

1952

# Phyllis K. Stuber v. Harvey T. Stuber : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

PHYLLIS K. STUBER,  
*Plaintiff and Respondent,*

vs.

HARVEY T. STUBER,  
*Defendant and Appellant.*

Case No. 7764

APPELLANT'S BRIEF

FILED

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*Plaintiff and Respondent,*

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7764

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*Defendant and Appellant.*

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APPELLANT'S BRIEF

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STATEMENT OF FACTS

On March 29, 1945, the respondent was granted a Decree of Divorce from the appellant in the District Court of Salt Lake County. The respondent was awarded the custody of Bruce Stuber, the minor child of plaintiff

and defendant, who at that time was 14 months of age. Respondent was granted \$30.00 per month for the support of said child, together with alimony in the sum of \$50.00 per month (T-1).

On February 13, 1951, respondent filed her Affidavit setting up the terms of the Decree of Divorce, and alleging that respondent, due to her inability to properly care for said child, voluntarily placed the custody of said child with the appellant until such time as she could properly care for said child, and setting forth a claim for unpaid alimony in the amount of \$3,550.00 (T-3).

To the Affidavit thus filed, appellant made answer in substance and effect as follows: He admitted the award of \$30.00 per month for the support of the minor child and the sum of \$50.00 per month alimony as set forth in the Decree. He admitted he had not paid the alimony and set forth that said minor child had been in his care, custody, and control, and that he had given to said child its sole support ever since the month of February, 1946; denied that the child had been in the care, custody, and control of appellant's mother except a short time following the granting of the Decree of Divorce; that he remarried on October 15, 1947, and that since that time said child had been in the care, custody, and control of appellant and his wife. For a period of approximately two years following February, 1946, the respondent did not see said child and made no inquiries concerning said child, and that the mother took no substantial interest in said child until January, 1950, and

then visited said child on an average of once a month. He alleged affirmatively that the respondent was not a proper person to have the care, custody, and control of said child; that said child had been cared for by appellant and his present wife with the assistance of his mother, all of whom were greatly interested in its welfare, and that the conduct and behavior of the plaintiff was not of such character as was or would be beneficial to said child if the care, custody, and control of said child was awarded to the respondent.

In Paragraph 4, appellant alleged that in the month of February, 1946, he had a conversation with respondent regarding said child, and at said time, respondent stated to appellant that she wanted appellant to take over the custody of said child and assume the obligation of its support, care, and maintenance; that if he would do so, respondent would make no claim against appellant for any alimony or support money for herself; the parties then agreed that appellant would take over the care, custody, and control of said child and pay for same if the respondent would release to him any rights that she might have to said child, and if she would further release any claim against appellant for alimony in the future. Appellant and respondent then and there agreed that for the foregoing considerations respondent would release any claim that she might have against appellant for the future custody of said child and would make no claim for any alimony in the future to which she might otherwise be entitled. Following said agreement, the appellant did take over the custody of said child in the month of

February, 1946; that ever since said time said child has been in his care, custody, and control; and that he had supported and cared for said child at his own sole cost and expense, and alleged that the respondent had never at any time since said agreement made any request or demand of any kind for alimony under the terms of said Decree, and that by reason of all of the facts and circumstances, respondent was estopped from asserting any right under the terms of said Decree of Divorce to recover a judgment against the appellant for any alimony accrued under the terms of the Decree.

In Paragraph 6 of his Answer, appellant also sets forth that because of the circumstances aforesaid, the respondent had been guilty of laches in asserting any right or demand for alimony in a court of equity, and that by reason of said laches and because of the agreement between the parties, her claim to relief was barred. By Paragraph 7 the appellant further alleged that the respondent was regularly employed and was able to support and maintain herself and had been able to support and maintain herself ever since 1946 and had in fact supported herself without assistance from the appellant and requested a modification of the Decree so as to relieve appellant of payment of alimony under the terms of the Decree. That said Decree be further modified so as to give to the appellant the exclusive care, custody, and control of the minor child subject to reasonable visitation by the respondent (T-9-13).



The respondent filed a reply wherein she admitted that she did voluntarily surrender the care of said child to the appellant and claiming that she did so because she was not so situated as to support or care for said child, but desired to have said child returned to her when she was able to provide for and care for said child. She further admits that the appellant had cared for and supported said child since February, 1946; that she agreed with the appellant that said child should be supported and cared for by the appellant until she could properly find a place to care for said child, "and that the defendant agreed with plaintiff that she could take said child as a dependent for the purpose of her income tax and he has violated this agreement." (T-14-15).

