

1962

Julia Harris v. Elmo L. Harris : Brief of Respondent

Utah Supreme Court

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JULIA HARRIS,

Plaintiff-Respondent Clerk, Supreme Court, Utah

vs.

Case No. 9564

ELMO L. HARRIS,

Defendant-Appellant.

RESPONDENT'S BRIEF

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable A. H. Ellett, Judge

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IN THE SUPREME COURT
of the
STATE OF UTAH

JULIA HARRIS,

Plaintiff-Respondent,

vs.

ELMO L. HARRIS,

Defendant-Appellant.

} Case No. 9564

RESPONDENT'S BRIEF

STATEMENT OF FACT

There are some additional matters which plaintiff feels should be added to defendant's Statement of Fact. With respect to the entering of the judgment of \$4500.00, this matter was entered upon a stipulation between plaintiff and defendant in open court. The testimony of the parties and their counsel is as follows: (R. 21)

"THE COURT: There is no question I take it that the sum of forty-six five, that is, \$4,605 would be due and owing if this decree isn't modified.

"MR. IVERSON: I think that is approximately right. There wouldn't be but two or

three matters that Mr. Harris says have been omitted from her accounting.

“THE COURT: Well, I imagine Mr. McCullough would take \$4500 and wouldn’t fuss.

“MR. McCULLOUGH: We will accept forty-five hundred. Is that agreeable?

“THE COURT: Do you?

“MR. IVERSON: Yes, we will stipulate that if she is entitled to judgment, that she is entitled to \$4500.00.”

With respect to the court’s statement at R. 60 of the record in holding the defendant in contempt, the court stated:

“THE COURT: I don’t care anything about this borrowing. The defendant is in contempt since he’s been working at Sperry’s by —

“MR. IVERSON: If Your Honor please—

“THE COURT: —sixty dollars instead of the one hundred, and whether he borrowed at other times I wouldn’t be interested.”

At the time the decree of divorce was entered (R. 24) the defendant was out of work, had no money, and was suffering from a double hernia and could not do heavy work. Yet the court in entering the decree of divorce on the 10th of February, 1956, by the Honorable Parley S. Norseth (R. 9) ordered the defendant to pay to plaintiff for the support and maintenance of the children the sum of \$50.00 per month per child.

With respect to the \$1,500 loan which defendant

claims he borrowed from his sister and is paying back at the rate of \$10.00 per month, it is interesting to note the defendant's testimony at page R. 28 of the record:

"Q. By the way, where did you get the fifteen hundred dollars to invest?

"A. I borrowed it from my sister.

"Q. What is her name?

"A. Donna Petty.

"Q. How much of it have you repaid?

"A. I haven't any of it repaid yet."

With respect to defendant's earnings and take-home pay, at R. 28 of the record, he testified:

"Q. Now, what is your present take-home pay?

"A. It averages around sixty-eight dollars a week or around three hundred a month practically you could say take-home pay.

"Q. That is approximately three hundred dollars a month. Now, during all this time that you were out of work, what did you do for money?

"A. I had to depend on my sister, I guess.

Defendant testified with respect to his expenses per month (R. 30 and 31) rent \$71.00, groceries \$60.00, utilities including telephone and electric power \$16.00, clothing \$10.00, barber \$5.00, laundering and cleaning \$8.00; that with respect to trans-

portation, he uses his wife's automobile which she purchased solely from her own funds, but that he maintains it at an expense of from \$35.00 to \$40.00 per month.

With respect to the money which defendant claims to have paid the plaintiff for the support of the children, the defendant claims \$60.00 per month since working at Sperry, plus \$10.00 "that he spends on the children." At page 32 of the record the defendant states:

"A. She's loaned me the money to go and get them fixed because I haven't been able to save enough outside of my living conditions and paying her sixty a month and spending ten on the kids, seventy, I had my hands full. I couldn't do it."

With respect to the amount of money the defendant gives or spends on the children, the defendant testified: (R. 32-33)

"Q. Now, what moneys have you given to the children, or how often do you give them moneys and what —

MR. McCULLOUGH: I object to that, Your Honor. I think it is irrelevant what he gives to the kiddies.

