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Dixie S. Cox v. Mervyn K. Cox : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DIXIE S. COX,
Plaintiff and Appellant,

v.

MERVYN K. COX,
Defendant and Cross Appellant.

BRIEF OF DEFENDANT-CROSS APPELLANT

APPEAL FROM JUDGMENT OF THE FIFTH JUDICIAL DISTRICT,
DISTRICT COURT OF WASHINGTON COUNTY,
HONORABLE J. HARLAN BURNS, PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

DIXIE S. COX,
Plaintiff and Appellant,
v.
MERVYN K. COX,
Defendant and Cross Appellant.

Case No. 13242

BRIEF OF DEFENDANT-CROSS APPELLANT

NATURE OF THE CASE

This is a divorce action wherein Plaintiff-Appellant, hereinafter referred to as Plaintiff, alleged mental cruelty and asked for custody of the four minor children, a reasonable division of the property, child support, alimony and attorney fees. Defendant and Cross Appellant, hereinafter referred to as Defendant, filed a counterclaim for divorce on the grounds of cruelty and asked for custody of the children, that a trust be provided for the children in lieu of some other provision of support and that Plaintiff be awarded no alimony.

DISPOSITION IN THE LOWER COURT

The lower court granted the divorce to the Defendant Mervyn K. Cox, Cross Appellant. The court initially awarded custody of the four minor children to the De-

fendant but thereafter modified its decision and granted custody to Plaintiff Dixie S. Cox who was the original Appellant in this action.

After changing its decision to grant custody of the children to Plaintiff, the court also ordered Defendant to pay to the Plaintiff the sum of FIVE HUNDRED DOLLARS ($500.00) per month as child support. It granted to Plaintiff a total cash payment in the nature of alimony and property settlement in the amount of $65,000.00, to be reduced by $5,000.00 if paid within six months, which was done.

RELIEF SOUGHT ON APPEAL

Defendant and Cross Appellant seeks a reversal of the lower court's decision regarding child custody. Plaintiff and Appellant seeks a modification of the property division.

STATEMENT OF THE FACTS

Plaintiff Dixie S. Cox filed her original Complaint on April 5, 1972, and an Amended Complaint on April 10, 1972.

Defendant Mervyn K. Cox filed his first Answer on August 9, 1972, and his Answer to the Amended Complaint and Counterclaim on October 30, 1972.

The case was tried before the court on January 10, 11 and 12, 1973. The evidence adduced at the trial disclosed the following:

The parties to the instant action were married in St. George on June 16, 1961. (Tr. 7) Four children have been born in that marriage. (Tr. 7)

Shortly after their marriage the couple moved to San Francisco where Dr. Cox completed dental school. (Tr. 8, 380)

Since the early stages of their marriage, Mrs. Cox has frequently sought the attentions of other men and has conducted herself in a flirtatious manner. (Tr. 382, 383) On occasions when the couple attended office staff parties where Mrs. Cox was working in San Francisco, she was flirtatious in her actions and gestures and in the way she looked at other male personnel with whom she worked. (Tr. 383)

After the Coxes moved back to St. George in 1964, Mrs. Cox continued in her usual practice to attract the attentions of other men. (Tr. 383) She was frequently absent from home. (Tr. 383) She admitted having necked, petted with and kissed other men on more than one occasion since her marriage to Mr. Cox (Tr. 113, 384)

About the time that the Coxes moved into their new home in St. George, Mrs. Cox became quite involved with another man. (Tr. 385, 428) She accompanied this particular male companion on an overnight trip to Lake Powell. (Tr. 385) On one occasion Dr. Cox confronted Mrs. Cox and this male companion about some petting he had observed between them. (Tr. 385, 428) Shortly after that incident the Coxes moved to Provo where they

lived about five months before returning to St. George. (Tr. 385)