The evidence in support of the above issues shows in substance that when the appellant took over the custody of the child, Bruce Stuber, he was then 14 months of age. At the time of the hearing of this cause on May 14, 1951, he was 7 years of age (T-20).

At the time the appellant took the child, Mrs. Stuber was living with a girl friend and felt that she was unable to take proper care of the child; that she did not have enough money to take care of him herself; but testified that it was her understanding that she could get him back (T-21); that Mr. Stuber told her he would not pay her any money for the child nor for herself. She also testified that they talked about who would claim Bruce as a dependent; that she said she would; and that Mr. Stuber agreed to this (T-22). Mrs. Stuber was not in a position

to support the child until the present time; that she had now made arrangements with her mother who had agreed to take care of Bruce until she could remarry. That while Bruce was with his father, she visited him as often as she felt like it, as often as she wanted to nearly; that when she went to get Bruce, that she was not invited into the home, and had had the door slammed in her face (T-23). That respondent and Bruce get along very well, and that he seems to enjoy being with her. Mr. Stuber and his wife have never refused to let her see Bruce; that she had not had any trouble about seeing him, but they were nasty a few times about it. Since the appellant took Bruce into his custody and control, he had not paid any money under the Decree of Divorce for alimony; that she had been taking the child as a dependent, even though he was being supported by his father (T-24). She had claimed Bruce as a dependent ever since she had been working, and that she had been working most of the time since her divorce. The government had asked for payment from her for three years back and told her she could not claim him as a dependent because Mr. Stuber was supporting him. She had asked Mr. Stuber for the return of Bruce and he had refused (T-25). She further testified after the divorce was granted, she and Mr. Stuber lived together for a short time, but did not get along well, so they separated; that the agreement with Mr. Stuber about Bruce and his support was had about two months after the separation. At that time, she knew that Bruce would be taken care of by Mr. Stuber's mother and supported by Mr. Stuber. Mrs. Stuber took good care of him.

Q. Now, as I understand your testimony, Mrs. Stuber, when you agreed that Mr. Stuber would take the child, you agreed that he should take the child, and that you would release him from any support money for the child and release him from the payment of alimony?

A. I told him that if Bruce were well taken care of there wouldn't be any trouble (T-27).

Concerning the care of Bruce after Mr. Stuber remarried, the respondent testified that he was well taken care of, but she still didn't think they gave him the love and affection he needs; that on some occasions when she called for him, he was not as clean as she would have liked to see him, and that he seems to be somewhat thin and nervous. That when she would get him, he didn't know just who to mind. That he is quite emotional and runs around constantly, and that he doesn't like school. "He doesn't have any interest in anything, as far as I can understand, just what he has told me." (T-28).

That respondent did not see Bruce for the first two years after Mr. Stuber took him (T-29); she felt like if Bruce was going to stay with his father, that she couldn't see any outlet as to how she would be able to take care of him. She felt like it was for his own good that he have very few people to interfere, and that it would be better if he was living there like he was; that she had seen him about twice a month following said two year period. When she goes to see him, she picks him up in a car and takes him with her (T-30).

Q. What is it you object to because we want to make it pleasant for you when you go to see the child?

A. Well, I don't see why I have to stand outside; not that I really care to go in, that isn't the point, but at least people can treat you civil when you go to get your own child.

Q. Well, you mean they didn't invite you in the house?

A. No, they never have since I and Harvey have been divorced.

On one occasion, she called to get Bruce and Mr. Stuber raised a commotion. Bruce cried to go with me. Mr. Stuber wouldn't let him go at first, but then he called me up and said that Bruce could go. That was about a month ago (T-31).

Q. Is that the only time anything of that kind has occurred, like that?

A. He has been fairly decent to me. I never made any claim for any money. I never made any claim for any money against Mr. Stuber until the Collector of Internal Revenue made a claim against me. I never bothered him. That was about December 27, 1950. At that time I was very upset about Bruce.

When we talked about Mr. Stuber taking Bruce, I didn't say he should be released. We talked about my taking Bruce as a dependent. I was employed at the time at the Lerner Shops (T-33). I didn't talk to Mr.