THE COURT: The objection is sustained. He may be charitable, but this court is not interested in his charity. It is only interested in whether he is abiding by the order of the court.

"Q. Did you have occasion to purchase a bicycle for the boy sometime ago?

MR. McCULLOUGH: Object to it—

“A. Yes, sir.

MR. McCULLOUGH: —Your Honor.

“Q. Wait just a minute.

THE COURT: The answer will be stricken. the objection is sustained.

With respect to the affirmative defense of estoppel raised by the defendant, the defendant testified that he had a conversation with the plaintiff in June, July or August of 1956, and defendant testified as follows: (R. 35-38)

“A. It was around in August of the same year.

“Q. All right, August of 1956?

“A. June, July or August.

“Q. Do you recall the first conversation where you were and where she was?

“A. Well, she lived in the apartments there on First South. I forget the name of them now.

“Q. Is that where the conversation was had?

“A. Yes.

“Q. And this would be in August in the apartment that she was living in?

“A. Yes, sir.

“Q. Do you remember the street that it was on?

“A. First South between Fourth and — I forget the name of the apartments now. First

South and Fourth East, somewhere in there.

“Q. All right, tell us what she said and what you said.

“A. She just said that she knew I had been out of work and to give her whatever I could, any little amount would help, and that she was working now, and every little bit I sent her would help a lot, and I would try and give her as much as I could.

“Q. Well, what else was said? Was there anything said about the — what you told us about before, Mr. Robbins?

“A. Was that before Mr. Robbins or after?

“Q. I am asking you.

“A. Oh, she said she would sure like me to keep these creditors off her back, so that she wouldn't have no trouble with her work, and she would be perfectly happy to accept whatever I could afford as long as I kept these creditors away from her place of business, because she said she would get fired if they came around there garnisheeing her wages.

“Q. Had she already been garnisheed?

“A. One week there she had.

* * * *

“Q. Is that the first time you had the conversation over this matter that you keep these creditors off her back?

“A. Yes, sir.

* * * *

“Q. All right, now, have you since this first conversation that you told us about had any

further conversations concerning the matter of your relationships in regard to the payment of the support money for the children with your wife?

"A. No, I have had happy relations up until this month. I thought she was satisfied the way things were going."

During the last year and a half prior to the hearing, the defendant testified that he had been paying the sum of \$70.00 per month to the plaintiff for the support and maintenance of the children. (R. 38, 39) Defendant testified at R. 39 of the record that he had been married two years in August of 1961; that at the time he was married they had no furniture; that since they married they have acquired some and that his wife had paid for all of it. Defendant further testified that he felt the maximum he could pay for the support of the children was the sum of \$70.00 per month. (R. 40) Based upon the one conversation which the defendant claims to have had with the plaintiff with respect to his defense of estoppel, the defendant testified as R. 42:

"Q. Now, if your wife had not told you that she would be satisfied if you paid the creditors and kept them satisfied and as much as you could possibly afford, what would you have done, Mr. Harris?

MR. McCULLOUGH: I object to that—

"A. I would have —

MR. McCULLOUGH: —as irrelevant, immaterial, incompetent, Your Honor. He knew what the order of the court was.

THE COURT: I will let him say. Go ahead.

“A. I would have got hold of an attorney and had it reduced to what I could pay, If I didn’t think she was happy with the set-up.”

With respect to defendant’s living expenses, on cross-examination the defendant testified at R. 46:

“Q. Now, you say you spend seventy-one dollars for rent. Is that correct?

“A. Yes, sir.

“Q. Is that the full amount of the rent for your apartment?

“A. Yes, sir.

“Q. Your wife doesn’t pay any portion of that?

“A. No, sir.

“Q. You spend sixty dollars a month for food?

“A. Yes, sir.

“Q. Does your wife pay any portion of that?

“A. She buys things from time to time.”

With respect to defendant’s defense of estoppel, the plaintiff testified at R. 52 of the record:

“Q. Mrs. Harris, have you ever at any time since the entering of the decree of divorce,

either orally or in writing or in any manner, told your husband or your former husband or indicated to him that he did not have to pay the full amount of the money set forth in the decree?