In the fall of 1969, about six months after she had given birth to a child, Mrs. Cox enrolled as a student at Dixie College. (Tr. 385) Even though she was enrolled only on a part-time basis, she was gone most of the day and would usually return to the library in the evenings. (Tr 389) The children were left with a babysitter during the day and Dr. Cox stayed with them in the evenings. (Tr. 389) Oftentimes Mrs. Cox would not return from school until 11:00 o'clock or later in the evenings. (Tr. 389) On one occasion in the evening Dr. Cox found Mrs. Cox with another man in a parked car outside the college library. (Tr. 106, 390)

On another occasion Dr. Cox came home a little earlier than usual in the afternoon and found Mrs. Cox in her nightgown with another man who was clad only in Bermuda shorts. (Tr. 390) The children were present in the home on this particular occasion. (Tr. 398)

During the early part of 1972 another of Mrs. Cox's male friends drove by the Cox home frequently and spent a great deal of time talking to Mrs. Cox. (Tr. 391) During this period of time Mrs. Cox received phone calls in the evenings, on which occasions she carried the telephone into another room where she could not be heard. (Tr. 391) Frequently when Dr. Cox or the oldest son answered the phone, the party on the other end would hang up. (Tr. 391) Mrs. Cox admitted spending time with this same individual at Pine Valley, Jacob's Lake and at the Thunderbird Motel at Mount Carmel in March of 1972.

(Tr. 72) She also admitted spending time with this same male friend in his motel room at Mount Carmel. (Tr. 72, 115) This testimony was corroborated by two other witnesses. (Tr. 245-249, 253-257)

Mrs. Cox admitted spending time in March of 1972 with yet another man in Salt Lake City. (Tr. 76-88)

In June of 1972 Mrs. Cox returned home from one of her trips to Salt Lake City, stayed overnight and then left the next day, only to be absent from the home for another ten days. (Tr. 90, 122, 284, 396-397) During this ten-day absence Mrs. Cox failed to call or contact any babysitter or anyone who was responsible for the care of the children and did not inquire as to the children's welfare. (Tr. 122) No one in St. George knew where Mrs. Cox could be reached during this absence in the event something happened to the children. (Tr. 90) Mrs. Cox had informed her neighbor who often tended the Cox children that she would be staying at a certain place in Boulder City. (Tr. 90) She admitted in testimony that she really had no intention of staying at that particular place in Boulder City. (Tr. 90) After Mrs. Cox had been gone on this occasion for five days, her neighbor became worried and called the motel in Boulder City where Mrs. Cox said she would be. (Tr. 284) She was informed that Mrs. Cox had never been registered there. (Tr. 284) Mrs. Cox made no contact with this neighbor during the ten-day period. (Tr. 284) Dr. Cox also attempted without success to locate Mrs. Cox during this ten-day absence. (Tr. 390)

In July of 1972 Mrs. Cox became infatuated with yet another man. (Tr. 128) She accompanied this male friend

and another couple on a return trip from Lake Powell. (Tr. 91, 114) Mrs. Cox and this particular male companion arrived in St. George on a Sunday. (Tr. 92) Dr. Cox was with the children. (Tr. 92) On the following Monday Mrs. Cox took the children to Las Vegas. (Tr. 92) While in Las Vegas, she took the children to the motel where her male companion was registered, ostensibly for them to have a swim. (Tr. 93)

Mrs. Cox was absent another five days in August when she accompanied her male friend on a trip into Wyoming. (Tr. 114)

In September Mrs. Cox spent time with this same male companion at the Tri-arc Travel Lodge in Salt Lake City. (Tr. 114, 261-266)

During the month of October Mrs. Cox spent time with the same man at the Astro Motel in Cedar City. (Tr. 96, 267-269, 271-276) She also entertained him at her home where he stayed overnight. (Tr. 94, 204, 296) When the babysitter arrived on Sunday morning, Mrs. Cox's male friend answered the door. (Tr. 315) On this occasion he was bare from the waist up. (Tr. 315) The children were in the living room at the time. (Tr. 315)

Also, in October Mrs. Cox took the children to Boise with her where they all occupied the mobile home of her boyfriend and spent the night. (Tr. 98-99) In November Mrs. Cox went to Boise without the children where she again stayed overnight with her boyfriend in his mobile home. (Tr. 99, 114)

