

1957

# Sheila Wherritt Graziano v. Charles Benito Graziano : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

SHEILA WHERRITT  
GRAZIANO,

*Plaintiff and Respondent,*

— vs. —

CHARLES BENITO GRAZIANO,  
*Defendant and Appellant.*

Case  
No. 8640

FILED  
MAY 1 - 1957

Utah Supreme Court, Utah

## Brief of Appellant

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(A) THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS THAT PLAINTIFF SHOWED GROUNDS FOR DIVORCE BUT ON THE CONTRARY THE EVIDENCE IS SUFFICIENT TO SUPPORT DEFENDANT'S GROUND FOR DIVORCE, AND

(B) THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE BEST INTERESTS OF THE CHILD WILL BE SERVED BY PLACEMENT OTHER THAN WITH PLAINTIFF.

2. APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED FOR THE REASONS:

(A) THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE ARE NOT IN CONFORMITY WITH THE EVIDENCE, AND

(B) THAT APPELLANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL.

3. THE COURT IMPROPERLY REFUSED TO ALLOW APPELLANT TO INTRODUCE EVIDENCE RELATING TO:

(A) WHETHER PLAINTIFF'S MOTHER MADE STATEMENTS TO PLAINTIFF DEGRADING DEFENDANT IN HIS OCCUPATION, AND

(B) APPELLANT'S EXPLANATION OF HIS ANSWER TO PLAINTIFF'S COUNSEL'S QUESTION AS TO HIS REASON FOR HIS MARRIAGE AS AN HONORABLE AND PROPER ACT UNDER HIS CHRISTIAN AND MORAL CODE.

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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GRAZIANO,

*Plaintiff and Respondent,*

— vs. —

CHARLES BENITO GRAZIANO,  
*Defendant and Appellant.*

Case  
No. 8640

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## Brief of Appellant

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### APPELLANT'S STATEMENT OF FACTS

Plaintiff and defendant intermarried at Elko, Nevada, on March 6, 1955. (R. 33, 43 and 44; Exh. 1) A daughter, Gina Graziano, was born the issue of said marriage at Salt Lake City, Utah, on October 20, 1955. (R 36) There is no testimony as to the ages of plaintiff and defendant but your author believes that it will be agreed that plaintiff is twenty-five years of age and that defendant is twenty-four years of age at the time of the trial. At the time of and before said marriage plaintiff and

defendant were employed at Alta, Utah, the plaintiff at Rustler's Lodge and the defendant with ski school instruction and acting in a motion picture being produced there; and that both resided at Rustler's Lodge at Alta. (R. 36) After said marriage and on or about April 1, 1955, while defendant was still engaged in the motion picture work, defendant began employment as a chef and manager at Finn's Restaurant in Salt Lake City, Utah, and resided at the Country Club Motor Lodge. (R 36) Plaintiff began telling defendant that plaintiff's mother repeatedly told plaintiff that defendant's occupation as a chef was degrading. (R. 79, 80, 105 and 106) Plaintiff and defendant on or about May 1, 1955, moved to the McKinnon home on Federal Way in Salt Lake City to occupy that home while the owners were away and on or about June 1, 1955, plaintiff and defendant moved into the apartment of a duplex at 2765 Wilshire Drive in Salt Lake City and resided there until about November 30, 1955. (R. 102) Defendant's employment at Finn's Restaurant was opportuned because Mr. Finn Gurholt, the owner and regular chef and manager was incapacitated due to an accident and it was understood between defendant and Mr. Gurholt that upon Mr. Gurholt's recovery and return the employment of the defendant would be unneeded. Therefore, on or about October 1, 1955, the defendant's employment at Finn's Restaurant terminated. (R. 96, and 97) Soon thereafter defendant became employed at the Alta Club in Salt Lake City as a buffet chef and at times serving at the bar. (R. 102) During defendant's employment at Alta Club plaintiff kept telling defendant that plaintiff's mother insisted that de-

defendant's employment was degrading to plaintiff and plaintiff's family and that some of plaintiff's mother's friends had mentioned to plaintiff's mother that they had seen and met defendant while at his buffet and bar duties at the Alta Club. (R. 78, 80, 105 and 106) The Alta Club employment was of about two weeks' duration and until about the 26th of October 1955. (R. 102) Defendant thereafter and about November 1, 1955, began work as a chef at the tea-room which Mr. Finn Gurholt operated in Mak-off's in downtown Salt Lake City. Defendant's employment at said tea-room ceased on or about the last week of November 1955 because of a discontinuance of operation and the entire tea-room staff was laid off. (R. 97 and 102)