Stuber about taking Bruce as a dependent until I had notice from the Office of the Collector of Internal Revenue. While Bruce was with Mr. Stuber's mother, he told me he was paying her \$65.00 per month. I expect to get married. I am acquainted with Mr. Fred E. Bacon (T-31). He is a married man living in Salt Lake and I have been going out with him for quite a while. He has divorce proceedings pending. I don't know if it is in court or not, but it is in the proceedings to be in court. Mr. Bacon, whom I contemplate marrying, has been separated from his wife almost two years.

Q. I will ask you if it is not a fact, Mrs. Stuber, that for a period of approximately a year, you were living at No. 234 North Main Street in Salt Lake City, and was registered there during all of that period as Mr. and Mrs. Fred Bacon?

A. That's right (T-84).

I never did request Mr. Stuber to make any payment of alimony to me or support money until this question arose with the Collector of Internal Revenue (T-35). Mr. Stuber, his wife, and mother are working, and during the past year Bruce has sometimes been taken care of by a baby tender.

I talked to Bruce's school teacher and he wasn't in school for almost a month and he was absent an awful lot. They took him deer hunting. The teacher said he was not very intelligent, but no one took sufficient interest in him to help him with his reading (T-38). The teacher



said that he was sometimes truant from school and Bruce says he does not like school. During the period, I didn't see him for two years, it seemed like he has too many bosses, and I thought it was for his own good that I didn't interfere. My mother lives at 1538 West 8th South Street, and has a good home and is able to take care of Bruce (T-39). I do not live with my mother. I haven't lived with her since I was married to Mr. Stuber. If I obtain the custody of Bruce, I would have him live with my mother and she would care for him. I don't expect to live with my mother unless some arrangement can be made where I can, but it is not a very big home. We will have to work that out when the time comes. She has two bedrooms and a living room, five rooms all together. There are my mother and father, a sister, and a brother, all living in mother's home (T-40).

I work at the Blue Cross Insurance Company and earn \$130.00 per month after deductions. I have been working at different jobs for four or five years (T-41).

Mrs. Ethel Kalian, the mother of respondent, testified that she would be able to take care of Bruce temporarily; that Bruce had been at her home on different occasions, and she and Bruce get along well together (T-43). I get along well with my daughter. I am 48 years of age and was quite ill a few years ago, but feel better now. I have never had any trouble when I went to get Bruce, and appellant and his wife have always been friendly to me. They would let us keep him a couple of days if we wanted to (T-45). I know the appellant's

mother is always very much interested in Bruce and gives him a great deal of love and affection. We never had any trouble about it. The appellant's wife has always treated me with proper consideration (T-46). We had some little difficulty only on one occasion (T-47).

The appellant testified in substance that he is employed by the Union Pacific Railroad where he has steady work as a brakeman and earns a good salary of about \$400.00 a month before deductions (T-49).

Appellant testified that when he took the custody of Bruce, that the respondent was living with a girl friend; that she was having trouble with her mother and did not want her mother to have the custody of Bruce (T-51). I was up to see the baby one day and it was ill and it was agreed that I should take the baby, and that if I did take it, that I would not pay her any more support money or alimony. It was agreed at that time that my mother would take care of Bruce because I had to work each day and was living at home with my mother. I took the custody of the baby at that time. He was then two years old and he is now 7 years old and I have had him during this whole five year period (T-52). I paid my mother \$60.00 a month for his care and paid all of the bills, such as phone, lights, gas, and groceries. We have a six room house (T-53).

We have never had any trouble with Bruce or with one another. My present wife and mother are very much interested in his welfare. They are both very kind and

affectionate toward him (T-55). My wife and I agree very well in connection with his discipline. My mother is 54 years old; I am 33 years old; and my present wife is 27 years old. We have one child besides Bruce, who was two years old in February, 1951. The children get along well together and think a great deal of one another. Most of his marks in school are satisfactory (T-56). His last report card showed eight satisfactory marks and three unsatisfactory. These related to loud talk in school and one was in reading. I am sure that he is a normal child in every way, and that any difficulty he has had in school is not in any way connected with his home life. He reads very satisfactory now for a beginner. I and Mrs. Stuber work with him in his school work. His teachers have never complained to us that his work was not satisfactory (T-57). There is a great deal of affection between myself and Bruce and I want it to continue that way. We have never had any trouble with respondent about seeing Bruce, except on one occasion when we both wanted him at Easter time when we were going up the canyon (T-58).