On another occasion in November of 1972 Mrs. Cox flew to Las Vegas to stay with her sister. (Tr. 100) She left Las Vegas by plane on the same day she arrived and flew to Reno where she stayed overnight again with her boyfriend. (Tr. 100-101, 114)

In December, 1972, Mrs. Cox again drove the children to Boise where they stayed overnight in the same mobile home with her boyfriend. (Tr. 101)

The evidence discloses that Mrs. Cox spent 80 days out of 100 during the last six months of 1972 away from the children and that the children were left on most of these occasions with babysitters. (Tr. 301, 313, 322)

There is also evidence that Mrs. Cox could not tolerate her daughter, Kim (Tr. 282); that she left on one of her excursions when Kim was ill and had to be taken to a doctor (Tr. 129) and that she neglected Kim when she was a baby. (Tr. 336)

The testimony at the trial revealed that Mrs. Cox is a poor housekeeper (Tr. 345, 336, 348); that meals for the children were often hurriedly prepared (Tr. 345) and that the meals were lacking in good food value. (Tr. 346)

Testimony was heard in the lower court proceedings to the effect that the children need to have more time spent with them to help them acquire better reading skills. (Tr. 65, 110) One of the children particularly, is in need of remedial reading attention. (Tr. 110)

Dr. Cox has always been a kind, warm and loving father and has treated the children well. (Tr. 30, 301, 327, 328, 334, 335; R. 124)

A number of affidavits have been made a part of the record as evidence of the fact that during the eight month period, while the children were in the temporary custody of Dr. Cox, Mrs. Cox spent a great deal of time with her boyfriend in the home on occasions when the children were visiting there and that on several of these occasions the boyfriend stayed overnight in the home when the children likewise stayed overnight. (R. 291-296)

At the conclusion of the trial which lasted three days, the court invited counsel for the respective parties to submit briefs. After having considered the respective briefs, the trial court, on February 9, 1974, in open court announced its decision in which it awarded Dr. Cox the divorce and also awarded custody of the four minor children to the Defendant, Dr. Cox. (R. 114) In so ruling the court found that Plaintiff's actions with respect to her lovers were lacking in propriety and judgment (R. 113-114) and that it was in the best interest of the children that their father be responsible for their care, custody and control. (Tr. 114)

Further, the court stated that it would review its determination in August, 1973.

On February 16, 1973, immediately following the court's ruling, the Plaintiff filed a Notice of Appeal in this Court.

No hearing in the matter was held in August, but on October 5, 1973, without the introduction of further evidence and without receiving testimony in addition to that which had been previously considered by the court in

January and February, the court awarded custody of the four minor children to the Plaintiff, Mrs. Cox (October 5, 1973; Tr. 27). The court did not make any statement or finding regarding any change of circumstances on which to predicate awarding custody to the Plaintiff even though the court had previously found that it was in the best interest of the children to award custody to their father.

The Decree of Divorce was finally entered on December 24, 1973. (R. 213) Defendant thereafter paid and Plaintiff accepted the amount of $60,000.00 awarded to her by the court as a property settlement.

Defendant Mervyn K. Cox filed Notice of Cross Appeal on January 21, 1974; and thereafter Plaintiff, on January 22, 1974, filed a further Notice of Appeal.

ISSUES

The sole issue insofar as the Cross Appeal is concerned is whether the lower court erred in awarding custody of the children to the mother, with the attendant award of support money, after having first granted custody of the children to the father.

ARGUMENT

POINT I

THE BEST INTERESTS AND WELFARE OF THE MINOR CHILDREN OF THE PARTIES REQUIRE THAT THEIR CUSTODY BE AWARDED TO THEIR FATHER.

