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Jerry Arthur White v. Nicole Edith White : Brief of Respondent

Utah Supreme Court

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In The Supreme Court of the State of Utah

JERRY ARTHUR WHITE,

Plaintiff-Respondent,

VS

NICOLE EDITH WHITE,

Defendant-Appellant.

Case No.

12000

BRIEF OF RESPONDENT

Appeal from the judgment of the Third Judicial District Court for Salt Lake County, Utah, rendered by the Honorable Merrill C. Faux, Judge.

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	5
POINT I	5
TRIAL COURT PROPERLY GRANT- ED A DECREE OF DIVORCE TO PLAINTIFF-RESPONDENT.	
POINT II	7
THIS COURT MUST REVIEW THE RECORD IN A LIGHT MOST FAVOR- ABLE TO THE PLAINTIFF-RE- SPONDENT.	
POINT III	9
THE COURT DID NOT ABUSE ITS DISCRETION IN A W A R D I N G CUSTODY OF THE MINOR CHILD TO RESPONDENT.	
CONCLUSION	12

TABLE OF CONTENTS—Continued

Page

CASES CITED

Briggs vs Briggs, 111 U. 418, 181 P. 2d 223 (1947)	10
Dearden vs Dearden, 15 U. 2d 105, 388 P. 2d 230 (1964)	10
Graziano vs Graziano, 7 U. 2d 181, 321 P. 2d 931 (1958)	5, 7
McBroom vs McBroom, 14 U. 2d 393, 384 P. 2d 961 (1963)	10
Mullins vs Mullins, 26 U. 2d 82, 485 P. 2d 1065 (1971)	5
Pluckard vs Anderson, 8 U. 2d 299, 333 P. 2d 1065 (1959)	8
Rowe vs Rowe, 12 U. 2d 291, 365 P. 2d 797 (1961)	8
Sorensen vs Sorensen, 18 U. 2d 102, 417 P.2d 118 (1966)	8
Stocks vs Stocks, 14 U. 2d 314, 383 P. 2d 923 (1963)	10, 11
Stuber vs Stuber, 121 U. 632, 244 P.2d 650 (1962)	10
Wilson vs Wilson, 5 U. 2d 79, 296 P. 2d 977 (1956)	8

STATUTES CITED

UCA Section 30-3-10 (1953, as amended by L. 1969, Ch 72 S 7)	9
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In The Supreme Court of the State of Utah

JERRY ARTHUR WHITE,

Plaintiff-Respondent.

vs

NICOLE EDITH WHITE,

Defendant-Appellant.

} Case No.
12960

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action for divorce wherein each of the parties sought a decree of divorce and custody of the minor child of the parties, Nicolette. Defendant-appellant also sought child support and an award of attorney's fees.

DISPOSITION IN LOWER COURT

The District Court with the Honorable Merrill C. Faux, Judge, presiding, awarded plaintiff-respondent a decree of divorce on the grounds of mental cruelty, in that the defendant had excluded the plaintiff from her activities and had company with other men, and awarded

to the plaintiff-respondent the care, custody and control of the minor child of the parties on the grounds that it would not be in the best interests of the minor child to be placed in the custody of the defendant-appellant.

RELIEF SOUGHT ON APPEAL

Respondent submits that this Court should affirm the decree of divorce as entered by the District Court that the divorce was awarded to the plaintiff-respondent together with the care, custody and control of the minor child.

STATEMENT OF FACTS

Appellant and respondent were inter-married on June 13, 1969, in the State of California. A female child, Nicolette, was born to the parties February 23, 1968 (R-1). Prior to the commencement of the college year, 1969, the parties moved to Salt Lake City, and established a matrimonial domicile. The parties resided together as husband and wife until the Summer of 1971, when appellant journeyed to San Francisco, to attend graduate school and obtain her master's degree. During the time she was attending school in San Francisco, she had used some drugs (R-83 thru 86) and had intercourse with a professor at San Francisco State College (R-82) (R-138-139).

Thereafter, on or about the 25th day of July, 1971, the respondent brought the minor child of the parties

to reside with him in Salt Lake City, and on or about the 10th of August, 1971, the complaint was filed commencing this action (R-137). In the interim appellant went to a "gestalt" workshop at Esalan, and had another chance to engage in an act of infidelity (R-73 thru 79) and, in fact, admitted intercourse with another man (R-78).

Trial was held before the Honorable Merrill C. Faux, Judge, on April 25th, and 26th, 1972, and thereafter on May 26th, 1972, the Court entered its findings of fact and conclusions of law and decree of divorce awarding the respondent the decree of divorce and the care, custody and control of the minor child of the parties, Nicolette.

The trial court found that the appellant had excluded the respondent from her activities by keeping company with other men (R-53-54) and that she had conducted her personal life in such a manner that it would be in the best interests of the minor child to award custody of the minor child to the plaintiff. The Court found that the defendant had engaged in several extramarital relationships, that she had put the attention and acclaim of other men ahead of her marriage and her minor child, and that she had kept company and slept with other men while the minor child was present (R-54).

