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IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

ANNI KRISTENSEN,)
)
Respondent,)
)
vs.)
)
POUL ERIK KRISTENSEN,)
)
Appellant.)

* * * * * * *

APPELLANT'S REPLY BRIEF

* * * * * * *

CASE NO. 15531

* * * * * * *

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FILED

MAY 23 1978

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

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	)
Respondent,	)
	)
vs.	)
	)
POUL ERIK KRISTENSEN,	)
	)
Appellant.	)

* * * * * * *

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT

OF THE STATE OF UTAH

* * * * * * *

ANNI KRISTENSEN, Respondent,	)	REPLY BRIEF
vs.	)	
POUL ERIK KRISTENSEN, Appellant.	)	Case No. 15531

* * * * * * *

In her Brief the respondent made assertions to which the appellant feels he must reply and consequently submits the following Reply Brief.

THE TRIAL COURT SIMPLY DENIED THE MOTION OF THE APPELLANT TO MODIFY THE DECREE OF DIVORCE AND MADE NO FINDING REGARDING THE BEST INTEREST OF THE CHILDREN.

In the Disposition in Lower Court portion of the respondent's Brief it is stated that Judge Sawaya failed to find a change of circumstances "or good cause warranted by the best interest of the children . . ." (Respondent's Brief, p. 1.) The record is devoid of any such judgment by Judge Sawaya. He simply found no change of circumstances and denied the motion of the appellant to modify the Decree of Divorce. (R. 115, 128.) No record reference is made for this assertion by respondent as none

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exists. The record, as was pointed out by appellant, demonstrated that the best interest of the children required a modification of the Decree of Divorce and the failure by Judge Sawaya to deal with this evidence is the basis of this appeal.

ALAN AND ERIK, TWO OF THE MINOR CHILDREN OF THE PARTIES, REFUSE TO LIVE WITH THE RESPONDENT.

The respondent declares that despite Judge Sawaya's Order and refusal to stay his Order, the defendant failed and refused to tender custody of the two boys of the parties to the respondent. (Respondent's Brief, pp. 5-6.) This is not true. After ordering the appellant to come before him to show cause why he should not relinquish custody of Alan and Erik, Judge Dee ruled they should remain with their father pending this appeal. (R. 154.) Examination of the Minute Entry order prepared by Judge Dee on the 25th day of January, 1978 (R. 154), demonstrates that after speaking with the two boys Judge Dee determined:

> ". . . because of the testimony in chambers that this is in the best interest of the children and ruling otherwise would cause serious problems for the children." (R. 154.)

This ruling was made after Judge Dee spoke with Erik and Alan,[1] the parties and Anne Marie in his chambers. (R. 154.) The boys

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1. Judge Dee heard this matter after Judge Sawaya declared that the Order to Show Cause proceeding should be heard by Judge Dee as the presiding Judge in the Domestic Relations Division of the Third Judicial District Court rather than himself as the Trial Judge.

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are residing with their father because they refuse to go to live with their mother and Alphonse Mulder.

RESPONDENT IS NOT MARRIED.

Respondent represented to this Court in her Brief that she and Alphonse Mulder are now married. (Respondent's Brief, p. 11.) If so, it is not a legal marriage. This Court has ruled that a Decree of Divorce is not final as long as a Motion for New Trial is pending. Glad v. Glad, 567 P.2d 160 (Utah 1977). Such a motion was pending in this matter until the 10th day of November, 1977 and the appeal to this Court was filed on the 21st day of November, 1977. (R. 43, 128.) Pursuant to the ruling of this Court in Glad v. Glad, supra and the provisions of Section 30-3-8, Utah Code Annotated, 1953, a remarriage by the respondent while this matter was pending would not be a legal remarriage.

The record is devoid of any evidence that such a remarriage took place, but it is clear from the record that the respondent's living arrangements with Mr. Mulder, entered into within one week of the entry of the Decree of Divorce (Tr. 73-74), formed a major basis for the actions of the children in rejecting life with the respondent. (Protective Services Referral Report; Exhibits 1-D, 2-D and 3-D.) Consequently, the assertion that respondent and Alphonse Mulder are now married is not only unsupported by the record, it could not legally be true. They reside together in a meretricious relationship.

As was determined by Judge Banks when he made his Order of the 25th day of August, 1977, entered on the 19th day of

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September, 1977, the respondent and Alphonse Mulder had simply moved in with each other, and on that basis Judge Banks transferred custody of the three older children of the parties to the appellant. (R. 102, 112-113.)

THE AUTHORITIES CITED BY THE RESPONDENT ARE NOT APPLICABLE TO THIS CASE.

The respondent cites this Court to and relies upon the case of Watts v. Watts, 21 Utah 2d 306, 445 P.2d 141 (1968) in support of the Trial Court's ruling. There are substantial differences between that case and the instant matter. The primary one is that in Watts the Court determined there was no material change of circumstance justifying a modification of the Decree of Divorce. The reverse is true in this case where within a week after the Decree of Divorce was entered, the respondent moved herself and the minor children in with her boyfriend, Alphonse Mulder. (Tr. 239.) This was a man to whom she was not married and could not lawfully marry. Glad v. Glad, supra. (R. 43, 128.)

It was a result of this living arrangement and the exposure to the home provided by the respondent and Alphonse Mulder that the children rebelled, causing the appellant to return to the Court seeking a custody evaluation. (R. 83, 85-86.) This evaluation was performed and three professionals examined the situation: Dr. Malcolm Liebroder, a licensed clinical psychologist, Mr. Bryant Eastham, M.S.W., from the Protective Services Section of the Utah State Division of Family Services,

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and Mr. Kim Peterson, M.S.W., employed by the Court for the purpose of conducting custody evaluations. (Original Custody Evaluation; Exhibits 1-D, 2-D and 3-D from hearing of September 20, 1977; Tr. of hearing of September 20, 1977, pp 7-49; R. 173-215.) All concurred that the appellant was the psychological parent of the three older children and recommended to the Court that custody of them be given to him. This situation and the acts of the respondent constituted a material change in circumstances which is considerably different from the evidence in Watts where it was established that the children were just unhappy.

It is also significant to note that the respondent is relying on Judge Banks' determination that the children were turned against the respondent by the appellant. This is directly in conflict with the testimony of Dr. Malcolm Liebroder (Tr. 34), Kim Peterson (Tr. 41, 42), Bryant Eastham (Tr. 46, 48) and that of the respondent's witness, Kent McDonald (Tr. 64, 65).

CONCLUSION

This Court has declared that it is the welfare and best interest of minor children which governs the award of custody. Bingham v. Bingham, 575 P.2d 703 (Utah 1978); Mecham v. Mecham, 544 P.2d 479 (Utah 1975). In this case application of that standard requires that the Judgment entered by Judge Sawaya be reversed by this Court, which should award care, custody and control of the minor children of the parties to the appellant.

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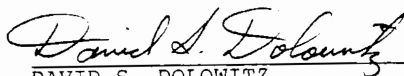
RESPECTFULLY SUBMITTED this 23rd day of May, 1978.



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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Reply Brief in Case No. 15531, postage prepaid, this 23rd day of May, 1978, to Gary R. Howe of Callister, Greene & Nebeker, Attorneys for Respondent, at 800 Kennecott Building, Salt Lake City, Utah, 84133.

DAVID S. DOLOWITZ

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