We have had no difficulties in the respondent's visits with Bruce. We have had no animosity against her and very often inconvenience ourselves to accommodate her. We want him to know his mother and have a normal relationship with her as far as possible (T-59). When I had my conversation with respondent when she wanted me to take Bruce, there was nothing said about her taking him as a dependent. I did not know that she had been taking him as a dependent until she called me the day



before Christmas of 1950. Following that time, I received a letter from her attorney. Up to that time, she had never asked for any alimony payments (T-60). I have never slammed the door in the respondent's face when she came for Bruce. I do not know what she means about somebody being nasty about it. I feel very sure that Bruce will be better off remaining with me and my present wife and mother, at least until the respondent shows more stability in her mode of life (T-61). Except for colds, there was only two occasions when Bruce was away from school. Once he was on the grounds and came home instead of going to school, and on another occasion, he was with me deer hunting for two days (T-63). At the present time, I am working, my wife works, and my mother works, and we have a baby tender part of the time (T-64). I have helped Bruce with his reading, and he seems to be a fair drawer, and he likes to have us read to him. I went to school with him when he registered (T-66). I talked to the teacher about the occasion he was truant. It would be like losing my right arm to have Bruce taken by respondent. He has never been away from me from the time he was born (T-67). We have three ample bedrooms in our home and all toilet and lavatory facilities (T-68).

Mrs. Sylvia Stuber, appellant's wife, testified that she and Mr. Stuber were married on October 15, 1947, and that they live in the home of Mr. Stuber's mother. They moved in with Mr. Stuber's mother in July, 1948 (T-69-70). Bruce has been with us ever since and was with us before that part of the time and the rest of the

time with Mr. Stuber's mother. We have one other child, Stephen, who is two years of age, and he and Bruce have sort of grown up together. They are very close to one another and Bruce is very protective of Stephen. I think a great deal of Bruce and I know he does of me (T-71). I have taken care of him when he has been ill and watched and worked for him as if he were my own. Since we have lived with Mr. Stuber's mother, she has left his care with me and has not interfered in any way. We all get along very fine together (T-72). I work for the Greyhound Bus and make \$90.00 each two weeks before deductions. They take about \$25.00 a month for income tax, \$4.00 a month for hospitalization, \$6.00 for union dues and \$2.00 for insurance and Social Security. When I have a baby tender, I pay her between \$50.00 and \$60.00 per month (T-73). The only reason I work is because Mr. Stuber does not make sufficient to get ahead and we have wanted to get a home in the country with a little acreage. All of Mr. Stuber's earnings have been devoted to the support of the two children and ourselves (T-74). When we have a baby tender, she comes before I leave in the morning, and I am home at 4:30. I am acquainted with the respondent (T-75). She usually calls by telephone before she takes Bruce. She stops and honks and I usually have him ready to go with her. There have been no unpleasant incidents between respondent and myself, and I try to accommodate myself to her convenience. I have never slammed the door in her face. Her mother has sometimes called for Bruce and has kept him a day or so, and we have never had any difficulty about it (T-77). We have never had any conflict about

visitation except one day when I had planned a birthday party for him (T-78).

I have had Bruce to some of the best doctors in town and they say his health is excellent. He has had a number of colds (T-79). Some of my earnings I have paid for a tonsil operation for Bruce and I have bought clothing for him and Stephen and made a down-payment on an automobile (T-80). I also bought a refrigerator. After deductions from Mr. Stuber's pay check, it isn't more than \$350.00 a month, and from that he has to pay out about \$80.00 to \$90.00 a month for his road expenses. Our grocery bill amounts to about \$130.00 per month. I love Bruce as much as I do my own child (T-81). Mr. Stuber's mother is home on Saturdays and Sundays, and I am home mostly Thursdays and Fridays (T-82).

The court rendered its decision in this cause (T-88-90), its Findings of Fact and Conclusions of Law (T-91-94), and its Judgment (T-95-96). By the judgment, the court required that the appellant surrender the child, Bruce Stuber, to the respondent, and that defendant's Petition for Modification of the Decree be denied; that respondent have judgment against the appellant for the sum of \$220.00 on account of respondent's income tax deficiency and for any other deficiency that might arise by reason of the respondent claiming the child, Bruce Stuber, as a dependent; that the appellant be released and discharged from any other obligation to the respondent; that in all other respects the Decree of Divorce remain in force and effect, and that respondent be grant-

ed judgment against the appellant for \$100.00 attorney's fees.

