

1972

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

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.

BRIEF OF APPELLANT

Appeal from the judgment of the
District Court for Salt Lake County
the Honorable Merrill C. [illegible]

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TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	6
POINT I	6
<p style="text-align: center;">THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN AWARDING THE DIVORCE TO RE- SPONDENT RATHER THAN TO BOTH RESPONDENT AND APPEL- LANT JOINTLY.</p>	
A. The trial court abused its discretion in failing to grant the divorce to both parties under circumstances where the facts indi- cate that both parties are equally at fault.	6
B. The determination of what constitutes mental cruelty must be made from the facts of each case.	7
C. From a review of the record in the in- stant case it is clear that appellant is no more responsible for the dissolution of the marriage than respondent.	9
POINT II	11

TABLE OF CONTENTS—Continued

	<i>Page</i>
THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY AWARD- ING CUSTODY OF THE CHILD TO RESPONDENT AND BY NOT AWARDING SAID CUSTODY TO THE APPELLANT.	
A. Divorce actions are equitable in nature and on appeal the Supreme Court has the authority to review the record <i>de novo</i> and to substitute its own judgment for that of the trial court if in its judgment the trial court committed a clear abuse of dis- cretion or if the trial court's judgment is against a clear preponderance of the evi- dence.	12
B. Under Utah Law the presumption is "that the mother is best suited to care for young children." Utah Code Ann. § 33-3-10 (Supp. 1971)	13
C. The critical issue in determining whether a mother is morally unfit to have the custody of her child is whether her con- duct is of such a nature as to hazard the child's welfare and render it unwise that the child be placed in her mother's custody.	14
CONCLUSION	21

TABLE OF CONTENTS—Continued

Page

CASES CITED

<i>Chase v. Chase</i> , 15 Utah 2d 81, 387 P.2d 566 (1963)	13
<i>Baker v. Baker</i> , 25 Utah 2d 337, 481 P.2d 672 (1971)	15
<i>Briggs v. Briggs</i> , 111 Utah 418, 181 P.2d 223 (1947)	14
<i>Chase v. Chase</i> , 15 Utah 2d 81, 387 P.2d 556 (1963)	13
<i>Curry v. Currey</i> , 7 Utah 2d 198, 321 P.2d 939 (1958)	8
<i>Dearden v. Dearden</i> , 15 Utah 2d 105, 388 P.2d 230 (1964)13, 14, 15, 16, 18, 19, 21	
<i>Doe v. Doe</i> , 48 Utah 200, 158 P. 781 (1916)	7
<i>Johnson v. Johnson</i> , 107 Utah 147, 152 P.2d 426 (1944)	8
<i>MacDonald v. MacDonald</i> , 120 Utah 573, 236 P.2d 1066 (1951)	12
<i>McBroom v. McBroom</i> , 14 Utah 2d 393, 384 P.2d 961 (1963)16, 17, 18	
<i>Mullins v. Mullins</i> , 26 Utah 2d 82, 485 P.2d 663 (1971)	6
<i>Stevenson v. Stevenson</i> , 13 Utah 2d 153, 369 P.2d 923 (1962)	7

TABLE OF CONTENTS—Continued

	<i>Page</i>
<i>Stuber v. Stuber</i> , 121 Utah 632, 244 P.2d 650	
(1952)	15
<i>Wiese v. Wiese</i> , 24 Utah 2d 236, 469 P.2d 504	
(1970)	22
<i>Wilson v. Wilson</i> , 5 Utah 2d 79, 296 P.2d 977	
(1956)	12, 22

STATUTES CITED

Utah Code Ann. § 30-3-10 (Supp. 1971)	13
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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 APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action for a divorce in which the plaintiff sought a division of the marital estate and the custody of the parties' only child, Nicolette White. The defendant counterclaimed seeking a decree of divorce, a division of the marital estate, the custody of the parties' only child, Nicolette White, child support, alimony and attorney's fees.