“A. No. In fact, I have asked him to the contrary. I have always asked for more.”

The home in which the plaintiff lives was purchased by the plaintiff, her sister, and her mother, and stands in the name of all three. (R. 54) However, the sister does not live with them any longer. (R. 53, 54)

With respect to the earnings of plaintiff's son, the plaintiff testified at R. 55:

“Q. And how much does the boy earn on his paper route?

“A. This last month he earned eight dollars. Some months he earns fourteen, and the highest he's ever earned was twenty-eight dollars.

“Q. What would he average, about twenty dollars a month?

“A. I would say so.”

With respect to the plaintiff's expenses per month, the plaintiff testified at R. 55:

“Q. Now, taking out what your sister has heretofore been paying you, there's four hundred thirty-five dollars a month. Can't you live on four hundred thirty-five dollars a month and feed the two children and your mother and yourself in that home?

"A. Well, I could if I had that coming in. We have had repairs on the house. We bought an old home, and we have had appliances go out. We have got to have it painted now, and my children both of them need an orthodontist right now at the present time, and that is what I really need money for now, and I have got a boy with hay fever, and he is suffering so bad I have got to take him and have a series of shots, which are very expensive from the doctor, and the children are costing a lot more now than they —

Further at R. 57:

"Q. Tell us what besides board and room you have to supply the children.

"A. My boy has two front teeth broken half way off. They both have got to be repaired, and it is about a hundred dollars for each one of those.

"A. All right.

"A. And my daughter has got to go to an orthodontist or have surgery on her molars that I couldn't take care of at the time I should have, and it is going to cost me a tremendous amount of money to get that taken care of now. I don't know how much, but I know it is going to be over two hundred dollars

"Q. All right. What ordinary, constantly recurring expenses do you have besides food and shelter.

"A. I have doctor bills. I have — the children — my boy belongs to the Boy Scouts. It

just cost me twelve dollars last month. He has to pay those dues, and I have to keep them clothed. I don't know all what you mean, but I don't have enough money to take care of them for the things that they need at the present time."

Further with respect to the defense of the defendant with respect to estoppel, the plaintiff testified at R. 58:

"Q. And you had no conversation at all with him about him taking care of these obligations on which you were jointly liable and that as long as he paid what he could for the children you would be satisfied?

"A. No, I never said that.

"Q. You never said anything like that?

"A. No, sir.

"Q. Have you ever told that to his sister?

"A. No, sir.

"Q. Do you know his sister?

"A. Yes, I know his sister.

"Q. She's loaned him money on various occasions to help keep the family when he hasn't had enough, hasn't she?

MR. McCULLOUGH: Object to it as irrelevant, immaterial, and incompetent, Your Honor.

THE COURT: If the witness knows, she may answer.

"Q. Do you know whether his sister has loan-

ed money to him for the support of the family when he's been out of work?

"A. Not for the support of his family, no, never.

"Q. What was the money for?

"A. When he had an invention and was to get a patent for an invention of his, she loaned some money.

Further on page 59:

"Q. I see. But at least you have taken no action of any kind against Mr. Harris to collect anything more than the amounts that he has been paying to you up until the last thirty days?

"A. I have asked him every time I have seen him that I need more money.

"Q. But you have done nothing about any action. Is that correct?

"A. He keeps promising that he will do it, and I never have until it came—"

The lower court found as set forth in the Findings of Fact (R. 66):

"4. That during the period of said delinquency the plaintiff made constant and repeated demands upon defendant to make said support money payments; that defendant failed and refused to make the payments as set forth in the order of the court dated the 10th of February, 1956."

ARGUMENT

POINT 1.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT FOR \$4500. FURTHER, THE TRIAL COURT DID NOT MISAPPLY THE LAW APPLICABLE TO SAID POINT IN ISSUE.