In divorce cases the welfare of the minor children is of paramount importance in determining custody. *Arends v. Arends,* 30 Utah 2d 328, 517 P.2d 1019 (1974); *Johnson v. Johnson,* 7 Utah 2d 263, 323 Pac. 2d 16 (1958); *Steiger v. Steiger,* 4 Utah 2d 273, 293 P.2d 418 (1956); *Graziano v. Graziano,* 7 Utah 2d 187, 321 P.2d 931 (1958); *Sampsell v. Holt,* 115 Utah 73, 202 Pac. 2d 550 (1949); *Hyde v. Hyde,* 22 Utah 2d 429, 454 P.2d 884 (1969). This Court in the case of *Sampsell v. Holt* said:

> "Child custody proceedings are equitable in the highest degree, and this court has consistently held that the best interest and welfare of the minor child is the controlling factor in every case . . ." (115 Utah 73, 202 P.2d 550 (1959)

Applying the above principles to the case now before the Court, it must be concluded that the best interests and welfare of the four minor children was and will be best served by awarding their custody to the father because of the following circumstances:

A. *The Plaintiff has manifested considerable moral deficiencies and has otherwise disqualified herself from fulfilling her obligations as a mother.*

In the case of *McBroom v. McBroom,* 14 Utah 2d 393, 384 P.2d 961 (1963), this Court *reversed* the award of custody of the children to the mother. The facts were not unlike those found in the case now before this Court. Two minor children, ages seven and nine, were involved. The record showed that the *father took his parental responsibilities seriously; that he was industrious and pro-*

vided an adequate standard of living for his family and that he spent a large portion of his free time with his children; whereas, the mother, on the other hand, had been *persistently guilty of indiscretions, including leaving the home on numerous occasions and staying out until the small hours of the morning,* arriving home at times in an intoxicated condition; had employed unseemly language in the presence of the children and on occasion surreptitiously used family funds to finance her clandestine affair with another man; *that she was a poor housekeeper;* tried to alienate the affections of the children from their father and *left the children often with babysitters.*

In *Sorensen v. Sorensen,* 18 Utah 2d 102, 417 P.2d 118 (1966), this Court affirmed the lower court's decision to grant the divorce decree to the wife but custody of the minor child to the father. The evidence showed that the wife had subordinated her responsibilities as a mother by going on a couple of excursions through several states with a girlfriend and two "gentlemen."

The Court affirmed the lower court's finding in *Francks v. Francks,* 21 Utah 2d 180, 442 P.2d 937 (1968), that the mother was unfit to have the custody of the children. The evidence showed in that case that the mother had been guilty of indiscretions involving men other than her husband; that she had traveled about the streets of the town where the parties lived late at night in an intoxicated condition and that she failed to care for the children *in the manner expected of a mother in like circumstances.*

In *Ryan v. Ryan,* 17 Utah 2d 44, 404 P.2d 247 (1965), the court found that the wife had belittled her husband and bragged to him of her many love affairs; *that she was away from home constantly* and failed to care for the children. It is significant that the evidence supporting these findings related only to the period of time *subsequent* to the separation of the parties and the commencement of the action. On this record, the court entered judgment for the father and found that the trial judge could reasonably conclude that the mother was not a fit or proper person to have custody of the children and that it was in their best interests that the father be awarded their care, custody and control.

The court sustained a decision of the trial court which granted a divorce to the husband and awarded him custody of a two-year-old child in the case of *Hyde v. Hyde,* 22 Utah 2d 429, 454 P.2d 884 (1969). The mother was shown to be emotionally unstable and on one occasion had left the child at the age of 13 months to go on a vacation and did not return for five and one-half months. The court emphasized the loving care the father had bestowed upon the child in ministering to its needs and placed great stress on the relationship between him and his daughter and the degree of security he brought into the life of the child. In response to the claim of superior right to the child's custody asserted by the mother under Section 30-3-10, Utah Code Ann. (1953), the court said:

> "It will thus be seen that *the defendant (wife) has no absolute right to the custody of her child simply because she is the mother.* At best, she has an advantaged position when all things are equal. However, when things are not equal as regards the

> ability of the parties to care for and properly rear the child, then any advantage customarily given to the mother must be denied and the award made so as to provide for the best interest and welfare of the child." 22 Utah 2d 429, 432 (emphasis added).