DISPOSITION IN LOWER COURT

The court awarded the plaintiff a divorce on grounds of mental cruelty, the care and custody of the parties' only child, Nicolette White, on the grounds that the defendant was an unfit mother, and denied the defendant's request for alimony and attorney's fees. The defendant appeals from those portions of the Decree of Divorce which awarded the plaintiff the divorce and the care and custody of the parties' only child, Nicolette White.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Decree of Divorce awarded jointly to both parties, the custody of the parties' only child, Nicolette White awarded to her, and the costs and attorney fees that she has incurred in prosecuting this appeal awarded to her.

STATEMENT OF FACTS

Appellant and respondent were married on June 13, 1964, in 'Twenty-Nine Palms, California. (T.T. 70)* One child, Nicolette White, was born to the parties on February 23, 1968. (T.T. 3). On or about August 10, 1971, respondent filed a Complaint in the District Court of Salt Lake County, seeking a Decree of Di-

*(Note: T.T. refers to the Trial Transcript)

voice on grounds of mental cruelty and praying for an award to him of the care and custody of the parties only child, Nicolette White. The defendant counter-claimed seeking a Decree of Divorce on grounds of mental cruelty and praying, among other things, for the award of Nicolette's custody.

The case came on for trial before the Honorable Merrill C. Faux, District Judge of the District Court of Salt Lake County, State of Utah, on April 25 and 26, 1972. On May 26, 1972, the Court entered its Findings of Fact and Conclusions of Law, and Decree of Divorce and made the following determinations: (1) respondent was entitled to a divorce on grounds of mental cruelty; (2) appellant's morals were "repulsive to the standard in this community"; and (3) due to appellant's morals it would be "in the best interests of the minor child of the parties to award the care, custody and control of the minor child" to respondent. (F.F. 2)*

The evidence does not, however, support to any degree the court's determinations of either fact or law. What uncontradicted evidence does indicate is that appellant is a model mother who has never neglected or abused her child. (T.T. 71). In fact, appellant had been able, due to her educational achievements and ability, to secure a job that provided her and her child with a comfortable living (\$700.00/month) while working only 16-18 hours per week, thus minimizing the amount of

*(Note: F.F. refers to the trial court's Findings of Fact and Conclusions of Law)

time that she had to spend away from her child (T.T. 45-56). In fact, she spent even less time than this away from Nicolette since 4-6 hours of her working time were actually spent at home preparing lessons and correcting papers. (T.T. 46). Finally, in order to insure that Nicolette would be properly cared for during what little time she had to spend away from her, appellant had engaged an older, mature woman, who had been approved by county authorities to care for young children, to care for Nicolette during her absences. (T.T. 46).

In contrast to this the record reflects only that respondent had a good relationship with Nicolette; it is silent as to his personal ability to care for her. (T.T. 11).

The record does show, however, that respondent had committed adultery at least once and that this had occurred prior to the separation of the parties in the summer of 1971. (T.T. 55-56). Even more important, respondent throughout the last few years of the parties' marriage had repeatedly threatened appellant's life. (T.T. 52-53). In fact, the day before the trial, respondent told appellant that she "was lucky to be alive; that he had spared . . . [her]." (T.T. 53). Furthermore, respondent at various times physically as well as verbally threatened appellant. (T.T. 53-54). In addition, respondent often addressed appellant in a vile and filthy manner. (T.T. 53).

Moreover, respondent had been a heavy user of a wide variety of dangerous and illegal drugs at various

times during the course of the parties' marriage. He admitted for example to having used marijuana, amphetamines, barbituates, and methadrine repeatedly over a number of years. (T.T. 93 & 96). Moreover, respondent's job requires him to work at least thirty hours per week, for which he only receives \$3.54/hour, and he spends additional time, up to ten (10) hours per week, away from home attending to school work. (T.T. 87). Not only do respondent's personal circumstances dictate that he spend well over twice as much time away from Nicolette than appellant's circumstances require, the people with whom he has arranged to place Nicolette during his absence are notably lacking in qualifications for such a high trust. The husband of this couple is a nineteen year old, sometimes employed "long hair." (T.T. 114-115). The mother is herself only a child of seventeen. (T.T. 114). Needless to say, this couple does not have any certification by any governmental body attesting to their fitness to care for young children. (T.T. 114).

