

1962

# Julia Harris v. Elmo L. Harris : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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CLERK, Supreme Court, Utah

JULIA HARRIS,  
*Plaintiff-Respondent,*

—vs.—

ELMO L. HARRIS,  
*Defendant-Appellant.*

9564  
No. 9513

APPELLANT'S BRIEF

Appeal from the Judgment of the  
Third District Court for Salt Lake County  
HONORABLE A. H. ELLETT, *Judge*

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# INDEX

	<i>Page</i>
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS .....	3
ARGUMENT	

Point 1. The trial court erred in entering judgment in favor of Plaintiff and against the Defendant for \$4,500.00. The Court misapplied the law applicable to the point at issue.....	9
Point 2. The trial court erred in refusing to permit the sister of the Defendant, Donna Petty, to testify that the Plaintiff had told her that so long as the Defendant paid joint obligations and paid what he could for the support of the children that she would be satisfied. ....	11
Point 3. The Court erred in finding the Defendant guilty of contempt. ....	12
Point 4. The trial court abused its discretion in committing the Defendant to jail for thirty days....	14
Point 5. The trial court erred in denying the Defendant's petition for modification of the decree of divorce to reduce the amount of support money payable by the Defendant to the Plaintiff. The trial court misapplied the law applicable to the point at issue.....	14

## CASES CITED

Larsen v. Larsen, 5 Utah 2d 224; 300 P. 2d 596.....	10
Wallace v. Wallace, 9 Utah 2d 237, 342 P. 2d 103.....	16
Section 30-3-3, U.C.A., 1953.....	17
Section 30-3-5, U.C.A., 1953.....	17

## AUTHORITIES CITED

19 C.J., Divorce, Section 817, Page 356.....	17
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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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JULIA HARRIS,  
*Plaintiff-Respondent,*

—vs.—

ELMO L. HARRIS,  
*Defendant-Appellant.*

No. 9513

---

APPELLANT'S BRIEF

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STATEMENT OF KIND OF CASE

This is an action upon a petition and order to show cause why the Defendant should not be punished for failure to pay support money payments in the amount of \$4,605.00 and for judgment in that amount and attorneys' fees. Defendant pleaded an affirmative defense to the prayer for judgment alleging that the Plaintiff had told the Defendant that if the Defendant would pay certain creditors of Plaintiff and Defendant to prevent them from garnisheeing her wages and so long as Defendant satisfied said creditors and paid as much as he could reasonably afford for support money for the children that the Plaintiff would expect no more, and that had Plaintiff not so agreed Defendant would have petitioned

for a modification of the decree of divorce to reduce the amount payable as support money, and that Plaintiff should be estopped to seek a judgment against the Defendant for \$4,605.00, or for any amount. Defendant cross-petitioned for a modification of the decree of divorce to reduce the support money payable for the support of the minor children of the parties from \$50.00 per month each to \$35.00 per month each, alleging changed circumstances, to wit: That at the time of the entry of the decree of divorce, Plaintiff was unemployed, but within two or three months thereafter she obtained steady employment for which she has received in excess of \$250.00 per month ever since.

### DISPOSITION OF THE LOWER COURT

The case was tried to the Court and the Court entered a judgment in favor of the Plaintiff for \$4,500.00 delinquent support money and \$100.00 attorneys' fees. The Court found the Defendant guilty of contempt of court and sentenced the Defendant to serve thirty days in the county jail and denied Defendant's petition for modification of the decree of divorce. From such denial of Defendant's petition for modification of the decree of divorce and such judgment and sentence of the Court, Defendant appeals.

### RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and order of the Court and every part thereof, and a new trial.

## STATEMENT OF FACTS

In February, 1956, when the decree of divorce was entered, Defendant was out of work, was financially embarrassed, and was suffering from a double hernia (R. 24). Between that time and the first of January, 1959, Defendant held four separate jobs for limited periods of time, but in each case was unable because of his physical condition to continue his work (R. 24-28). During that time he paid what he could to the Plaintiff for the support of the children (R. 26-26). One of the jobs so held by him was for a company known as All Plastics with whom he obtained a position by purchasing 1,500 shares of capital stock of the company with \$1,500.00 which he borrowed from his sister, Donna Petty, no part of which he has been able to repay (R. 27-28). While out of work he was obliged to depend upon his sister with whom he lived and who took care of him (R. 29). On January 1, 1959, Defendant was given a position with Sperry's after having an operation for the repair of his hernias, and he has worked continuously at Sperry's from that date until now (R. 28). The court stated at the conclusion of the evidence:

“The Defendant is in contempt since he has been working at Sperry's.” (R. 60)

Defendant's average income is now \$68.00 per week, \$300.00 per month take home pay (R. 28). Defendant has remarried and is living with his wife (R. 30).