The transcript of the trial is replete with testimony of the appellant herself concerning her infidelity and infidelity while the minor child, Nicolette, was present

(R-65-66-70-71-72-73-74-78-79-81). Further, the record clearly shows that the appellant was overly concerned with her education (R-90-101-110-121-122).

After the commencement of this action the parties attempted a reconciliation, but separated again on or about October 1, 1971 (R-69). On Thanksgiving Day of 1971, the respondent found appellant engaged in sexual intercourse at her residence with "Mike", with the minor child of the parties in the next bedroom. A fight ensued between respondent and the other man (R-70 thru 73 and 118). Thereafter, the appellant took the minor child of the parties contrary to the temporary order of the parties to the State of California, and admitted at the time of trial that while there for a period of about four weeks lived with another man, to wit: Mike Issel (R-65 thru 67 and 126). The respondent in this matter is a young man who has now received his master's degree and notwithstanding the fact that several years ago he had by his own admission engaged in the use of marijuana and certain other drugs, he has now completely reformed and has not for more than a year prior to the commencement of this action used any type of drug (R-152-153). Further, he has made what the District Court found adequate arrangements for caring for the minor child of the parties. The respondent loves the child; they have shown a great deal of affection and fondness for each other, and he is a good father (R-69-70).

ARGUMENT

POINT I

TRIAL COURT PROPERLY GRANTED A DECREE OF DIVORCE TO PLAINTIFF-RESPONDENT.

While a divorce in the State of Utah may be granted to both parties jointly where both are equally at fault, whether one or the other or both should be given a decree of divorce should be left to the sound discretion of the Court. In *Mullins vs Mullins*, 26 U. 2d 82, 485 P. 2d 663 (1971), the Court found grounds for divorce on both sides and stated that it would have awarded the divorce to both parties but Utah law did not allow such a procedure. The trial court awarded the divorce only to the wife. On Review, the Supreme Court held that Utah law does allow a divorce to be granted to both parties where the facts find each of the parties equally at fault; however, the Supreme Court declined to reverse the trial court even though the decree being granted to the wife was based upon misunderstanding of the law. The Supreme Court held that even under these circumstances whether one or the other or both should be given a divorce should be left to the sound discretion of the trial court based upon the evidence adduced, 486 P. 2d at page 664. See also *Graziano vs Graziano*, 7 U. 2d 181, 321 P. 2d 931 (1958).

The record in the instant case is clear that the appellant caused the respondent great mental suffering

by a repeated course of infidelity. During most of this time appellant had the parties' minor child with her causing the respondent great concern over the child's welfare, to the extent that he has been compelled to go to the child's aid to remove her from such circumstances (R-132 and 72-73). The appellant has allowed herself to be so attracted by the attentions from other men that she has found it difficult to remain true to the respondent and this feeling has caused her to spend time and attention with other men rather than with the respondent and their minor child, and she has told him so (R-89 thru 91).

The appellant has further placed her desire for schooling above her marital responsibilities spending time away from home and leaving the matrimonial domicile with the parties' child, against respondent's wishes to pursue her schooling (R-134-135). Respondent, on the other hand has not been guilty of a single, uncondoned act of infidelity.

Appellant in her brief has alluded to an incident which occurred in California, which incident was prior to the parties establishing a matrimonial domicile in the State of Utah, and hence would not be grounds for divorce on the part of the appellant and which act of infidelity was fully condoned and forgiven by the appellant (R-127). The appellant attempts to show grounds for her divorce being his temper and her being afraid of him. He called her "slut" and "bitch" (R-124-125). I submit that these are justifiable terms of en-

dearment when you catch your wife in bed with another man, or when she admits sexual intercourse with other men on three or four occasions.

In the *Graziano* case, *supra*, notwithstanding the fact that the Court found fault on both sides sufficient to a grant a divorce, the Court granted the divorce to the wife and the Supreme Court in refusing to reverse the trial court held in substance that the Supreme Court will not substitute its judgment for the trial courts, unless a clear preponderance of the evidence is against the findings and there is no practical good except moral vindication that can be served by reversing and ordering a decree for the other party, and that the Court was mindful of the propriety of indulging deference to the trial court's judgment and should not lightly disturb it. 321 P. 2d @ 933

POINT II

**THIS COURT MUST REVIEW THE
RECORD IN A LIGHT MOST FAV-
ORABLE TO THE PLAINTIFF-RE-
SPONDENT.**

A district Court of the State of Utah, sitting as a trial court in a divorce action has a great deal of discretion in awarding divorce and custody of minor child and its judgment will not be overturned except where manifest justice is worked on trial court's finding is against clear preponderance of the evidence. (*Graziano vs Graziano*, *Supra*)

In *Wilson vs Wilson*, 5 U. 2d 79, 296 P. 2d 977 (1956), the Court stated its policy

“ . . . That the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly, and, in fact, not at all unless it worked such a manifest injustice or inequity as to indicate a clear abuse of discretion . . . ” (Supra at page 981) (See also *Pluckard vs Anderson*, 8 U. 2d 229, 333 P. 2d 1064 (1959)).