Insofar as appellant's morals are concerned, the evidence indicates only that appellant had relations with two different men on several different occasions. (T.T. 5-6 & 22). Moreover, both of these involvements occurred after the onset of the difficulties between the parties. (T.T. 52-53, 67-68, and 78-79). There is absolutely no evidence in the record that indicates in any fashion that appellant ever conducted herself improperly with a man in front of her child.

The evidence, moreover, clearly establishes that appellant was not a heavy drug user but rather had only smoked marijuana twice and hashish once and had only taken a hallucinogenic drug, psilocybin, once. All of these instances had occurred approximately nine months before the trial and have never been repeated. (T.T. 43). The evidence also establishes without contradiction that appellant rarely consumes alcohol and then only wine as a beverage with a meal. (T.T. 43).

ARGUMENT

POINT I

THE COURT CLEARLY ABUSED ITS DISCRETION IN AWARDING THE DIVORCE TO RESPONDENT RATHER THAN TO BOTH RESPONDENT AND APPELLANT JOINTLY.

A. The trial court abused its discretion in failing to grant the divorce to both parties under circumstances where the facts indicate that both parties are equally at fault.

In *Mullins v. Mullins*, 26 Utah 2d 82, 485 P.2d 663, 664 (1971), the Utah Supreme Court stated as follows:

“There seems to be nothing in our statute or

in logic that would prevent a dissolution of this marriage by granting a divorce to both, where the facts fault each equally as respect to grounds therefor. . .”

B. The determination of what constitutes mental cruelty must be made from the facts of each case.

In *Stevenson v. Stevenson*, 13 Utah 2d 153, 369 P.2d 923 (1962), the Utah Supreme Court reaffirmed a long line of cases extending back to *Doe v. Doe*, 48 Utah 200, 158 P. 781 (1916), in holding as follows:

“Whether defendant’s conduct was cruel and whether it caused plaintiff to suffer great mental distress, can only be determined in light of the sensibility of this particular plaintiff. Persons’ sensibilities may vary due to their different degrees of intelligence, refinement, delicacy of health, etc. For this reason, the same conduct may constitute mental cruelty in one case and not in another. The ultimate answer depends not so much on defendant’s conduct, but rather on the effect such conduct had upon the plaintiff.” 369 P.2d at 923.

The trial court in that case had refused to grant the plaintiff wife a divorce on grounds of mental cruelty where the wife had among other things established that her husband had treated her like a slave, expecting

her to serve his every need, had falsely accused her of marital infidelity, and had falsely accused her of being mentally ill. The court held that these facts, coupled with the evidence that the plaintiff greatly feared her husband, constituted a sufficient showing of mental cruelty to warrant the granting of a divorce and on remand directed the trial court to enter a decree in plaintiff's favor. 369 P.2d at 924-25.

In *Johnson v. Johnson*, 107 Utah 147, 152 P.2d 426 (1944), the court affirmed the award of a divorce to the plaintiff wife wherein the evidence adduced at trial established that the defendant had called the plaintiff, at times in the presence of their children, vile and abusive names, had accused her of marital infidelity and had once, without provocation, beat one child over the head with his fist in her presence. The wife had alleged that this conduct on the defendant's part had caused her mental pain and suffering. 152 P.2d at 427.

