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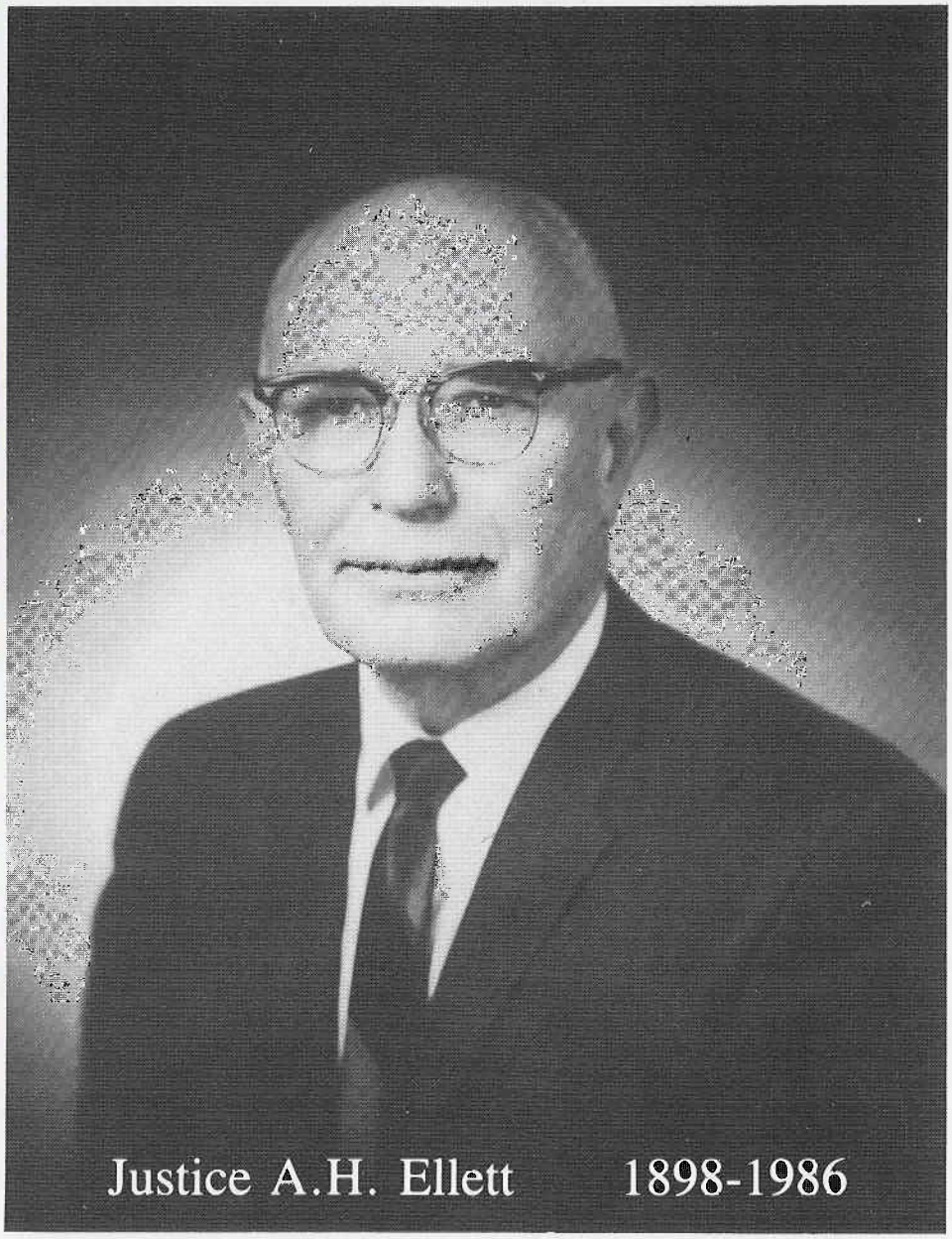