In the *Hyde case* the court held that the mother was *not* immoral, but awarded custody to the father, nevertheless.

Even though the court held in *Hyde,* as well as in *Arends v. Arends,* 30 Utah 2d 328, that Section 30-3-10, Utah Code Ann. (1953), does not apply to divorce, it is significant to note that in 1969 the legislature amended Section 30-3-10 to read as follows:

> "In any case of separation of husband and wife having minor children, *or whenever a marriage is declared void or dissolved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. 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 young children."* (emphasis added).

Divorce is defined in Black's Law Dictionary as follows:

> "The legal separation of man and wife, effected, for cause, by the judgment of a court, and either *totally dissolving* the marriage relationship, or suspending its effects so far as concerns the combination of the parties." Atherton v. Atherton, 181 U.S. 155, 21 S. Ct. 544, 45 L.Ed. 794. . . . (emphasis added).
>
> "The dissolution is termed 'divorce from the bond of matrimony,' or, in the Latin form of the expression, 'a vinculo matrimonii. . . .'"
> Black's Law Dictionary 556 (4th ed. 1968)

Whether the specific language regarding dissolution of marriage which was added to Section 30-3-10 by way of the 1969 amendment embraces *divorce* may be arguable. However, it cannot be denied that the thrust and rationale of that section applies with equal force in a divorce situation. [The court may not have had the 1969 amendment before it when it rendered its 1969 decision in *Hyde v. Hyde.*]

There is no merit in arguing that the "past conduct and demonstrated moral standards of each of the parties" should not weigh heavily in considering the best interests of the children. And, carrying this same rationale one step further, if the expression "past conduct and demonstrated moral standards" is to have any meaning whatsoever, certainly the facts of the instant case demand its application.

The Nevada Supreme Court in the case of *Sisson v. Sisson,* 77 Nev. 478, 367 P.2d 98 (1961), reversed the lower court decision and awarded custody to the husband upon the finding that the wife and mother had lived in adultery and had exposed the children to her adulterous living over a continuing period of time. In that case the wife, after separating herself from her husband, traveled with the children from Maryland to Nevada escorted by her new paramour. According to the record, the wife first committed adultery several weeks after arrival in Nevada. Once initiated, that conduct continued thereafter up to and including the time of trial, a period of about one year. In awarding custody to the father, the Supreme Court discussed the comparative moral standards of each party,

which appear to be quite similar to the divergent standards of the parties in the instant case. The court's discussion was as follows:

> "Though the tragedy of marital separation inevitably casts injury upon the children, a strenuous effort must be made to maintain if at all possible, that love, stability, security, and moral environment which they formerly enjoyed. It is evident and without dispute that the father, under the circumstances of this case, could have provided the children with as much love, with more security and stability, and with a more wholesome moral environment than did the mother. The wife's conduct following separation is despicable. The children were not babies; they were intelligent, curious and interested. They undoubtedly knew right from wrong, good from bad. The oldest son was then 9, the next 6, and the daughter 4 years old. Though the mother professed great love and affection for them, it became incidental to her passion for another man. Adult passions, apparently, sometimes provoke illicit togetherness. However, we cannot approve such conduct, especially its exhibition before beloved children. This is not a case where adultery is but an isolated occurrence. To the contrary, the wife-mother deliberately subjected her children to a shameful, immoral, unwholesome environment of more than a year's duration. That a more satisfactory solution was available for the children's welfare, pending divorce, is without question. We note that the father was not found unfit. Indeed, such a finding was not possible under the facts here present.
>
> "*We have not found authority from any courts which would support a custody award to the mother, under circumstances like these.* The adultery with which we are here concerned probably did not affect the husband-wife relationship, for

reasons heretofore related, but it must have caused terrible harm to the children." 367 P.2d 98 at 102, 103 (emphasis added).