In *Curry v. Curry*, 7 Utah 2d 198, 321 P.2d 939 (1958), the husband was awarded the divorce but the wife was awarded the custody of their children. The husband on appeal claimed first that he should have been awarded the children since he was awarded the divorce, but the Court rejected this argument. He then argued that he only wanted the divorce if he could keep the children and, since the trial court had awarded the children to his wife, he would waive the decree of divorce that had been awarded to him if the Supreme

Court proved unwilling to award the children to him. An integral part of his argument in this regard was that only he had grounds for divorce and that the trial court had so found by awarding the divorce to him. The Supreme Court answered this argument by finding that the trial court could have awarded his wife the divorce on the evidence contained in the record that was before it. The Court in assessing this evidence first noted that the rule in Utah was that the showing of mental cruelty which a complainant had to make in order to be entitled to a divorce varied with the sensibilities of each complainant and the facts and circumstances of each case. It then reviewed the evidence in the record which showed that the husband was very antagonistic towards organized religion unlike either his wife or his children, that he had acted in a very superior and condescending manner towards both his wife and children, and that he had accused his wife of marital infidelities. The Court held that on this record the wife would have been entitled to an award of the divorce if the trial court had so chosen since even a person of ordinary sensibilities would suffer severe mental anguish and distress as a result of the husband's attitudes, conduct and actions as set forth above. 321 P.2d at 742-43.

- C. From a review of the record in the instant case it is clear that appellant is no more responsible for the dissolution of the marriage than respondent.

In the instant case, the record is clear that the appellant possessed more than adequate grounds for divorce. Respondent had himself at least once committed adultery. (T.T. 55-56). This fact by itself had caused appellant a great deal of pain and suffering. (T.T. 67-68). Even more important, respondent throughout the last few years of the parties' marriage had repeatedly threatened appellant's life. (T.T. 52-53). In fact, the day before the trial, respondent told appellant that she "was lucky to be alive; that he had spared . . . [her]." (T.T. 53). All of these facts are uncontradicted and have never been denied by respondent. Moreover, respondent at various times physically as well as verbally threatened appellant. (T.T. 53-54). In fact, appellant testified that for several months after the incident at her apartment in Salt Lake City over the 1971 Thanksgiving holidays when respondent, without permission entered her apartment and assaulted Mr. Issel (T.T. 38-39, & 90), she lived in constant fear of bodily harm from respondent. (T.T. 54). Digressing for a moment, several other things should also be noted about this episode: First, respondent was not living with appellant at the time this incident occurred. He had moved out earlier and was then living at 1143 East Ninth South, Salt Lake City, Utah. (T.T. 9-11). Second, respondent's violent conduct so frightened appellant that she called the police. (T.T. 39).

Respondent not only verbally and physically threatened appellant's physical well being, he also quite

often addressed her in a vile, coarse manner. He, for example, has often called her a "bitch" and a "slut", (T.T. 53) a practice which he initiated far in advance of any infidelity on appellant's part. (T.T. 66).

Finally, respondent throughout the course of the parties' marriage continually attempted to stifle appellant's educational goals and desires and sought to have her subordinate her needs and aspirations to that of his own. (T.T. 50-52, 63 & 75-76). Respondent did not, for example, approve of appellant taking one or two classes, let alone a full load. (T.T. 63). Respondent's stated reason for not wanting appellant to further her education was that it prevented her from taking proper care of Nicolette. (T.T. 51). That this was not the true reason for his feelings is revealed by the fact that he expected her to work at a job in order to provide them with a living. (T.T. 53). Appellant in fact worked consistently to support them, apparently without any objection from respondent, while respondent was in school, both as an undergraduate (T.T. 35) and as a graduate student (T.T. 36). Respondent's true concerns about his daughter is also reflected by the fact that between December 1, 1971, and the date of trial, April 25, 1972, a period of almost five months, respondent contributed a grand total of five dollars (\$5.00) towards Nicolette's support. (T.T. 69).

POINT II

THE TRIAL COURT COMMITTED

REVERSIBLE ERROR BY AWARDING THE CUSTODY OF THE CHILD TO RESPONDENT AND BY NOT AWARDING SAID CUSTODY TO APPELLANT.