Defendant's expenses are: \$10.00 per month payable to sister on \$2,000.00 of loans (R. 29); \$71.00 per

month rent; \$60.00 per month for groceries; \$16.00 per month for utilities; \$5.00 per month for barber; \$10.00 per month for clothes; \$8.00 per month for laundry (R. 30). He uses his wife's car, a 1955 Buick, which was purchased and paid for entirely by her. He maintains the automobile at a cost of \$35.00 to \$40.00 per month. It is necessary to his employment that he have access to an automobile (R. 31). He has been unable to pay a cent toward the purchase price of the automobile after paying his living expenses, \$60.00 per month to Plaintiff and \$10.00 per month to the children (R. 32).

The children are a boy, age fourteen, and a girl, age ten and a half. Defendant called and talked with the girl nearly every day until Plaintiff started this action. Ever since the divorce when in Salt Lake Defendant has visited with the children every week or every two weeks (R. 32).

Plaintiff was not working at the time of the divorce and had not worked at any time while they were married (R. 33). Within forty-five to sixty days after the divorce was granted, Plaintiff obtained employment (R. 33). Plaintiff's present income is \$325.00 per month, with take home pay of \$275.00 (R. 34). About six months after the divorce her wages were garnisheed. Defendant testified that Plaintiff told him that if he would keep their creditors "off her back" she would accept whatever he could afford. She would get fired if they garnisheed her wages (R. 36-37). She said she would be happy to accept whatever he could afford so long as he kept the creditors away from her place of business (R. 36). Defendant paid several creditors to protect Plaintiff (R. 37).

The Court sustained an objection to further testimony concerning bills paid by the Defendant to protect the Plaintiff. The Court stated:

“I don’t see that there would be any consideration for her trying to get him to pay the bills. Paragraph Six of the decree says he shall.” (R. 38)

Since those conversations Defendant testified that he has had happy relations with the Plaintiff until the month of the hearing, and that he thought she was satisfied the way things were going; she had never indicated that she would attempt to collect any unpaid support money (R. 38).

Since he has worked at Sperry’s he has not missed making a payment every month to the Plaintiff. During the last year or year and a half he has been paying \$60.00 per month (R. 38).

If Defendant’s wages are garnisheed he will lose his work. Two of his fellow employees have been discharged for garnishments (R. 39).

Defendant remarried in August, 1959. His present wife bought and paid for all furniture. She must contribute to maintenance of the home. She has accumulated no money since they were married (R. 40). Defendant stated that he can pay \$70.00 per month, the amount he has been paying Plaintiff and giving to the children.

If Plaintiff had not told Defendant that she would be satisfied if he paid their joint creditors and kept them



satisfied and paid as much as he could possibly afford, he would have secured an attorney and had the support money reduced to what he could pay (R. 42).

Defendant paid not a dime on the Buick automobile that his present wife bought (R. 44). The first month he was at Sperry's he gave Plaintiff \$40.00 and has never missed payment since (R. 45). In 1957 he took bankruptcy and discharged all obligations except those jointly owed by him and Plaintiff, about \$800.00 of obligations (R. 46).

Defendant's present wife pays nothing on rent or utilities but buys food from time to time. She earns \$220.00 per month take home pay (R. 46).

The son of the parties told Defendant that he makes \$40.00 per month from his paper route (R. 49).

Plaintiff testified that she has never since the entry of the decree of divorce, either orally or in writing, told the Defendant he did not have to pay the full amount of the money set forth in the decree, and that she has always asked him for more. She is living at 2222 Preston Street with the two children and her mother. Her sister is married and living in Sandy (R. 52). She does not think she can support the children on less than \$50.00 per month each (R. 52). Plaintiff is employed at Hercules Powder Company earning \$325.00 per month with \$275.00 per month take home pay (R. 53). She takes credit for the two children as her dependents (R. 53).