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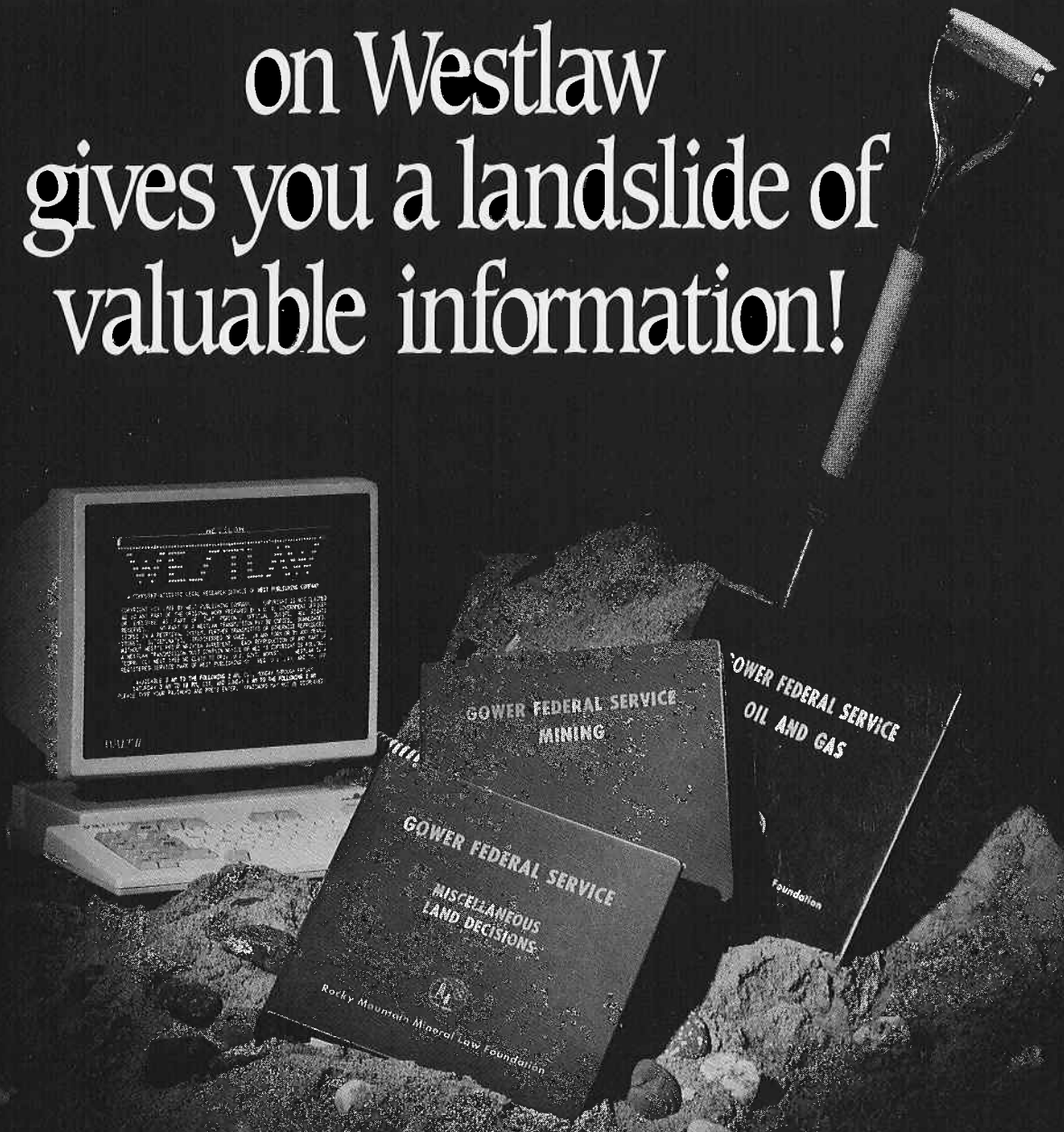

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Cover: Photograph of Utah Supreme Court Justice Albert H. Ellett, 1898-1986.

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QUESTION OF THE MONTH

By Nann Novinski-Durando

The *Utah Bar Journal* will periodically pose a "Question of the Month." Readers are invited to submit responses. Letters should be typed, double spaced, signed by the writer and mailed no later than one month after the question is published, all generally consistent with the letters to the editor guidelines outlined in the "Editor's Note," August/September, 1988 issue of the *Journal*.

A cross section of responses will be printed in a later issue. Not all letters received will be printed. Bar Journal editors will select responses that reflect differing views and offer meaningful insights into or possible solutions to the questions posed.