A motion for the amendment of the Findings was made (T-98-100) and the same denied on October 6, 1951 (T-101). The Notice of Appeal was filed on October 9, 1951 (T-102), and an order extending time to file the record on appeal to and including December 3, 1951, was made on November 19, 1951 (T-104). The Designation of Record on Appeal was filed October 18, 1951 (T-105-106).

## STATEMENT OF POINTS

### POINT I.

THE COURT ERRED IN ENTERING ITS JUDGMENT AWARDING THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD, BRUCE STUBER, TO THE RESPONDENT AND ERRED IN FAILING TO MODIFY THE DECREE OF DIVORCE SO AS TO AWARD THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD TO THE APPELLANT, SUBJECT TO REASONABLE VISITATION BY THE RESPONDENT.

### POINT II.

THE COURT ERRED IN ENTERING ITS JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANT FOR THE SUM OF \$220.00, BEING THE AMOUNT FOR WHICH RESPONDENT WAS AT SAID TIME INDEBTED TO THE COLLECTOR OF INTERNAL REVENUE ARISING OUT OF THE FACT THAT RESPONDENT FOR A PERIOD OF TWO YEARS CLAIMED THE MINOR CHILD, BRUCE STUBER, AS A DEPENDENT IN HER INCOME TAX RETURN AND ALSO ERRED IN REQUIRING THE APPELLANT TO PAY ANY OTHER SUM OR SUMS FOR WHICH THE RESPONDENT MIGHT BECOME OBLI-

GATED TO PAY THE COLLECTOR OF INTERNAL REVENUE BY REASON OF RESPONDENT CLAIMING SAID CHILD AS A DEPENDENT.

### POINT III.

THE COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF THE APPELLANT AND AGAINST THE RESPONDENT MODIFYING THE DECREE OF DIVORCE SO AS TO RELIEVE THE APPELLANT FROM THE PAYMENT OF FUTURE ALIMONY TO RESPONDENT.

### POINT IV.

THE COURT ERRED IN AWARDING THE RESPONDENT ATTORNEY'S FEES IN THE SUM OF \$100.00.

## ARGUMENT

### POINT I.

THE COURT ERRED IN ENTERING ITS JUDGMENT AWARDING THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD, BRUCE STUBER, TO THE RESPONDENT AND ERRED IN FAILING TO MODIFY THE DECREE OF DIVORCE SO AS TO AWARD THE CARE, CUSTODY, AND CONTROL OF THE MINOR CHILD TO THE APPELLANT, SUBJECT TO REASONABLE VISITATION BY THE RESPONDENT.

The testimony in this cause established without conflict that the minor child of plaintiff and defendant, Bruce Stuber, has been in the care, custody, and control of appellant, his father, from the time that said child was 14 months of age. He is now seven years of age. Plaintiff and defendant each testified that respondent requested appellant to take over the custody of this



child at which time it was agreed that if the appellant would assume the obligation of the child's care and support, that respondent would make no claim against appellant for the alimony which had been awarded by the Decree of Divorce, made and entered on March 29, 1945. The appellant, relying upon this agreement, has ever since the month of February, 1946, sincerely devoted himself to the general welfare of this child, has given it support and supplied its every need and by his own efforts and the efforts of his mother and present wife have given to said child all of the comforts of a home, and bestowed upon him their love, care, and affection and are now deeply attached to said child and are greatly concerned about his future welfare. The respondent, herself, was unable to disclose any want of care and consideration for the child. In contrast to such love and devotion, the respondent for a period of two years, wholly failed to show any interest whatever in the welfare of this child and even failed to see or visit it. The attitude of the mother toward the child during this period is sought to be justified by the explanation that she felt the child would be better off if she did not interfere with the custody of appellant or the appellant's mother who took care of said child when the appellant was at work. It seems reasonable to say that the period of time when this child had the greatest need of its mother has now passed and the child having now attained the age of 7 years, the respondent for the first time seeks to recover its custody and control. It would also seem to be a reasonable conclusion that she now seek custody and control for her own pleasure and benefit and not