As set forth in plaintiff's Statement of Facts, the sum of \$4500 was agreed to by plaintiff and defendant in open court as the sum that judgment would be rendered for, if plaintiff was in fact entitled to judgment. Defendant's main contention is that the plaintiff was estopped to claim said judgment by reason of her actions. Plaintiff has set forth the testimony in full of the defendant with respect to what he claimed were the grounds for estoppel, and plaintiff refers the court to plaintiff's Statement of Fact. It should be remembered, however, that according to the defendant's own testimony there was but one conversation with the plaintiff with respect to these grounds for estoppel, and that was in June, July or August of 1956, and defendant's testimony was as follows:

"She just said that she knew I had been out of work and to give her whatever I could, any little amount would help, and that she was working now, and every bit I sent her would help a lot, and I would try and give her as much as I could."

Further, "Oh, she said she would sure like me

to keep these creditors off her back so that she wouldn't have no trouble with her work, and she would be perfectly happy to accept whatever I could afford as long as I kept these creditors away from her place of business because she said she would get fired if they came around there garnisheeing her wages." Further, "Is that the first time you had the conversations over this matter — that you keep the creditors off her back?"

"A. Yes, sir"

Further, "All right, now have you since this first conversation that you told us about had any further conversations concerning the matter of your relationships in regard to the payment of the support money for your children with your wife?"

"A. No, I have had happy relations up until this month. I thought she was satisfied the way things were going."

This is the only conversation which the defendant testified to by his own words in which anything was mentioned to the plaintiff with respect to his grounds for estoppel. Even as to this one conversation, the plaintiff denied ever having such a conversation and that her total conversation with the defendant at all times was "I need more money, can't you give me something more?" or words to this effect.

Until the defendant was employed at the Sperry Rand job, his employment was spasmodic and he was unable to maintain employment because of his

physical condition, which physical condition by the defendant's own testimony existed at the time the decree of divorce was entered. The trial court clearly believed the evidence as submitted by the plaintiff and without question did not believe the evidence testified to by defendant. The trial court found, as set forth in its Findings of Fact, that during the period of the delinquency plaintiff made constant, repeated demands upon defendant to make said support money payments. Under the doctrine recited in the case of *Price vs. Price*, 4 Utah 2d 153, 289 P. 2d 1044, this court held that if there was evidence adduced at the trial which it believed would support the trial court's award, then the judgment of the lower court could not be disturbed on appeal. It is interesting to note the comment of the court at page 154 of the Utah Reports:

"As to 1): Defendant recites facts testified to by him which he apparently assumes the court was required to consider as true, but it is obvious from the trial court's conclusion that the latter did not believe everything defendant said. Other evidence adduced, if believed, would support the award, and under familiar principles we cannot disturb the judgment in such event."

Further, defendant seems to take great comfort in the fact that while he was flitting from job to job and unable to hold employment because of his "physical condition" the fact that plaintiff did not

harass him was a conclusive presumption that the plaintiff waived her rights. Accordingly, the plaintiff is barred from recovering against defendant because of her actions. This court in the case of *Openshaw v. Openshaw*, 105 Utah 574, 144 P. 2d 528 at page 579 of the Utah reports states:

“But mere inaction or delay short of the period of limitations, in the enforcement of payment of an obligation already accrued, without more, is insufficient upon which to predicate laches.

“ ‘Laches is more than mere lapse of time; its essence is estoppel.’ *De Giovacchini v. Teich*, 133 N. J. Eq. 107, 30 A. 2d 815, 819. As stated by this court in *Burningham v. Burke et al*, 67 Utah 90, at page 107, 245 P. 977, at page 983, 46 A.L.R. 446: ‘While delay is an important factor, yet mere delay, unless unreasonable or inexcusable, is not enough; and of equal importance are the circumstances occurring during the delay, the relation of the parties to the subject, disadvantages that may have come through loss of evidence, change of title, intervention of equities, or injury from other causes.’