QUESTION FOR DISCUSSION THIS MONTH

Should the law be changed to allow the non-custodial parent to withhold, suspend, defer or cancel child support payments where the custodial parent unjustifiably frustrates or denies visitation to the non-custodial parent?

If so, why, when and/or how? What safeguards or standards should be instituted?

If not, why not? Are present procedures sufficient to protect and enforce the visitation rights of the non-custodial parent?

BACKGROUND INFORMATION ON THE QUESTION

This month's question focuses on a problem often overlooked in the on-going struggle to protect and enforce the rights of parties, including children, in divorce actions.

Because of its magnitude and serious consequences, the problem of the non-custodial parent who fails or refuses to make court-ordered child support payments often overshadows the problem of the non-custodial parent who does pay child support but is unjustifiably denied visitation rights by the custodial parent. The latter may be less pervasive but is no less serious in its consequences. Yet enforcement procedures are often ineffective or non-existent.

The custodial parent not receiving child support has available a variety of possible remedies and enforcement procedures—contempt proceedings, execution, attachment, garnishment, wage assignment, liens, criminal non-support actions. Whether enforcement and collection is successful in a given case depends on various facts and factors but, nevertheless, procedures are available and can be effective. The same cannot be said about enforcement procedures available to the non-custodial parent who is being unjustifiably denied visitation rights in violation of the terms of the divorce decree. Order-to-show-cause actions and contempt proceedings often do little more than result in another order for the custodial parent to ignore. The custodial parent who refuses to comply with the divorce decree is just as likely to ignore post-divorce orders; and so the cycle continues. This, in effect, leaves the non-custodial parent with no practical method of enforcing visitation rights.

The non-custodial parent in such cases may stop paying child support, feeling justified in refusing to support a child with whom he/she is denied contact, and then react with bitterness against a legal system that attempts to enforce the support obligation yet remains unable to enforce visitation rights. It is for these reasons that many see a need to link support and visitation, a need to permit child support payments to be withheld, deferred or suspended when visitation is unjustifiably denied or frustrated or where the custodial parent's conduct leads to a child's unjustifiable refusal to see the other parent.

Traditionally, courts have rejected using child support as a sword to enforce visitation rights. Support and visitation have been regarded as separate issues. Utah has been fairly traditional in its approach to such linkage. But as non-custodial parents have become more vocal and persevering in their attempts to secure and enforce their rights, recent Utah cases might be examined for cracks in the wall separating support and visitation. Two questions might then be addressed: Have cracks indeed been left for the non-custodial parent and, if so, should those cracks be widened by case law or statute and perhaps widened enough to crumble the wall.

In *Race v. Race*, 740 P.2d 253 (Utah 1987), the Utah Supreme Court rejected a trial court order for support payments that conditioned payment on development of a visitation schedule: "Child support is an obligation imposed for benefit of children . . . We find no circumstances here which justify the trial court in deferring support until visitation between the children and their father could be worked out." Did that language indicate that the court might find in another case circumstances that would justify the deferring of support payments? And if so, would unreasonable and unjustifiable interference with visitation rights be a circumstance that would be such a justification?

In an earlier case, *Hunter v. Hunter*, 669 P.2d 430 (Utah 1983), the custodial parent petitioned for nine years of back child support. After the divorce, she had gone into hiding, concealing herself from the child's father and thus completely denying him visitation rights. The trial court found that she had waived her right to collect and was estopped from collecting the back support. The Supreme Court reversed. Two dissenting justices found clear acts of waiver and estoppel (. . . "the appellant [mother] made it clear she wanted the respondent [father] out of her life completely. . . ") and would have upheld the lower court ruling. But the three-justice majority found the concealment justifiable and, hence, no conduct on the part of the mother that constituted acts of waiver or estoppel. This reasoning indicates that if the majority had found the concealment to be unjustified, then perhaps the withholding of back support would have been upheld. If so, one would argue that the unjustified denial or frustration of visitation rights either amounts to a waiver of child support or is conduct that should estop the custodial parent from collecting support.