for the general welfare of said child. The evidence discloses without any substantial conflict that since the mother has taken sufficient interest in the child to see and visit said child, that there has been the greatest cooperation on the part of the father and his present wife to make that association pleasant and agreeable. Since January, 1950, the mother has visited said child on an average of approximately once a month. Since the mother concluded to see and visit with the child, she has been caused no difficulty nor inconvenience in so doing, except on two occasions. On one of these occasions, the appellant's wife had arranged a birthday party for the child and on the other occasion the appellant had arranged an Easter trip for the family. The respondent's mother testified that she had never had any trouble when she went to get Bruce, and that appellant and his wife had always been friendly to her. Any slight disturbances which might have occurred when the respondent has taken the child are of immaterial consequence. It seems to appellant that the respondent has wholly failed to show such interest in the child as should permit her at this time to disturb the very satisfactory relationship which has existed between the child and those charged with its care and maintenance, and has wholly failed to show that the welfare of the child will be best or better served by having its custody awarded to her. If we disregard entirely the lack of interest shown in the child by the mother for two years of its early life, it will still be reflected by the evidence that the respondent's mode of life is not sufficiently stabilized as to show any permanent ability on her part to give

to the child the surroundings and care that it will require in the future. Respondent testified that she has not lived at her mother's home since she was married to Mr. Stuber; that if she were to obtain the custody of Bruce, she would have him live with her mother who would care for him, and that Respondent does not intend to live with her mother where said child would be unless some arrangement could be made which was not apparent at the time of trial. In other words, it would seem that the proceedings brought by the respondent were primarily conducted for the purpose of securing the custody and control of the child for the respondent's mother. There is nothing to appear in the record from which any reasonable inference can be made that the relationship between mother and child, if awarded to respondent, would be any different than the relationship which has existed during the period of time that the respondent has taken sufficient interest in the child to see it on occasions. The further facts appear without dispute that the respondent expects some time to marry. This expectation, however, is based upon the present association of the respondent with a married man, and that respondent and said married man were registered at 234 North Main Street, Salt Lake City, Utah for a period of approximately one year as Mr. and Mrs. Fred Bacon. She has indicated by her testimony that she expects to marry this man, but certainly the welfare of this child should not be predicated upon the possibility that such a marriage may take place in the future, and it would be of the opinion of the writers of this brief, under all of the circumstances, that such a marriage is



highly improbable and if it were to take place, it is difficult to see how the best interest of this child could be served by taking it away from its father, with whom it has been living all these years, and to place it more or less under the direction and control of some man with whom said child has had no association and is probably wholly unacquainted.

As we understood the law in this jurisdiction, it has now been definitely decided that in determining the right of custody of minor children that such determination will be made solely in the interest of the child. Our statute, Section 40-3-10, provides that:

“In any case of separation of husband and wife having minor children, the mother shall be entitled to the care, control and custody of all such children \* \* \* provided further, that if it shall be made to appear to a court of competent jurisdiction that the mother is an immoral, incompetent or otherwise improper person, then the court may award the custody of the children to the father or make such other order as may be just.”

By some cases, this court had construed the above statute so as to give a fit mother a primary right to the custody of minor children. Subsequently in the case, *Alley v. Alley*, 72 Utah 196, 269 Pac. 487, in a decision written by the late Justice Cherry it was held:

“So far as the superior right of the mother under the statute is concerned, we think she has

waived and lost it in consequence of her failure to assert it on the two previous occasions mentioned. And there being no sufficient grounds shown or claimed why the welfare of the child demands a change of its custody, we find no merit in the appeal.”

More recently in the case of *Sampsell v. Holt*, .... Utah ...., 202 Pac. 2nd 550, this court construed the foregoing statute in the following language :

“Moreover, it seems unreasonable to attribute to the legislature a purpose or intent to give to a divorced mother an absolute right to the control and custody of a child under ten years of age, without regard to the best interest of such child. For many centuries, it has been the policy of the law in matters of this sort to give controlling weight to the considerations of the best interest of the child. There is nothing in the legislative history of these sections to indicate that it was the intent of the legislature to alter this principle. Sec. 40-3-10 must be understood as applying only to cases of separation, and not to cases of divorce.

\* \* \*

“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. *Walton v. Coffman*, 110 Utah 1, 169 P. 2d 97, and cases there cited. Such proceedings being equitable, we may review the facts as well as the law on appeal.”

We assume therefore without the citation of further authority that the sole question to be determined under Point I is whether or not the court has erred or has failed to exercise a sound discretion in awarding the custody of the child, Bruce Stuber, to the Respondent in view of all of the facts and circumstances appearing in the pleadings and the evidence.

