. Lynn W. Bray : Brief of Appellant

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

FILED

JUL 7 - 1960

LOIS FULMER BRAY SMITH,
Plaintiff and Respondent,

vs.

LYNN W. BRAY,
Defendant and Appellant.

Clark, Supreme Court, Utah

**CASE
NO. 9523**

9253

APPELLANT'S BRIEF

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LOIS FULMER BRAY SMITH,
Plaintiff and Respondent,

vs.

LYNN W. BRAY,
Defendant and Appellant.

**CASE
NO. 9523**

APPELLANT'S BRIEF

STATEMENT OF FACTS

The parties to this action were divorced on the 27th day of February, 1945, and the court entered a judgment against the defendant requiring him to pay \$60.00 per month for the support of his minor children. The defendant did support the children until the latter part of 1946 or the first part of 1947 (Tr. 7). From that time on the defendant has paid the plaintiff nothing for the support of the children, except \$30.00 which was paid in February of 1959 in response to a letter from the plaintiff's attorney immediately prior to the filing of this action.

The defendant states that the reason he did not pay plaintiff support money as required by the decree is that

she told him that her husband was going to adopt the children (Tr. 10 & 21) and that they both told him to stay away from the home and that she and Mr. Smith would support the children.

Mr. Bray contacted Mrs. Smith occasionally to inquire about the children but was always told not to interfere or that he would get her in trouble (Tr. 26). The defendant saw the children on one occasion, a fishing trip in 1953 (Tr. 27). It was Mr. Bray's testimony that Mrs. Smith never requested any payment from him, nor demanded any payment from him.

The children have, since 1946, gone by the name of Smith; they have been registered in school by the name of Smith, and have had little or no contact with their father. The only correspondence between the parties has been a Christmas card at Christmas time (Tr. 24, L. 12).

It was not until the spring of 1959 that Mrs. Smith made any demand upon the defendant and then she had her attorney write him a letter setting forth the amount of his indebtedness to her. Subsequently, this action was filed to collect \$9,860.00 in accrued support money. Mrs. Smith explained to the court that the only reason the action was commenced was that they (Mr. and Mrs. Smith) had some financial reverses, or otherwise they would not have brought the action (Tr. 15, L. 2-10).

STATEMENT OF POINTS

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PLAINTIFF WAS GUILTY OF LACHES IN THE ENFORCEMENT OF HER RIGHTS UNDER THE DECREE REFERRED TO IN HER PETITION AND

THAT SHE WAS ESTOPPED AND BARRED FROM RECOVERING ON THIS DELINQUENCY.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE PLAINTIFF WAS GUILTY OF LACHES IN THE ENFORCEMENT OF HER RIGHTS UNDER THE DECREE REFERRED TO IN HER PETITION AND THAT SHE WAS ESTOPPED AND BARRED FROM RECOVERING ON THIS DELINQUENCY.

It is the position of the defendant that the facts in this case are identical in every material particular with the case of Larsen vs. Larsen, 5 Utah 2d 224, 300 P2d 596. In that case the court concluded that there were sufficient facts and evidence from which the trial court could reasonably find that the respondent (defendant) in that case was barred from recovering her sought for judgment. Our analysis of the two situations is as follows:

In the Larsen case Darwin W. Larsen, the appellant therein, obtained a divorce from VaLene P. Larsen and the court awarded to her, the mother, \$35.00 per month for the support of the child. The appellant in that case had not made payments for the support of the child since June of 1947. The respondent remarried shortly after the divorce above referred to and the appellant therein, Mr. Larsen claimed that Mrs. Larsen had told him that her husband would support the child and that all she wanted from the appellant was that he should refrain from seeing her or the child. Mrs. Larsen in that case said that she had not refused payments for the support of the child and testified that none had been offered to her by the appellant,

although she admitted she had never asked or tried to collect any of the payments. The evidence also disclosed that the child had taken the name of her stepfather when she attended school.

It is our position that the facts in this case are identical. The Court will note that the parties were divorced in 1946, that they both remarried, and that the defendant here had not made payments since the fall of 1946 or the spring of 1947 (Tr. 7). In the instant case the court ordered payments of \$30.00 per child, or \$60.00 per month, as compared to \$35.00 per child in the Larsen case. In this case the appellant did not make payments to the plaintiff for reason that she told him she did not want him to make payments to her (Tr. 29). She told him that his calls were interfering with her marriage (Tr. 27), and that she would prefer that he stay away from her home. She further told him that her husband was going to adopt the children (Tr. 10) and her husband confirmed that fact (Tr. 21). The children went by the name of Smith and had done so for at least ten years (Tr. 17) and probably twelve years (Tr. 11). Some material excerpts from the transcript are as follows:

Concerning Mrs. Smith's demand for money (Tr. 7):

“Q. (By Mr. Howard) Have you?

A. I have made no demand.

Q. That is right.

A. I have expected, but I have made no demand.

Q. Nor have you filed an action to reduce this to judgment, have you?

A. No.”

Concerning the proposed adoption of the children by Mr. Smith (Tr. 10):

“Q. (By Mr. Howard) Isn’t it a fact, Mrs. Smith, that you told him your husband was going to adopt the children?

