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FILED
JUL 20 1965
Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

PAT M. JOHNSON FRENCH,
Plaintiff and Appellant,

vs.

PHILLIP T. JOHNSON,
Defendant and Respondent.

No. 10147

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

HONORABLE ALDON J. ANDERSON, *District Judge*

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IN THE SUPREME COURT
of the
STATE OF UTAH

PAT M. JOHNSON FRENCH,
Plaintiff and Appellant,

vs.

PHILLIP T. JOHNSON,
Defendant and Respondent.

No.
10147

Appeal From the Judgment of the Third District Court
For Salt Lake County
HONORABLE ALDON J. ANDERSON, *Presiding*

RESPONDENT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

PETITION FOR A REHEARING

Phillip T. Johnson, defendant and respondent, respectfully petitions the court for a rehearing on the following grounds:

1. The opinion of the court was based upon the theory that the defendant had defaulted in his payments under the decree of divorce without having given vent to the reason for such default.

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2. The court failed to take into consideration the fact that the money allocated in its decision will revert to the mother and step-father of the child for their own benefit and use.

3. The court failed to take into its consideration that the child, over the period of time involved, had been provided proper food, shelter and care.

4. The opinion is based upon the fact that the plaintiff made no representations, either explicit or implicit, to defendant with respect to the discontinuation of payments and that estoppel will not be applied where there is no moral or legal duty to speak.

SUPPORTING BRIEF

ARGUMENT

POINT I.

THE OPINION OF THE COURT WAS BASED UPON THE THEORY THAT THE DEFENDANT HAD DEFAULTED IN HIS PAYMENTS UNDER THE DECREE OF DIVORCE WITHOUT HAVING GIVEN VENT TO THE REASON FOR SUCH DEFAULT.

In its opinion the court proceeded on the assumption that the trial court relieved the defendant of past payments on the theory that the plaintiff had been dilatory in not requesting payments and producing her forwarding addresses to defendant.

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The defendant did not claim that plaintiff failed to furnish him her forwarding addresses, as the money, by decree, was to be paid to the clerk of the court, and the plaintiff received the payments from the clerk of the court for nearly two years, and the district court found the plaintiff's conduct over the succeeding eight years, constituted laches and by reason of the same, equitable estoppel should be applied. I agree with Justice Henroid that there isn't any moral or legal ground compelling a woman to remind her ex-husband that his monthly payment is due, but the father is entitled to know whether his child is alive or dead and for ten years the plaintiff failed to inform him or the court of any circumstances relative to the being or welfare of the child.

The father fulfilled his obligation at law completely and would have so continued to do, had the plaintiff in some way contributed to her whereabouts over the long period of time. The opinion imposes complete responsibility upon the father, and relieves the plaintiff of every equitable principle contained in the law. In Justice Crockett's concurring opinion in *Wallis v. Wallis,* 9 Utah 2nd 242 (though Justice Henroid disagreed) he says

> "Both spouses continue to sustain some duties toward each other and to the children. It is important that the duties do not all run one way: they are reciprocal and must be faced up to if the proper objective is served. The purpose of the divorce decree and the conduct of the parties under it must be calculated towards the solution of existing problems and the sustenance of the

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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 harass the defendant so that he cannot hold a job or live a respectable existence."

This concurring opinion, though criticized by Justice Henroid, clearly and succinctly expresses the judicial reasoning which commands respect and admiration of fellow members of the bar in applying the law of domestic relations.

POINT II.

THE COURT FAILED TO TAKE INTO CONSIDERATION THE FACT THAT THE MONEY ALLOCATED IN ITS DECISION WILL REVERT TO THE MOTHER AND STEP-FATHER OF THE CHILD FOR THEIR OWN BEHALF AND USE.