Also, in the case of *Lantis v. Lantis,* 86 Nev. 885, 478 P.2d 163 (1970), the Supreme Court of Nevada held that it was not necessary that the mother be found unfit before she could be deprived of custody of an infant child previously awarded to her, where there was an express finding of fitness of the father. The court commented on the deep concern of the trial court for the welfare and best interests of the child, and its determination that the mother's conduct indicated a lack of maturity and responsibility.

The evidence now before this Court in this case clearly demonstrates that the controlling habit of the Plaintiff has been and continues to be the satisfaction of her own personal desires and inclinations in total disregard of the erosive effect of this conduct on her children. She has not only indulged during her marriage in a continuing series of flirtations and serious and aggravated indiscretions strongly suggesting actual adultery, but she has allowed these immoral episodes seriously and adversely to affect the best interests and welfare of the children by repeated and extended absences from the home (Tr. 90, 114, 122, 284, 301, 313, 322, 383, 385, 389, 396-397) and by directly exposing the children (Daniel, age 9; Jeffrey, age 7; Kimberly, age 6; and Joseph, age 3) on multiple occasions to the sordid reality of her immoral alliances. (Tr. 93-94, 98-99, 101, 204, 296, 315, 390, 391; R. 291-296) Although past conduct and demonstrated moral standards on the part of the Plaintiff to which the

children were directly exposed are sufficiently repulsive, standing alone, to justify the Court in awarding custody to the father, the Plaintiff's past conduct and numerous immoral excursions away from home without the children bespeak the fact that she is not a fit and proper person to have custody of the four minor children notwithstanding the trial court's obvious compassionate finding that Plaintiff, as well as Defendant, was a fit person to have such custody. (Tr. 72, 76-88, 90-91, 96, 99-101, 106, 113-115, 122, 128, 245-249, 253-257, 261-269, 271-276, 284, 382-385, 390, 396-397, 428)

Many of Plaintiff's encounters with other men were established at trial by her own admissions. (Tr. 72, 88, 91, 96, 99-102, 111, 113-115) Other such encounters were either established or corroborated by nine independent witnesses (Tr. 172, 245-250, 252-257, 261-278, 284, 293, 296, 314-315), in addition to testimony of Defendant. (Tr. 382-385, 390-393, 398, 428)

One witness testified that Plaintiff had left the children with babysitters about 80% of the time during a particular six-month period. (Tr. 301, 313)

Another witness testified that in the same six-month period the children were left under the care of babysitters way over half of the time; that Plaintiff "has been gone more than she has been home." (Tr. 322)

During Plaintiff's ten-day absence from her home in June of 1972, she failed to call or contact any babysitter or anyone who was responsible for the care of the chil-

dren to inquire as to their welfare. (Tr. 122) Neither her husband nor anyone who had any responsibility for the children on that occasion knew where they could contact Plaintiff in case of emergency. (Tr. 90)

One of the several babysitters testified that she tended the children on 12 of the 31 days in October of 1972 and that she had tended the children more than that in September, 1972. (Tr. 286-287)

In 1969, about six months after she had given birth to one of their children, Plaintiff enrolled as a student at Dixie College. (Tr. 385) There was no reason for this "educational" activity except to satisfy the social requirements or urges of Plaintiff. She was gone most of the day and usually returned to the library in the evenings. (Tr. 389) The children were left with a babysitter during the day and their father stayed with them in the evenings. (Tr. 389)

During another period of time Plaintiff enrolled in a 12-week charm and dance school in Las Vegas. (Tr. 384) While attending this course, she was gone two or three days each week. (Tr. 385) At that time there were three children who were left with a babysitter during the day and with their father in the evenings. (Tr. 385)

B. *Defendant-Cross Appellant and father of the four minor children is morally and in every other respect fit for the custody of the children, has manifest an abundance of love and concern for the children and will have the assistance of others who also love the children and have experience in caring for them.*

The record from the trial below is void of any evidence which casts a doubt upon the past conduct or moral standards of the father in any respect which could call into question his fitness to have custody of the four minor children.