She is buying her home and paying \$91.00 per month

therefor. Her mother's income is \$102.00 per month. The mother pays \$60.00 per month into the household (R. 53). The house is in the name of the mother, sister and Plaintiff (R. 54). The sister paid \$100.00 per month for board and room and on the house. She made \$325.00 per month (R. 54). The boy earns an average of \$20.00 per month from his paper route (R. 55). Plaintiff has had repairs on the house; she has had appliances go out; the house needs painting; both of the children need an orthodontist; the boy has hay fever and needs a series of shots which are very expensive (R. 55).

Defendant has been carrying insurance on the children for medical expenses and they have had about \$800.00 of medical expenses paid by the insurance in the last year or two (R. 55-56). Medical insurance does not cover hay fever (R. 56). Plaintiff pays \$91.00 per month on the home, \$35.00 per week for food for herself, her mother and the two children, leaving \$200.00 per month for other things (R. 56).

Plaintiff was asked what other things she needs that require \$200.00, (R. 56). Thereupon, the Court interjected:

"I don't care to hear it. I know what it takes. I don't care what she takes otherwise \* \* \* If you want to confine it to what she needs for the kiddies, well and good, but what she needs for herself and her mother, I am not interested in it." (R. 56).

Plaintiff was then asked to tell what she thinks she requires besides food and the rent. She answered, "Since

my sister left I have to have a car.” (R. 56). The Court then interjected:

“I am not interested in what this lady has to have. She can be rich as Croesus. She is getting no alimony. I am only talking about the Defendant’s duty to support his kiddies, what she needs for the kids.” (R. 57).

Plaintiff testified that the boy had two front teeth broken half off which need to be repaired at a cost of about \$100.00 each. The daughter needs to go to an orthodontist for work to cost over \$200.00 (R. 57).

Plaintiff has taken no action of any kind against Defendant to collect anything more than the amounts he has been paying until within the last thirty days prior to trial. She stated that she has asked him every time she has seen him that she needs more money, but she has done nothing about any action (R. 59). Defendant testified that until the last thirty days Plaintiff has never complained about him not paying her enough money (R. 60).

Defendant offered the sister of the Defendant, Donna Petty, as a witness to testify that Plaintiff had told her that as long as the Defendant paid the bills and paid her what he could that she would be satisfied. The Court refused to permit the witness to testify and stated:

“That would be no consideration for that type of promise.” (R. 60)

## ARGUMENT

### POINT ONE

The trial court erred in entering judgment in favor of Plaintiff and against the Defendant for \$4,500.00. The court misapplied the law applicable to the point at issue.

Plaintiff sought a judgment for accrued and unpaid support money in the amount of \$4,605.00. The court awarded judgment for \$4,500.00. Defendant pleaded as a defense to the prayer for judgment that the Plaintiff told him shortly after the divorce was entered and after she had been garnisheed by a judgment creditor that if he would satisfy joint creditors and would pay her as much as he could afford that she would expect no more. He further pleaded that had the Plaintiff not done so he would have petitioned for a modification of the decree of divorce to reduce the amount ordered paid as support money, and that Plaintiff should be estopped to seek a judgment against him for \$4,605.00, or for any amount.

The Defendant testified in support of this allegation (R. 36-37). The Plaintiff denied that she had made such an agreement (R. 52).

The trial court obviously misapplied the law applicable to the point at issue. At one point Plaintiff objected to further testimony concerning the bills paid by the Defendant to protect the Plaintiff from garnisheeing creditors. The trial court sustained the objection, stating

“I don’t see that there would be any consideration for her trying to get him to pay the bills.

Paragraph Six of the decree says he shall." (R. 38).

Again Defendant offered the sister of the Defendant Donna Petty, as a witness to testify that the Plaintiff had told her that as long as the Defendant paid the bills and paid what he could that she would be satisfied. The Court refused to permit her to testify and stated:

"That would be no consideration for that type of promise." (R. 60).

It is Defendant's position that in such a matter the defense need not be founded upon consideration but is properly based upon estoppel.

In the case of *Larsen v. Larsen*, 5 Utah 2d 224, 300 P. 2d 596, the Court stated:

"A mother by her actions or representations or both may preclude herself from recovering pastdue installments of support money to reimburse her for the money which she has spent for the support of the children where the father's failure to make such payments was induced by her representation or action and where as a result of representations or actions the father has been lulled into changing his position which he would not have done but for such representations, and that as a result of such failure to pay and change in his condition it would cause him great hardship and injustice if she is allowed to enforce the payment of such back installments, she may be thereby *estopped* from enforcing the payment for such back installments."