The court failed to take into consideration the fact that the money allocated in its decision will revert to the mother and stepfather for their benefit and use. Justice Crockett said in his dissenting opinion in which he is supported by Justice McDonough, "The fact that after one parent has actually supported a child for a period of time, the right of reimbursement then belongs, not to the child, but the one who has furnished the support". Who is there that can challenge that statement? No person who has not suffered a loss may recover in any court on any claim.

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The only entity which expended any money was the government of the United States. Yet Justice Henroid says "That plaintiff's present husband was claiming defendant's child as a dependent in the Navy is inapropos here and cannot be a basis for reneging on a Judicial decree and moral obligation."

Where in the record does it show that the defendant reneged from his legal obligation, or is the word reneged improperly used?

POINT III.

THE COURT FAILED TO TAKE INTO ITS CONSIDERATION THAT THE CHILD, OVER THE PERIOD OF TIME INVOLVED, HAD BEEN PROVIDED PROPER FOOD, SHELTER AND CARE.

The court, in its opinion, failed to take into consideration that the child, over the period of time involved, had been provided with proper food, shelter and care. Courts are deeply interested in the welfare and being of infants coming within their jurisdiction and endeavor to enforce its decrees as to their support and care, and says "A Decree awarding child support payments cannot be avoided by a parent's conduct or agreement."

The defendant has no quarrel with that statement, and under normal circumstances should be enforced to the letter. Yet in *Larsen vs. Larsen,* 5 Ut. 2nd 229, though it sent the case back to the lower court to make its findings on laches and equitable estoppel and the directives

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therein, guided the lower court in relieving the plaintiff from making the back payments of support money for the child. Justice Wade, said, page 227,

> "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, but which actually appear to rest on equitable estoppel".

Citing *Openshaw vs. Openshaw,* 105 Utah 574, 579, 144 Pac. 2nd 128.

To hold differently in the present case would reverse a decision which this court concurred by a majority of four to one. Justice Henriod dissenting with a critical reason to back his judgment up.

POINT IV.

THE OPINION IS BASED UPON THE FACT THAT THE PLAINTIFF MADE NO REPRESENTATIONS, EITHER EXPLICIT OR IMPLICIT, TO DEFENDANT WITH RESPECT TO THE DISCONTINUATION OF PAYMENTS AND THAT ESTOPPEL WILL NOT BE APPLIED WHERE THERE IS NO MORAL OR LEGAL DUTY TO SPEAK.

The opinion of Justice Henroid says: "That the plaintiff made no representations, either explicit or implicit, to the defendant with respect to the discontinuation of payments and estoppel will not lie where there is no

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moral or legal duty to speak." Let's assume that the plaintiff had made representations to the defendant as to the discontinuance of payments. What difference would that have made in the case? In the same breath Justice Henroid says "The parents are without warrant in law to nullify such a decree by mutual agreement between themselves under the decree of the court of competent jurisdiction," and cites cases to support this view.

This defendant, thoroughly agrees with the rule in its entirety (no one is going to argue with the court over a doctrine that has been established since children were born), however, equity and fairness must be taken into consideration in every case of domestic relations relative to the payments of child support: the welfare of the child is the court's main concern in all of these cases, and in the parent case, the court burdens the defendant in its consideration of the child's welfare, it fails to consider that the child has been well fed, educated and clothed by someone, in this case the United States through allotments granted, and yet in addition thereto, the court casts a burden on the defendant which he cannot meet, either by equity or law. True, the lower court has continuing jurisdiction of the case, however, it does not have the power to rule again on the judgment now harnessed to the defendant by this court, as split as its theories may be.

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CONCLUSION

The opinion of the bare majority of this court casts the doctrine of equity to the four winds and the decision proceeds to work to a hardship and burden upon a man who can never meet it.

If the doctrine of equitable estoppel, through the laches of the plaintiff does not apply here — then you must nullify the directives given to the court in the Larsen case 5- Ut. 2nd 224.

We respectively submit that the ruling denying the application of the doctrine of estoppel in this case should be reversed, or in the alternative, remand the same to the court below with directives therein.

Respectfully submitted,

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