- A. Divorce actions are equitable in nature and on appeal the Supreme Court has the authority to review the record *de novo* and to substitute its own judgment for that of the trial court if in its judgment the trial court committed a clear abuse of discretion or if the trial court's judgment is against a clear preponderance of the evidence.

The Utah Supreme Court has long held that it possesses the power in an equitable action such as a divorce to review the record *de novo* and to render its own judgment thereon if it believes that the trial court has committed a clear abuse of discretion (*Wilson v. Wilson*, 5 Utah 2d 79, 84, 296 P.2d 977 (1956)), or if it believes that the trial court's judgment is contrary to a clear preponderance of the evidence. *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066 (1951).

As the following discussion will reveal, the trial court's findings that appellant is morally unfit to have Nicolette's custody and that Nicolette's best interests would be served by awarding her custody to respondent are contrary to a clear preponderance of the evidence.

Moreover, this discussion will also reveal that the trial court plainly abused its discretion by awarding Nicolette to respondent.

- B. Under Utah Law the presumption is "that the mother is best suited to care for young children." Utah Code Ann. § 30-3-10 (Supp. 1971)

In *Dearden v. Dearden*, 15 Utah 2d 105, 388 P.2d 230 (1964) the Court held that there was a "universally recognized presumption that it is for the best interests and welfare of a child of such tender years to be with her mother." 15 Utah 2d at 108. The Court then stated that,

"the mother's right to custody should not be denied unless it is shown that she is such an immoral, incompetent or otherwise improper person that it would be contrary to the child's best interest and welfare to be in her custody." 15 Utah 2d 108-109; *Accord*, *Chase v. Chase*, 15 Utah 2d 81, 83, 387 P.2d 556 (1963) (There must be "some substantial and compelling reason to deprive her [the mother] of . . . [the child's] custody.")

It should be noted that the language quoted above from the *Dearden* decision is completely in accord with the standard set forth in Utah Code Annotated Section 30-3-10 (Supp. 1971) which section was amended by the

legislature in 1969, to make it specifically apply to divorce actions. It should also be noted that in *Briggs v. Briggs*, 111 Utah 418, 181 P.2d 223, 228 (1947), the Utah Supreme Court set forth the requirements of this statute (which has not been substantively changed since that decision with the exception, as noted above, that it is now applicable to divorce actions) as follows:

“Under this statute the mother is entitled to the custody of the child unless is is made to appear to the contrary. Thus the burden of convincing the court is on the father. We must also keep in mind that ordinarily no one can take the place of a mother in the life of a girl of this age.” 181 P.2d at 228

C. The critical issue in determining whether a mother is morally unfit to have the custody of her child is whether her conduct is of such a nature as to hazard the child's welfare and render it unwise that the child be placed in her mother's custody.

In the *Dearden* case, *supra* the trial court awarded both the divorce to the husband (on the grounds of mental cruelty) and the custody of the parties' 2½ year old daughter after finding that the mother was morally unfit to have the custody of her daughter. The trial court based this finding on the fact that the husband's evidence indicated that the mother had engaged in an

adulterous course of conduct, extending over a several month period of time, with another man. The Utah Supreme Court emphatically rejected these findings as a basis for denying the mother the custody of the child, stating first that:

“It is generally held that such misconduct as found against plaintiff, although of course censurable and not to be condoned, will not necessarily of itself deprive a parent of her child. Social ideas have changed, considerably since the time of the ‘East Lynne’ concept when for moral transgression a wife was cast into outer darkness and deprived of all, including her children.” 15 Utah 2d at 107

See also, *Stuber v. Stuber*, 121 Utah 632, 244 P.2d 650, 652 (1952) where the Court stated: “The fact that she lived with a man whom she expected to marry, although censurable, does not in itself make her an unfit and improper person to have the custody of her child.”; and *Baker v. Baker*, 25 Utah 2d 337, 481 P.2d 672 (1971)