## POINT II.

THE COURT ERRED IN ENTERING ITS JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANT FOR THE SUM OF \$220.00, BEING THE AMOUNT FOR WHICH RESPONDENT WAS AT SAID TIME INDEBTED TO THE COLLECTOR OF INTERNAL REVENUE ARISING OUT OF THE FACT THAT RESPONDENT FOR A PERIOD OF TWO YEARS CLAIMED THE MINOR CHILD, BRUCE STUBER, AS A DEPENDENT IN HER INCOME TAX RETURN AND ALSO ERRED IN REQUIRING THE APPELLANT TO PAY ANY OTHER SUM OR SUMS FOR WHICH THE RESPONDENT MIGHT BECOME OBLIGATED TO PAY THE COLLECTOR OF INTERNAL REVENUE BY REASON OF RESPONDENT CLAIMING SAID CHILD AS A DEPENDENT.

The respondent admits that she and the appellant had an agreement concerning the care, custody, and control of the minor child. She testified that this agreement was had about two months after the separation of herself and Mr. Stuber; that at that time she knew that Bruce would be taken care of by Mrs. Stuber's mother and supported by Mr. Stuber; that Mr. Stuber did take good care of him, and that she agreed that he should take Bruce and told Mr. Stuber that if Bruce were well taken

care of there would not be any trouble (T-27). When she and Mr. Stuber talked about Mr. Stuber taking Bruce, she didn't say he would be released, but talked about her taking Bruce as a dependent; that at that time she was employed at the Lerner Shops (T-33); that she did not thereafter talk to Mr. Stuber about taking Bruce as a dependent until she had notice from the Office of the Collector of Internal Revenue; that she never at any time requested Mr. Stuber to make payment of alimony until the question arose about her taking Bruce as a dependent (T-35).

The record discloses that Mrs. Stuber was employed during all of the period from the time of the separation of herself and Mr. Stuber. It is apparent that for the first two years of her employment she either did not take Bruce as a dependent or if she did, it did not come to the attention of the Collector of Internal Revenue. At all events for the entire period of time since the Decree of Divorce and until the Collector ascertained that Mrs. Stuber was claiming the child as a dependent, which would be a period of approximately four years, Mrs. Stuber made no claim against the appellant. It seems obvious to the writers of this brief that if any such agreement existed as testified to by Mrs. Stuber, that she would at least have notified Mr. Stuber of the time when she commenced taking Bruce as a dependent.

Mr. Stuber testified that when he took the custody of Bruce, respondent was living with a girl friend; that she was then having trouble with her mother and did

not want her mother to have the custody of Bruce; that he was up to see the baby one day and it was ill and it was then agreed that he take the baby and that when he did take it, he was not to pay respondent any more support money or alimony. Mr. Stuber paid his mother \$60.00 a month for the care of Bruce and paid all of the home bills and groceries (T-51-53). He did not know that Mrs. Stuber was taking Bruce as a dependent until just before Christmas of 1950; that when he had the above conversation with respondent, there was nothing said about her taking him as a dependent (T-59-60).

Considering all of the surrounding facts and circumstances, we think it probable that the testimony of Mr. Stuber in regard to the agreement when the custody of Bruce was surrendered to him that nothing would have been said concerning who should take Bruce as a dependent. This would be especially true because the respondent was well aware that the entire support of Bruce was being provided by the appellant, and that she would have no legal right under such circumstances to take credit for Bruce as such dependent. We submit therefore that the court erred in finding that such an agreement was made and in rendering judgment against the appellant as set forth in Point II.

### POINT III.

THE COURT ERRED IN FAILING TO ENTER JUDGMENT IN FAVOR OF THE APPELLANT AND AGAINST THE RESPONDENT MODIFYING THE DECREE OF DIVORCE SO AS TO RELIEVE THE APPELLANT FROM THE PAYMENT OF FUTURE ALIMONY TO RESPONDENT.



Without further discussion of the above point, we request the court's consideration thereof under the argument presented under Point IV and respectfully submit that the appellant was entitled under the circumstances to be relieved from the payment of alimony in the future to the Respondent.

#### POINT IV.

THE COURT ERRED IN AWARDING THE RESPONDENT ATTORNEY'S FEES IN THE SUM OF \$100.00.