The Defendant not only testified that the Plaintiff agreed to be satisfied with what he could pay in addition

to paying off joint obligations of the parties, but he also testified that until this proceeding was filed that she made no complaint of his inability to pay the full amount of \$100.00 per month and appeared to be satisfied with the payments he was making (R. 38). It is true that she testified that she complained every time she saw him that he was not paying enough (R. 59). He testified and she did not deny that until she filed her action he talked with the daughter practically every day on the telephone and visited the children of the parties once a week or at least every two weeks. The Defendant has been employed steadily since January, 1959, and she has not taken any action to obtain more than he has been paying or to obtain the full amount of the payments that have accrued until this proceeding was filed.

The Defendant cannot contend that the judgment of the court is not based upon competent evidence, but the great weight of the evidence is contrary to the statement of the Plaintiff that she did not agree to be satisfied so long as the Defendant paid joint creditors and paid as much as he could reasonably afford. Moreover, it is apparent that the Court misapplied the law applicable to this defense.

## POINT TWO

The trial court erred in refusing to permit the sister of the Defendant, Donna Petty, to testify that the Plaintiff had told her that so long as the Defendant paid joint obligations and paid what he could for the support of the children that she would be satisfied. The court mis-

applied the law applicable to the point at issue.

This assignment of error is discussed under Point One.

### POINT THREE

The Court erred in finding the Defendant guilty of contempt.

The Court stated that the Defendant was guilty of contempt for failure to pay the full amount of the support money during the time that he has been employed at Sperry's (R. 60). Thus, his actions prior to that time need not be discussed.

The testimony is that while he is at Sperry's he has earned from \$50.00 per week take home pay to \$68.00 per week take home pay (R. 28). During the period that he has been so employed he has never missed a payment even though his payments have not been the full amount ordered paid (R. 38). The evidence shows that at the present time his expenses are: \$10.00 per month payable to his sister on \$2,000.00 of loans (R. 29); \$71.00 per month rent; \$60.00 per month for groceries; \$16.00 per month for utilities; \$5.00 per month for barber; \$10.00 per month for clothes; \$8.00 per month for laundry (R. 30). He is obliged to maintain an automobile which was purchased and paid for entirely by his wife, at a cost to him of \$35.00 to \$40.00 per month (R. 31). He testified that after paying such expenses and \$60.00 per month to the Plaintiff and \$10.00 per month to the children (R. 32) that he has nothing left with which to pay more.

The foregoing payments total \$285.00 of his \$300.00 take home pay. It is apparent that the foregoing items of expense cannot cover all of his expenses as everyone has a multitude of expenses not embraced within the foregoing category of expenses.

In addition to Defendant paying Plaintiff \$60.00 per month and giving the children \$10.00 per month, the Plaintiff has received the benefit of taking the children as her dependents (R. 53). This gives her an additional \$20.00 or \$21.00 per month benefit as her income tax is reduced by that amount. Thus, the \$70.00 paid by Defendant and the \$20.00 which she has received the benefit of amounts to \$90.00 per month. In addition, without any order of Court so to do, the Defendant has maintained medical insurance upon the children and there has been paid by the insurer for the benefit of the children within the last year or two \$800.00 for medical expenses (R. 55-56), thus relieving the Plaintiff of these medical costs, which greatly exceed the remaining difference between \$90.00 per month and \$100.00 per month, or even a difference of \$30.00 a month during the last two years, which is the full amount of the difference between the \$70.00 per month which has been paid by the Defendant to the Plaintiff and the children and the \$100.00 ordered paid. It thus appears that she has received the benefit of at least \$100.00 per month during the past two years while he has been working for Sperry's.

Considering the further fact that he has been in daily communication with the daughter of the parties and has



seen the two children of the parties at least every two weeks and usually every week during the past years, it seems inconceivable that the Court would find the Defendant in contempt of court under such circumstances and commit the Defendant to jail for thirty days therefor. It is so contrary to the usual treatment accorded defendants in such a proceeding as the case at bar.

Furthermore, the Defendant will, no doubt, lose his work if he is required to spend thirty days in jail.

#### POINT FOUR

The trial court abused its discretion in committing the Defendant to jail for thirty days. The argument under Point Three is applicable to this point.