“In this case we have searched the record in vain for any evidence which would even tend to show that plaintiff misled defendant to his detriment, or in any other way did anything to injure defendant, make it difficult or impossible for him to comply with the order of the court, or persuaded him not to apply to the court for reduction of the award. 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 or arrearages, is not sufficient upon which to conclude that she was guilty of laches. * * * *

“Nor does he show how he has been injured by her acting on the mistaken belief so induced, nor why he should in equity profit by his conduct in making the niggardly contribution to her support of approximately \$9.50 per month for the five years preceding the hearing — the amount arrived at by giving full credence to his own testimony as to such payments.

“* * * laches cannot be imputed to one who was ignorant of the facts and for that reason failed to assert his rights, and on such ground, to bar relief against fraud, laches must not only consist of delay but of a delay which worked a disadvantage to the opposing party.’ *Burningham v. Burke*, supra.

“The evidence was clearly insufficient to support the finding or justify the conclusion, whichever it may be designated, of laches.

“The cases cited by respondent to the effect that laches for many years may constitute a defense to contempt proceedings are no authority for his contention that the failure of an aggrieved party to immediately enforce payment of an award of alimony and support money may be treated as laches.”

Because of defendant’s poor “physical condition” the plaintiff has of necessity been required to seek employment, which she did immediately after the divorce decree in order to support herself and

the two minor children. As shown by her testimony and her repeated demands upon the plaintiff she has constantly been after the defendant to make additional payments and to bring the payments to date. As shown by the plaintiff's testimony, the children themselves, because of the failure of defendant to make his payments, have suffered by not having the proper dental care for their teeth at the time when they should have been cared for. The court only has to read the testimony of the plaintiff in this regard to fully understand that because the children were not receiving the full amount they had to forego the necessary dental repairs they needed.

It is true the plaintiff has not brought a court action to secure judgment for the delinquency prior to the instant hearing and the defendant seems to take great comfort in the fact that if the plaintiff had wanted the back money that she would have proceeded with the matter in court. A slight perusal of the defendant's own testimony with respect to his earning capacity in the past is indicative of how futile a court action at such time would have been. Certainly the defendant cannot say that the plaintiff has waived her rights by failing to bring a court action. By Plaintiff's own testimony it is apparent that the plaintiff could not waive this right of the children's support when the children were so definitely in need of that support. Defendant's biggest

argument is to the effect that since the plaintiff is working and has been since shortly after the decree of divorce, that he should no longer be required to comply with the court's order and pay the \$100.00 per month for the support of the children, regardless of whether they need it or not. If defendant's contention in this regard is to be accepted, then any divorced father can merely sit by until his former wife obtains employment, and then come into court and say, look my former wife is now working, therefore, the support payments for the children should be reduced or entirely eliminated as to anything that I have not paid in the past. The defendant's argument is totally without logic.

Defendant quotes from the case of *Larsen v. Larsen*, 5 Utah 2d 224, 300 P. 2d 596 for the proposition that since defendant testified with respect to his grounds for estoppel, even though not believed by the lower court, that he is now under the doctrine of the *Larsen* case relieved of the obligation of any accrued arrearages. It should be noted that the court in this case specifically found that the evidence was sufficient to support findings for either party on issue of plaintiff's laches, acquiescence, and equitable estoppel following her recovery. Therefore, the court remanded it to the trial court for a specific finding with respect to said issue. The lower court in the instant case has specifically

found in its Finding of Fact (R. 66): "That during the period of said delinquency, the plaintiff made constant and repeated demands upon defendant to make said support money payments, and that defendant failed and refused to make the payments as set forth by the order of the court dated November 10, 1956." And again with respect to defendant's grounds for estoppel, the court should specifically examine the testimony of the one conversation upon which defendant bases his grounds for estoppel as set forth in the Statement of Fact by plaintiff. The facts of the Larsen case are entirely different than those in the instant case; therefore, said case would have no bearing upon the decision in this case.

In what way has the defendant changed his position in order to invoke the doctrine of estoppel? He was ordered to pay the bills as set forth in the decree of the court, some of which he paid and some of which he did not pay. And he was ordered to make monthly payments to the plaintiff, a portion of which he has paid and the majority of which he has not paid.

POINT 2.

THE TRIAL COURT DID NOT ERR IN REFUSING TO PERMIT THE SISTER OF THE DEFENDANT, DONNA PETTY, TO TESTIFY.