A. Yes.”

And the children have gone by the name of Smith (Tr. 11):

“Q. Mrs. Smith, you have had these children go by the name of “Smith” for twelve years, haven’t you?

MR. IVINS: I will object to that as being immaterial.

THE COURT: The objection will be sustained.

(Argument was had.)

MR. IVINS: I can’t see where it would be a factor.

MR. HOWARD: It would show her attitude toward the children. She treated them as her children of her second husband, not as her first.

THE WITNESS: He accepted them as his children.

MR. HOWARD: Your husband did?

A. Surely he did. Wouldn’t any man?

MR. HOWARD: That is the point I am getting at.

THE COURT: Well, I think she has answered the question. She had them go by the name of Smith.”

(Tr. 17, L. 16):

“What name do they go by?

A. From the second grade on, David and Danny go by the name of “Smith.”

(Tr. 17, L. 24):

“Q. (By Mr. Howard) How old are the children?

A. David is seventeen and Danny nine.”

That the children were well taken care of (Tr. 17):

“Up until last year your husband had always been able to support and maintain these children adequately, had he not?

A. Yes.

Q. And they have been well taken care, have they not?

A. Yes.”

The only reason Mrs. Smith brought this action was because of Mr. Smith’s financial reverses (Tr. 15, L. 8):

“Q. But if it hadn’t been for financial reverses, you never would have started this action?

A. That is right.”

Mr. Bray testified as to why he has not paid anything for the children, which testimony substantially reflects the facts (Tr. 29, L. 19):

“Q. (By Mr. Howard) Mr. Bray, why is it you haven’t paid any support for these children?

A. Because I was told not to.

MR. IVINS: Because why?

A. Because they said they would take care of them on their own.

Q. (By Mr. Howard) I believe you stated that you were told not to, is that right?

A. That is right. That they didn’t want anything from me.

Q. Is there any other reason, or is that the sole reason?

A. Well, the last while I haven't been in a position to send support.

Q. But you have relied upon their statements, I suppose?

A. Yes."

His above statement in court is almost identical to his February 14, 1959, reply to Mr. Ivins' letter (Pltf. Ex. 1), which is as follows:

"50 Lorraine Avenue
Pittsburg, California
February 14, 1959

Heber Grant Ivins
Geneva Finance Building
American Fork, Utah

Dear Sir:

We received your letter a little late because of the wrong address and the people who got it held it for a few days. We were really taken for a loss when we read it. We were up there in January and saw Mrs. Smith at that time. She made no mention of this subject. However, we will try to explain why she has received no payment since she was married.

In the first place she and her husband let us know that they wanted to raise the boys as their own. They made the boys take the name of Smith and every time we would send them a percent they seemed to give us the impression it wasn't wanted. We have been to Utah several times in the last 7 years and at no time was the mention of the support mentioned, so we just naturally thought they were satisfied to raise them on their own. The last time I tried to contact the boys was October, 1957. At that time I was told over the phone not to call again. so I have not even as much as asked

about them since that time as I didn't want to cause any trouble to anyone.

I am very sorry that Mrs. Smith didn't say anything in January as it would have saved her the need to trouble you as I know we could have worked something out. We are not able to pay the back money but I am sure we can work out something for the future.

Hoping to hear from you I remain,

Sincerely,

/s/ Lynn Bray"

It is the position of the appellant that this case is in point in almost every particular with Larsen vs. Larsen and that the rationale as applicable in Larsen vs. Larsen is applicable in this case. We quote to the Court its finding and language in the Larsen case:

"(1) A reading of the cases cited in support of the above quoted statement discloses that relief to the father of a minor from such support money judgment depends on the view of the court determining the case as to what is equitable under the circumstances. We conclude that the evidence is sufficient from which the trial court could reasonably find facts which would support a holding that the respondent is barred from recovering a part of this judgment for back support money on the grounds which the above quotation calls laches or acquiescence but which actually appear to rest on equitable estoppel. We are sending the case back to make findings on those issues for we conclude the evidence is sufficient to support findings either way. The court may make such findings from the evidence already received or the court in its discretion may al-

low the parties to reopen the case and introduce additional evidence on such questions.”

“(3) 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. Of course, as to future payments, there is no question but what she is entitled to collect from the time she made demand, and appellant does not dispute this. He has been making such payments since her demand for them.”

The distinction between the Larsen case and the Bray case is that in this instance the defendant has not been dishonest in his conduct toward the plaintiff, nor has he defrauded her or the government, as the dissent so wittily observed in the Larsen case. Furthermore, the period of laches has been four years longer in the instant case than in the Larsen case, which should strengthen the position of the appellant here.

This matter being so closely in point to the Larsen case and the Court having before it the authorities for the Larsen case, as set forth in the Court's opinion on page 226, the appellant rests his case thereon. This being an equity

matter, the transcript being but 36 pages in length, the appellant respectfully requests the Court to read the entire transcript and there to judge the facts for itself.

Respectfully submitted,
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Attorneys for Defendant and
Appellant