#### POINT FIVE

The trial court erred in denying the Defendant's petition for modification of the decree of divorce to reduce the amount of support money payable by the Defendant to the Plaintiff. The trial court misapplied the law applicable to the point at issue.

The evidence concerning the Defendant's ability to pay has been set forth under Points One and Three, *supra*. In addition, the evidence shows that from the time of the entry of the decree of divorce in February, 1956, to January, 1959, the Defendant was unable to maintain employment because of his physical condition. During that period of time his income was small when he did work

and during a large part of the time he was obliged to depend upon his sister to maintain him (R. 29). At the time of the entry of the Decree of Divorce Plaintiff was not employed and had not been since she was married to Defendant. Within two months thereafter, she obtained work and ever since has received from \$250.00 to \$325.00 per month (R. 28). This constitutes a material change of circumstances.

Here again the Court misapplied the law applicable to the point at issue.

The testimony showed that the Plaintiff is paying \$91.00 per month on the home in which she lives and \$35.00 per week for food for herself, her mother and her children, and that her income totals \$425.00 per month, including her take home pay of \$275.00, the boy's earnings of at least \$20.00 per month as she testified, the mother's contribution of \$60.00 per month, and the moneys which have been furnished by the Defendant totalling \$70.00 per month, leaving a balance after payment on the home and for food of \$190.00 per month.

The Plaintiff was asked what other things she needed that would require \$200.00 per month. Without objection of counsel the Court interjected:

“I don't care to hear it. I know what it takes. I don't care what she takes otherwise \* \* \* If you want to confine it to what she needs for the kid-dies, well and good, but what she needs for herself and her mother, I am not interested in it.” (R. 56)

Plaintiff was then asked to tell what she thinks she

requires besides food and rent. She answered, "Since my sister left I have to have a car." (R. 56). The Court again without objection of Plaintiff's counsel interjected:

"I am not interested in what this lady has to have. She can be rich as Croesus. She is getting no alimony. I am only talking about the Defendant's duty to support the kiddies, what she needs for the kids." (R. 57)

It appears that her income has been wholly adequate for the support of the children and herself as she made no testimony otherwise. Apparently she was satisfied until "Since my sister left I have to have a car."

It is the position of the Defendant that the mother owes an obligation to the children and that if the father's financial condition is such that he cannot live reasonably and pay the full amount necessary to support the children, the mother, being able, should assist in the support of the children.

The statement contained in *Wallace v. Wallace*, 9 Utah 2d 237, 342 P. 2d 103, is to the point:

"The fact that the marriage is terminated does not obliterate whatever results it may have produced. They cannot be wished away nor ignored. Both spouses continue to sustain some duties toward each other and to the children. It is important to remember that these duties do not all run one way; they are reciprocal and must be faced up to if the proper objective is to be served. The purpose of the divorce decree and of the conduct of the parties under it must be calculated toward the solution of existing problems and sus-

tenance of the parties so they can reconstruct their lives on the most wholesome foundation possible under the circumstances. The purpose of the provision for alimony and support money is to provide for the current needs and not to allow the beneficiary to sit by and permit a burdensome debt to accumulate and then use it to harness the Defendant so that he cannot hold a job or live a respectable existence. Even though the decree may impose the responsibility of support upon the husband primarily, the wife also has a duty to see that the children are furnished with the necessities of life. It is because of the recognition of the continuing obligations of the parties for the welfare of the children that the statute provides that they are subject to such further orders of the court with respect thereto as the court shall deem reasonably proper. Section 30-3-5, U.C.A., 1953."

The Legislature of Utah apparently is in accord with this statement made in *Wallace v. Wallace*. Section 30-3-3 provides:

"30-3-3. Temporary Alimony and Suit Money  
The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children and to enable such party to defend the action."

In 19 C.J. Section 817, Page 356, the following statement of the law is made:

"The reasonableness of the amount allowed for the support of the children depends largely upon the needs of the children and the financial condition of the father, including his earning cap-

acity. If a mother to whom custody of a child has been awarded has means of her own, she may be held to contribute toward its support and thus diminish the amount to be paid by the father, the rule in this respect not differing materially from that applied in the case of an allowance of permanent alimony. In such cases the court should, therefore, consider the ability of the parents, the care and attention the mother must give the children, the assistance the mother will receive from the children, if any, and all the surrounding facts and circumstances and equalize the burden between them as nearly as may be."

Defendant submits that the Judgment and Order of the Trial Court should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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By J. GRANT IVERSON  
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