With respect to Point 2 of the defendant's argument, the defendant set forth in full and the

plaintiff has repeated defendant's statement in her Statement of Fact, the one conversation upon which he claims to rely for his grounds of estoppel. Certainly the sister of the defendant could not elaborate beyond that particular statement. The matters as set forth in Point 1 of plaintiff's brief are equally applicable to Point 2.

POINT 3.

THE COURT DID NOT ERR IN FINDING DEFENDANT GUILTY OF CONTEMPT FOR HIS FAILURE TO MAKE THE FULL PAYMENT SINCE HIS EMPLOYMENT AT SPERRY'S.

The defendant has taken great pains in his brief to show that although he has only paid the plaintiff the sum of \$60.00 per month, that in reality he has been paying her in full because, as he states, he was spending \$10.00 a month on the children and, in addition, the plaintiff took the children as dependents on her income tax return, which gave her another \$20.00 or \$21.00 per month. And, further, that the defendant has maintained since his employment at Sperry's medical insurance to cover the medical expenses of the children. The reasoning of the defendant in these respects no matter how commendable it may or may not be certainly is not complying with the order of the court as set forth in the decree of divorce. The decree did not authorize the defendant to enter into these alternative programs, but made a specific requirement that the

defendant pay the sum of \$100.00 per month, which he has not done and has failed and refused to do.

Further, the defendant in setting up his monthly expenses, pays the entire rent for the apartment for both himself and his present wife although she is working. Secondly, he buys the groceries for the sum of \$60.00 per month. When asked if his present wife paid any portion of the groceries, his statement was that "she buys things from time to time". Further, the defendant set forth that he is obligated to spend \$8.00 for laundry, \$5.00 for a barber, \$10.00 for clothes, \$35.00 or \$40.00 per month for an automobile that he doesn't own. Further that they have accumulated furniture since he married his present wife although he has never paid for any portion of it; they have accumulated an automobile however he didn't pay anything with respect to the automobile; that his present wife has made all of the payments in that respect. And then again he says he can only pay \$60.00 per month because he has to spend \$10.00 per month on the children. Here again this is not the defendant coming into court with clean hands to show good cause why he has not complied with the order of the court, but rather a defendant trying to rationalize his expenses so as to justify the amount which he wants to pay for the support of the minor children.

With respect to defendant's contention that he

will lose his job if he is required to spend thirty days in jail. Certainly the plaintiff is not desirous that the defendant lose his employment. It has taken him since 1956 to the present time to obtain employment whereby he could in some half measure comply with the order of the court and attempt to support his minor children. The plaintiff does not want him to lose his job. However, the defendant has got to be made to realize the necessity of complying with the court's order and to give his children the support they are entitled to and which he can afford to pay.

POINT 4.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN COMMITTING THE DEFENDANT TO JAIL FOR THIRTY DAYS.

No argument is necessary with respect to Point 4 of defendant's brief.

POINT 5.

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S PETITION FOR MODIFICATION OF THE DIVORCE DECREE TO REDUCE THE AMOUNT OF SUPPORT MONEY PAYABLE BY THE DEFENDANT TO THE PLAINTIFF.

The defendant proved no material change in circumstance the entering of the divorce decree. Pursuant to the facts, it was clearly brought out that defendant, at the time the decree was entered, was unemployed and was still ordered to pay the

sum of \$50.00 per month per child. Since that time the defendant's position has been bettered measurably. He is now steadily employed earning a net take-home pay of \$300.00 per month. The defendant's contention that since the plaintiff is now working therefore the defendant does not need to support the children to the extent that he was required to do so when he was totally unemployed is without merit. The needs of the children as illustrated by the plaintiff are adequately set forth in the Statement of Fact of the plaintiff and will not be duplicated here. However, the court's attention should be called to such statements of the plaintiff and the immediate needs of the minor children for dental care, clothing, and the social needs of the children as set forth by the plaintiff.

Plaintiff respectfully submits that the judgment and order of the Third District Court should be affirmed.

Respectfully submitted,

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