The Court in *Dearden* then stated the applicable standard as follows:

“The critical question for consideration is whether the conduct shown is of such a nature as to hazard her [the child’s] welfare and make

it unwise that she be in her mother's custody."
15 Utah 2d at 107

The Court then held, having assumed that the trial court's finding that the mother was guilty of adultery was valid, that there was no indication

"of anything base or depraved or erratic in plaintiff's attitude toward or treatment of her daughter or in her relationship with her. On the contrary, there was testimony that the plaintiff was a 'fine housekeeper' and a 'very good mother.' The trial court found that the plaintiff was 'a neat and orderly housekeeper' and there is no evidence that she has directly or intentionally mistreated the child." 15 Utah 2d at 108.

That the Court's central concern in cases involving a claim that the mother is morally unfit to have the custody of her child is whether or not the mother's conduct directly affects both her relationship with her child and the care and treatment which she provides the child is made manifestly clear by the Court's explication of its decision in *McBroom v. McBroom*, 14 Utah 2d 393, 384 P.2d 961 (1963) in its opinion in *Dearden, supra*. In the *McBroom* case the trial court awarded the divorce to the husband, but the custody of the parties' two children to the wife. The husband appealed and the Supreme Court reversed the lower court's custody award

on the grounds that the children's best interests would be served thereby. The evidence upon which the Court based its decision indicated among other things that she had been

“persistently guilty of indiscretions, including leaving the home on numerous occasions and staying out until the small hours of the morning. The circumstances shown indicate[d] to a practical certainty that she was in an improper relationship with a married man. . .”
14 Utah 2d at p. 396.

The evidence in the *McBroom* case also indicated that the wife often came home in the early hours of the morning under the influence of alcohol, and unable to properly care for the children. It also showed that she used vile language in front of the children and left salacious and obscene material around the house in places easily accessible to the children. Moreover, it further indicated that she often refused to engage in various activities with the children. Furthermore, there was evidence to the effect that she was a poor housekeeper who didn't prepare proper meals for her family and there was also evidence to the effect that she had, during the pendency of the appeal, attempted to alienate the children's affection toward their father and had punished them whenever they had any contact with him. Finally, there was evidence to the effect that the mother had arranged to leave the children with “babysitters” during the day

time when the children weren't in school. The husband on the other hand had arranged for his mother to care for the children in his absence in the event the court awarded the children to him. 14 Utah 2d at 396-97.

From a reading of the Court's opinion in *McBroom*, as a whole, it appears clear that its decision to reverse the trial court and award the children to the husband was not based upon the wife's sexual misconduct but rather on the fact that the evidence clearly indicated that she was a poor mother, from whom the children received substandard treatment. Whatever doubt may exist in this regard due to the Court's recitation of her sexual misconduct along with the rest of the evidence was laid to rest by the Supreme Court in the *Dearden* case, *supra*. The husband there relied heavily on the *McBroom* decision as a basis for his appeal. The Court, however, held that the husband's reliance was misplaced because "while immorality was involved [in that case], erratic behavior was manifest in the [wife's] attitude toward and treatment of the children which was deemed to hazard their [the children's] welfare." 15 Utah 2d at 108, n. 4.

Of added significance is the fact that despite, in *McBroom*, the mother's gross neglect of and inattention to her parental responsibilities and obligations as established by the evidence in that case, the Supreme Court still directed the district court to review the custody award two years from the date of its remittitur of the case to the district court. 14 Utah 2d at 398.

In the instant case there is no indication whatsoever that appellant's sexual conduct has ever been "of such a nature as to hazard . . . [the child's] welfare and make it unwise that she be in her mother's custody" *Dearden, supra*, 15 Utah 2d at 107. The record is in fact barren of any evidence that appellant has ever conducted herself in an improper manner in front of her child. The evidence uniformly does show, however, that appellant has always been a wonderful mother. Respondent in fact testified on direct examination by his own attorney as follows:

Q. During the time that you and Mrs. White were residing together as man and wife, did you have occasion to observe how she took care of and treated your daughter?