The Utah Supreme Court partially departed from the traditional separation of visitation and support in *Rohr v. Rohr*, 709

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QUESTION OF THE MONTH

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P.2d 382 (Utah 1985). The lower court had set up a schedule that restricted visitation rights because of unpaid support and decreed that the restrictions could not be changed or modified until all back support had been paid. The Supreme Court rejected the conditioning of future modification (that is, the expansion of visitation by easing the restrictions) upon the father's compliance with the support order, a ruling in line with the separation of support orders and visitation rights. But the Court departed from this separation in approving the actual restrictions on the visitation. The court pointed out that where non-payment of support is willful and intentional, visitation rights may be reduced if the welfare of the child requires it. Applying this reasoning to the flip-side of the situation, one would argue that where denial or frustration of visitation is willful and intentional, support payments should be restricted (withheld, deferred, reduced) if the welfare of the child requires it.

Not all jurisdictions have been rigid in their search for solutions to the problem. New York is a state where support and visitation have been linked both statutorily and in case law.

Although the welfare of the child remains a paramount consideration, the principle that unjustified denial of visitation rights may suspend the non-custodial parent's obligation to pay child support to the custodial parent is well settled in New York case law. A comprehensive discussion of the relationship between visitation and support obligations in New York and of the numerous cases on the issue is found in McKinney's Cons. Laws of New York, Book 29A, Family Court Act, Practice Commentary to Sect. 447. The courts base this linkage on two considerations: the unfairness of requiring a parent to support a child he/she is not permitted to see and the use of the support order as a tool to enforce visitation orders.

The New York courts do not view visitation as something less important than support. "Thus it seems clear that the right of children to housing, clothing, etc.... does not have priority over the father's right of visitation." *Sandra B. v. Charles B.*, 380 N.Y.S.2d 861 (Fam.Ct. 1976), "The child must be viewed as the joint holder of two rights, visitation and support, of which the more crucial is the right of visitation... Thus, under certain circumstances the court may restrict the child's right to support from the non-custodial parent, an obligation which may be met from other sources, in an effort to enforce the child's more critically important right to visit the non-custodial parent." *South Carolina Department of Social Services v. James*, 464 N.Y.S.2d 942 (Fam.Ct. 1983).

New York finds interference with visitation to be more than a simple denial of the right of the non-custodial parent to visit the child. The custodial parent has a duty to encourage the child to see the non-custodial parent. *Wostl v. Wostl*, 429 N.Y.S.2d 328 (App.Div. 1980); *Goldstein v. Goldstein*, 385 N.Y.S.2d 140 (App.Div. 1976). And moving with the child to another jurisdiction without justification has been held to be a denial of visitation making suspension of support payments appropriate. *Courten v. Courten*, 459 N.Y.S.2d 464 (App.Div. 1983). In *Alexander v. Alexander*, 514 N.Y.S.2d 148 (App.Div. 1987), the court said a move from New York to California "effectively frustrated [the non-custodial parent's] visitation rights" and suspended the support obligation. See also *South Carolina Department of Social Services v. James*, supra, where support was suspended pending granting of visitation in a similar case.

Domestic Relations Law Sect. 241 explicitly gives the court power to suspend spousal support (alimony or maintenance) payments when there is a wrongful interference with visitation. Cases have held that this applies to child support as well as spousal support. In *Reilly v. Reilly*, 418 N.Y.S.2d 731 (Fam.Ct. 1979), the court pointed out that Sect. 241 did not provide "statutory authority to suspend child support payments....However, recent cases have concluded that when the non-custodial parent has been deprived of his visitation rights, the suspension of support payments applies to child support, as well as alimony. [Citations omitted.]" Later cases questioned this expansive interpretation and a 1986 amendment to Sect. 241 provides that the section cannot be used as a defense in an action to enforce child support or as grounds to cancel arrears in child support.

Family Court Act Sect. 451 also contains a restriction on the power of the court to cancel arrearages in child support for interference with visitation unless good cause is shown for the failure of the non-custodial parent to seek relief from a support order.

In effect, this modified case law that permitted a non-custodial parent to use interference with visitation as a shield in an action seeking child support arrearages. But this provision, like the amendment to Sect. 241, does not affect the use of interference as a sword in an affirmative action seeking relief from future support payments. Even so, Sect. 451 still allows the shield use in arrearage cases when the petitioner can show a good reason for not having sought affirmative relief. □