

1960

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

Utah Supreme Court

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

FILED

LOIS FULLMER BRAY SMITH,
Plaintiff and Respondent,

vs.

LYNN W. BRAY,
Defendant and Appellant.

Clerk, Supreme Court, Utah

**CASE
NO. 9253**

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	2
ARGUMENT	2

CASES CITED

Hall vs. Hall, 7 Utah 2d 413, 326 P 2d 707.....	4
Larsen vs. Larsen, 5 Utah 2d 224, 300 P 2d 596.....	2
Price vs. Price, 4 Utah 2d 153, 289 P 2d 1044.....	4
Riding vs. Riding, 8 Utah 2d 136, 329 P 2d 878.....	3

In the Supreme Court of the State of Utah

LOIS FULLMER BRAY SMITH,
Plaintiff and Respondent,

vs.

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Defendant and Appellant.

**CASE
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RESPONDENT'S BRIEF

STATEMENT OF FACTS

The Statement of Facts of appellant are basically correct. However, they tend to relate only that position favorable to appellant's cause and for the purpose of making a more complete statement of facts the following is related.

Plaintiff, following her divorce from defendant, made a concerted effort to force payment of support and on one occasion signed a criminal complaint having defendant arrested and incarcerated (Tr. 18). However, some seven

years prior to the hearing in this case, defendant moved his residence to California (Tr. 4) making continued efforts to enforce the order more difficult. Plaintiff continued to request support (Tr. 7) and denies having refused defendant permission to see his children (Tr. 16). In recent years the conduct of the plaintiff has been rather passive. However, she has requested, on those occasions when seeing the defendant, that some assistance be given.

STATEMENT OF POINTS

THE TRIAL COURT DID NOT ERR IN FINDING NO BASIS FOR LACHES OR ESTOPPEL WHICH WOULD BAR PLAINTIFF FROM RECOVERING DELINQUENT SUPPORT PAYMENTS FOR A PERIOD OF EIGHT YEARS.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFF WAS NOT GUILTY OF LACHES IN THE ENFORCEMENT OF HER RIGHTS UNDER THE DECREE AND THAT SHE WAS NOT ESTOPPED NOR BARRED FROM RECOVERING DELINQUENT SUPPORT PAYMENTS.

The defendat relies solely upon the case of Larsen vs. Larsen, 5 Utah 2d 224, 300 P 2d 596, and claims that the facts in this case and the case referred to are identical. However, they are distinguishable in several respects. Plaintiff's children, because of the failure of the defendant to provide support, have not been cared for as well as they would have been otherwise (Tr. 18-19) and have,

during some periods since the divorce occurred, subsisted upon welfare payments. The Court, in the Larsen case, held that this factor was of great importance in determining whether the mother was free to release, compromise or waive support payments of the minor children (P228 (3)). There is no evidence in the instant case of any agreement upon the part of the plaintiff to waive support payments. The only evidence being the assertion upon the part of the stepfather, denied by the plaintiff, that he intended to adopt the children. These facts differ completely in that in the Larsen case it was an uncontroverted fact that the parties had agreed that certain payments would be waived while the defendant was serving a mission in Europe. The matter of the stepfather having made assertions that he desired to adopt the children were countered by the defendant saying that he would do so "over my dead body" (Tr. 10) showing that the defendant objected to being deprived of his legal rights and yet he is now maintaining that he should be relieved of his legal obligations.

The intent to adopt upon the part of the stepfather cannot be held to be of importance in view of the ruling in the case of Riding vs. Riding, 8 Utah 2d 136, 329 P 2d 878, in which case an order was made relieving the natural father of his obligation of support conditioned upon a written agreement of the stepfather that he would undertake the adoption of the children. In that case the Court held that since the second husband did not initiate the adoption proceedings that the first husband was not relieved from the obligation to support the children.

The Riding case points up the law that the courts will jealously protect the interests of minor children even in

the face of promises made by their natural parents and states, upon page 139 thereof:

“There is not vested in any court of this State the right to make a final order relieving a father permanently of his obligation to support his child except under the Adoption Statute”.

It would appear that the instant case is one in which the natural mother appeared content to avoid the unpleasantness of continual harassment of her ex-husband in an effort to force him to perform an act which he was legally ordered and morally obliged to complete. Such conduct does not establish facts which warrant the invoking of laches or estoppel and such has been the ruling of this Court in numerous cases.

In the case of Hall vs. Hall, 7 Utah 2d 413, 326 P 2d 707, the natural mother not only made no effort to collect delinquent support but secreted herself in order that the natural father was unable to make payments, not knowing his ex-wife's whereabouts. If the father is not relieved of the obligation of support under these circumstances, certainly he should not be relieved of the obligation where, as in the instant case, the natural mother's whereabouts is known at all times and the only excuse proffered by the defendant is that no persistent request for payment was made.

Another case which the Court has recently decided bearing upon this subject is the case of Price vs. Price, 4 Utah 2d 153, 289 P 2d 1044. In this case the Court pronounced:

“Future child support effectively cannot be the subject of bargain and sale. Among other things, the

State is an interested party in such matters since a child's welfare is at stake and any modification of a child support award must be approved by the Court".

In the Price case the defendant contributed practically nothing to his children's support for a ten year period, and although the evidence showed the defendant was physically ill and his earning ability impaired, the Court still awarded the plaintiff a judgment for support payments which were in arrears.

I respectfully urge that the Court uphold the findings of the trial court as it would appear from the language of previous cases, broad discretionary powers rest with the trial judge and unless there has been shown to be an abuse of this discretion, his findings should be sustained. Certainly the plaintiff should not be penalized and deprived of her rights merely by her failure to have periodically demanded that the defendant perform the acts which he had been ordered to perform and which, it would appear to me, should be undertaken without a court order or request of the natural mother, for certainly the support of one's natural children is the greatest moral obligation in our society.

Respectfully submitted,

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Attorney for Plaintiff and
Respondent