A. Yes, I did.

Q. In your opinion, did she ever fail to properly bathe and clean your daughter?

A. No.

Q. In your opinion, did she ever fail to properly feed your daughter?

A. No.

Q. She prepared meals, correctly?

A. Yes.

Q. In your opinion, did she ever fail to properly clothe the child?

A. No sir.

Q. She keep a dirty house?

A. No sir. (T.T. 71).

Moreover, Barbara Dunn Lancaster, a witness who was called on behalf of the appellant, testified, after having testified that she had known both of the parties for many years (T.T. 99), that she had worked as both a fourth grade teacher and as a teacher in the Headstart program (T.T. 103), that she had tended Nicolette for appellant on numerous occasions (T.T. 99) and that she had observed appellant and Nicolette together at least 208 different times (T.T. 103), that in her opinion, based on her experience with children, and the familiarity which she had both with appellant and Nicolette and their relationship, appellant was "definitely" a "fit and proper mother." (T.T. 104). She then stated that "*if there was anyone that I would be delighted to model as a mother, it would be Nicole [appellant]*" (T.T. 104). (Emphasis added)

In addition to these facts, uncontradicted evidence also indicates that appellant had arranged her employment prior to the trial of this action so that she would be away from Nicolette no more than 14 hours per week. Moreover, she had secured an older, mature, county approved woman to care for Nicolette during the time that she was required to spend away from her. (T.T. 56). In contrast to this, respondent's employment and school work required him to be away from Nico-

lette between 30 and 40 hours per week. (T.T. 87). Moreover, the people that he secured to care for Nicolette during his absences do not appear to be well qualified for the job. The husband is only nineteen years old and apparently does not have a stable employment record. (T.T. 114). Respondent in fact admitted that he could be characterized as a "long hair." (T.T. 114-115). His wife, who is most responsible for caring for Nicolette is but herself a child of seventeen years of age. (T.T. 114). Moreover, neither of these persons has been approved by any governmental agency or body as being fit to care for young children. (T.T. 114).

One final factor is worthy of note in this appeal. A review of the trial court's Findings of Fact and Conclusions of Law, and especially the statements and observations that the court made throughout the course of trial (see T.T. 91-92, 124-26 & 130) reveals that the court is of the view that "the 'East Lynne' concept when for moral transgression a wife was cast into outer darkness and deprived of all, including her children," is still a viable rule of law in Utah. As this Court made quite clear in *Dcarden*, however, that view or rule of law has been completely discarded and abandoned for all time by the Utah courts.

CONCLUSION

For the foregoing reasons it is respectfully requested that the Court set aside both the trial court's award of the divorce to respondent and the trial court's

award of Nicolette to respondent and exercise the authority which it has in a divorce action to review the record *de novo*, *Wilson v. Wilson, supra*; and *Wiese v. Wiese*, 24 Utah 2d 236, 238, 469 P.2d 504 (1970) and decree its own judgment awarding both appellant and respondent the divorce and awarding Nicolette's permanent custody to appellant. In the alternative, appellant requests that the judgment of the district court awarding the divorce and the custody of Nicolette White to respondent be reversed and that the same be remanded to the trial court with directions to enter a decree of divorce in the names of both parties and to award Nicolette's custody to appellant.

Appellant has incurred substantial costs and attorney fees in prosecuting this appeal and respectfully requests that the Court award her costs and her attorney fees in an amount to be set by the Court.

DATED this day of, 1972.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant was served upon Lauren N. Beasley, attorney for respondent, by delivering a copy thereof to him at Cotro-Manes, Warr, Fankhauser & Beasley, 430 Judge Building, Salt Lake City, Utah 84111, on this day of September, 1972.

Stephen D. Swindle