The record below is replete with evidence of the father's unfaltering love and attention to the children and the love they reciprocate for their father.

It was their father who stayed with the children in the evenings on the numerous occasions when the Plaintiff was indulging herself with her various male companions. (Tr. 91, 102, 122-125, 129, 335, 350, 389, 396, 435)

Defendant has always been a kind, warm and loving father and has treated the children well. (Tr. 30, 301, 327, 328, 334, 335, 401) Defendant was in the habit, prior to the separation of the parties, of bathing the children and washing their heads. (Tr. 431) He is also accustomed to ironing the children's clothes. (Tr. 435)

In the case of *McBroom v. McBroom,* 14 Utah 2d 393, 384 P.2d 961 (1963), the court took into consideration the fact that the father had demonstrated a willingness and ability to care for the children more adequately; that his mother had agreed to move into the home to supervise the children; that another woman would be hired to care for household tasks and that he had the firm support of other relatives who appear willing to help.

Such is also the case with the father in the instant action. Not only is he financially able to continue to pro-

vide the necessities of life and a comfortable home but he has expressed his intentions, if awarded custody, to spend time with the children when he is not working. (Tr. 402) He plans to work approximately four days a week from about 8:30 a.m. until 4:30 p.m., which would allow him to spend considerable time with the children. (Tr. 402) He has also talked to various dependable individuals about assisting him in caring for the children and providing a proper home environment for them. (Tr. 402) Such things as meals, bathing, washing, ironing and clothing would be properly maintained. (Tr. 403)

C. *Based upon considerations of their total environment, including the only home they have known, and their friendships and attachments through school, church and social contacts, the best interests of the children would be better served by awarding custody to their father.*

As has been previously stated, the court, on February 9, 1973, awarded custody to the Defendant, specifically finding that it was in the best interest of the four minor children to be in the care, custody and control of their father. In so ruling, the court expressed concern over the lack of propriety and judgment exhibited in the actions of the Plaintiff.

Approximately eight months later, during which time there appeared to be no change in attitude or disposition of the parties, the court reversed itself and awarded custody to the Plaintiff without any specific showing or finding that it was in the best interests of the children to do so.

In the October hearing, when custody was transferred to the Plaintiff, there was no evidence offered or received to show any change of circumstances to justify a change of custody.

In point of fact, the evidence shows that the Plaintiff continued to exhibit immaturity and lack of responsibility through her indulgence in illicit relationships during the times in which the children were visiting with her in her home in St. George. (R. 291-295) In the language of the *Sisson* case quoted above, "The children were not babies; they were intelligent, curious, and interested. They undoubtedly knew right from wrong, good from bad." Even though the Plaintiff in the instant case may express love and affection for the children, it is apparent that any love she may have is incidental to her passion for other men and the gratification of her own selfish desires. This is not a case where adultery is but an isolated occurrence. The Plaintiff in the instant case has deliberately subjected her children on numerous occasions to a shameful, immoral and unwholesome environment of more than a year's duration.

One of the concerns expressed by the court was that the Plaintiff contemplated marrying one of her male companions and moving with her children and her new husband to Boise, Idaho. (R. 113-114) This concern has indeed become a reality, which action has not only disrupted the lives of the children with references to their stability in school, church and the social exvironments to which they were accustomed, but also forced them into a situation where they are confronted daily with the reminder of their mother's immoral extra-marital conduct.

SUMMARY

The children should be allowed to stay with their father in the home in which they have been reared, to offset by the love and security that this disposition will afford, the traumatic experience that this divorce and the misconduct of the Plaintiff have thrust upon them. In this home they will continue to attend the same church and schools, to play with the same friends and cousins and the divorce of their parents will not so completely disrupt their lives and routines and devastate their emotions as it will if custody is granted to the Plaintiff.

We respectfully submit that the judgment of the lower court regarding custody should be reversed and the custody of the four minor children returned to their father who has demonstrated his being entitled to have such care, custody and control.

Respectfully submitted,

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