The appellant admits that if the respondent was entitled to an award of attorney's fees that the amount required to be paid by the decree is not unreasonable, but we are of the opinion that in this case the respondent was not entitled to an award of attorney's fees. The evidence discloses, as hereinbefore pointed out, that this proceeding was initiated by the respondent for the purpose of recovering the future care, custody, and control of the minor child of the parties and for the purpose of recovering a judgment for accrued alimony claimed in the respondent's Affidavit in the amount of \$3,550.00. In the lower court the respondent prevailed as to the custody of the minor child, but recovered nothing under her claim that there was due and owing \$3,550.00 in unpaid alimony.

On the respondent's claim for unpaid alimony, the court found in Paragraph No. 6 of the Findings (T-92-93) that because of the agreement entered into by plaintiff and defendant plaintiff was entitled to recover from

the defendant the sum or sums of money she will be obligated to pay to the Collector of Internal Revenue by reason of said Collector disallowing the plaintiff the right to take said minor child as a dependent. The court further found that because of said agreement the plaintiff had waived her right to receive from the defendant any amount of alimony payments in arrears in excess of the amount or amounts she will be compelled to pay the Collector of Internal Revenue. It will thus be seen that the plaintiff did not prevail on her claim for unpaid alimony. Under these circumstances it would appear that each party should be required to bear his own attorney's fees.

Furthermore, there is no evidence which discloses that the respondent was unable to pay her own attorney's fees. The record discloses that the respondent was regularly employed. So far as disclosed by the record, it may be a fact that the respondent had ample funds or property on hand without regard to her earnings to meet her own attorney's fees and court costs and the record affirmatively shows that at the time her proceedings were commenced, she was regularly employed by the Blue Cross Insurance Company and earned \$130.00 per month after her deductions; that she had been working at different jobs for the last four or five years (T-41).

The record also discloses that the respondent is more able or equally as able as appellant to bear her own expenses. Mr. Stuber earns after deductions between \$325.00 and \$350.00 a month (T-49). Mrs. Stuber testi-

fied that the pay check of Mr. Stuber is not more than \$350.00 a month and from that amount, he pays from \$80.00 to \$90.00 a month while he is away on his runs as a brakeman for the Union Pacific Railroad. The grocery bill each month for the support of the family, including appellant's mother in whose home appellant and his family live, amounts to \$130.00 per month. The appellant also pays for all of the utilities used in the home. He is compelled to pay for his hotel room and meals on each trip out. In consideration of living with his mother in her home, he buys all of the groceries for the family including his mother (T-65, 81-82). The record does not show the amount expended for utilities such as telephone, electricity, and gas, but would at least reduce the net income of \$130.00 per month to approximately \$110.00 a month, and if it were not for the income of his wife, he would have to pay the installments on the purchase of his automobile, together with medical expenses from time to time as they arise.

The appellant's wife testified that she works for the Greyhound Bus Company and earns \$90.00 each two weeks before deductions; that she has the following deductions: \$25.00 per month for income tax, \$4.00 per month for hospitalization, \$6.00 per month for union dues, \$2.00 for insurance and social security; she further testified that at the time of trial, she was paying the sum of \$50.00 to \$60.00 per month for a baby tender from the wages she was receiving because appellant's mother was working; and that the only reason she works is because Mr. Stuber did not make sufficient to get ahead



and they wanted to buy a home (T-73-75). She had also paid from her own earnings for a tonsil operation for Bruce; had bought him clothing; and made a down-payment on an automobile and bought a refrigerator (T-79-80). Appellant and his wife had contracted obligations and laid out plans for the future welfare of themselves and their family without any anticipation whatsoever that they would be called upon to meet the expense which would arise incident to this litigation. So that at the time the same was commenced and at the time of trial, their obligations and the necessities of their family were such that it would seem that the respondent was much more able to bear her own expenses than the appellant. Furthermore, we submit it is not unreasonable to assume that the respondent gets financial assistance from the person with whom she has been associating and apparently living with for a considerable period of time.

In the Affidavit which was filed initiating these proceedings (T-3), no claim was made that respondent was unable to meet her own expenses and attorney's fees. Under all of the circumstances, we respectfully submit that this is not a case wherein attorney's fees should be awarded. In the case of *Weiss vs. Weiss*, 111 Utah 353, 179 Pac. 2nd 1005, this court held:

“That it is proper for the court to allow attorney's fees in its discretion provided the necessity for such awards is found to exist.”

## CONCLUSION

We respectfully submit that the appellant is entitled to the relief denied him in respect to the points hereinbefore discussed.

Respectfully submitted,

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