The Supreme Court of the State of Utah in reviewing divorce cases will review both the facts and the law. (See *Pluckard vs Anderson*, supra). Nevertheless, in making such review the Court will canvass the record in a light most favorable to the party awarded custody by the trial court (*Rowe vs Rowe*, 12 U. 2d 291, 365 P.2d (1961) and *Sorensen vs Sorensen*, 18 U.2d 102, 417 P. 2d 118 (1966)). In reviewing the record in a light most favorable to the respondent there is no doubt as to the correctness of the trial court's decision; and furthermore, even viewing it in a light most favorable to the appellant does not change any of the facts or alter any of the facts of infidelity and certainly should not alter the Court's findings.

POINT III

THE COURT DID NOT ABUSE ITS
DISCRETION IN AWARDING CUS-
TODY OF THE MINOR CHILD TO
RESPONDENT.

Since the 1969 General Session of the Utah State Legislature, the often used presumption that a mother is best suited to care for the minor child of the parties has been altered, and a new public policy has been declared. At the present time there are several facts that must be taken into consideration by the finder of facts in addition to this presumption.

Section 30-3-10, UCA (1953, as amended by L. 1969, Ch 72 S 7) reads in part as follows:

“ . . . in determining custody the Court shall consider the best interests of the child and the *past conduct and demonstrated moral standards* of each of the parties and the natural presumption that the Mother is best suited to care for the young children” (emphasis added)

Prior to the above quoted amendment to the statute the presumption was that the Mother was best suited to care for the minor children and except in extreme cases of unfitness on the part of the Mother the children would not be taken from her. This clearly is not the status of the law at the present time.

Respondent would call this Honorable Court's attention to the fact that every case cited by the appellant in her brief relative to past conduct and moral standards of the parties are cases which were decided by this Court prior to the 1969 amendment. See *Dcarden vs Dcarden*, 15 U. 2d 105, 388 P. 2d 230 (1964); *Briggs vs Briggs*, 111 U. 418, 181 P. 2d 223 (1947); *Stuber vs Stuber*, 121 U. 632, 244 P. 2d 650 (1952), and *McBroom vs McBroom*, 14 U. 2d 393, 384 P. 2d 961 (1963).

These foregoing cases are clearly not in accord with the present Utah law which requires the finder of fact to weigh the conduct and the moral standards of each of the parties in deciding in what is best for the minor children.

Respondent would submit that the appellant in her brief has overstated this old rule and would call the Court's attention to *Stocks vs Stocks*, 14 U. 2d 314, 383 P. 2d 923 (1963), wherein the Court stated:

"The Rule which favors the Mother is only one of many factors which must be considered and is applicable only if *all* things are equal." *Id* at P 924. (emphasis theirs).

The trial court in this matter after hearing the testimony of both of the parties after viewing their demeanor and manner in Court found that the appellant so conducted her personal life that it was repulsive to the standards of this community and that her morals are

such that it would be detrimental to the best interests of the minor child to allow the minor child to reside with the appellant. The Court further found that because of her loose morals and desire to be with other men even while the minor child was present that these were factors which the statute specifically mandated that the Court should take into consideration and the Court correctly took these matters into consideration and awarded the respondent the custody of the minor child. In *Stocks vs Stocks*, supra, the Supreme Court stated at page 294:

“The trial court was in a much better position to understand and evaluate the testimony than we are. The Court has observed the attitudes, manners and personalities of the parties and has had the opportunity to evaluate the ability of the parties and the effect that association with these parties will have on the child’s life.”
(Citing *Smith vs Smith*, 1 U. 2d 75, 262 P. 2d 283 (1953)).

The whole point in this matter being brought before this Court is that the trial court found that the actions of Mrs. White in the presence of the minor child, Nicolette, was repulsive to the standards of the community and that it would not be in the best interests of the minor child to allow her to remain in a situation where her Mother was more concerned with the attention she was deriving from other men and where her Mother would be living with a man and not her hus-

band. I submit to this Court that the trial court was correct. If the appellant were to feed and bathe the child every day and see that she washed her teeth, and had clean clothes on her, that would be doing the ministerial things that a Mother must do; even loving a child is not enough. We must look to the best interests of the child and that is exactly what the trial court did.

CONCLUSION

Respondent respectfully submits that this Court should affirm the decision of the District Court in awarding the respondent the decree of divorce and the custody of the minor child, in that there is no prejudicial error that was committed by the District Court in either the award of the divorce or the custody of the child.

Respectfully submitted,

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