During the residence of plaintiff and defendant at 2765 Wilshire Drive in Salt Lake City, defendant furnished their apartment and plaintiff's mother dictated the placement of furniture and generally interfered with plaintiff's and defendant's homemaking. (R. 80) Plaintiff did no cooking of meals and very little of house cleaning during their residence in Salt Lake City after their marriage. (R. 82, and 112) After plaintiff's and defendant's child Gina was born at the hospital at Salt Lake City plaintiff and the child were taken to plaintiff's mother's home and remained there so long, to the embarrassment of the defendant, that defendant finally found it necessary to insist that plaintiff and the child come and reside at plaintiff's and defendant's home. (R. 106) The testimony of defendant, undenied by plaintiff, shows that plaintiff indulged in the reading of pornographic literature provided by her mother, and defendant found it

necessary to return such book to plaintiff's mother. (R. 116 and 117) Defendant's testimony, undenied and corroborated by plaintiff's testimony, shows that during the years from 1948 to 1955 plaintiff had numerous illicit sexual intercourse affairs with a number of men about which plaintiff continually told defendant. (R. 67 to 71 inc. and 113 to 116 inc.) Plaintiff's mother had plaintiff will all her assets to her mother shortly after the marriage. (R 73) Plaintiff eradicated the date on the marriage certificate. (R. 44) Plaintiff voluntarily testified that the child Gina was conceived out of wedlock. (R. 44) Plaintiff, while living in Aspen, Colorado, left the child unattended. (R. 117) Plaintiff admits that she does not believe in God or Christ and intended not to give the child any Christian guidance and rearing. (R. 90, 91 and 118) Defendant is a lifelong member of the Catholic religious faith and a devout Christian. (R. 118 and 119)

Defendant on or about December 1, 1955, contacted Charles Sall, who operates the Hotel Jerome at Aspen, Colorado, and obtained employment as a chef at said hotel. (R. 36 and 37) Plaintiff, defendant and their child moved to Aspen, Colorado, about December 1, 1955, and took residence there until about March 1, 1956. (R. 37) During their stay at Aspen plaintiff's mother visited them there and on or about February 20th, 1956, plaintiff and their child came to Salt Lake City to visit plaintiff's mother and family. (R. 38 and 107) On or about March 1, 1956, defendant phoned plaintiff at Salt Lake City from Aspen and related to her that he had quit his job in Aspen and should they go to Connecticut and

plaintiff agreed to move and entrained with their child to Glenwood Springs, Colorado, where defendant met them and took them to Aspen, from whence they drove to Connecticut in their automobile arriving at Bristol, Connecticut, about March 6, 1956. (R. 38) At the time of and immediately after their marriage plaintiff and plaintiff's mother and family expressed desires that plaintiff and defendant move to Connecticut. (R. 72, 73, 90 and 110) Connecticut is defendant's home state, although during the major portion of the seven years preceding the marriage defendant had lived in Utah (R. 64) Defendant, plaintiff and child took residence at defendant's mother's house in Bristol, Connecticut. (R. 39) The house in Connecticut is a two-story structure with nine rooms on the main floor, consisting of three bedrooms, two kitchens, dining room, living room, bathroom and a sun room; and a complete apartment on the second floor. (R. 55 and 108) The defendant's brother and brother's wife and daughter occupy the second floor apartment. The first floor of the house is well furnished and very modern in all respects. (R. 55) Plaintiff testified that house was inadequate and she had no privacy but later she testified "there was nothing wrong with the house." (R. 55 line 29) Plaintiff testified that the people in the house and neighborhood in Connecticut were "illiterate." (R. 39) On cross-examination plaintiff admits she did not know if they were illiterate and all she ended up with was that defendant's mother could not read English. (R. 56, 58 and 59)



Defendant was employed soon after arrival in Connecticut by his brother in a credit and collection business as a salesman or solicitor. (R. 39 and 40) About two weeks after arriving in Connecticut defendant traded his Ford automobile on a Porsche automobile for use in his work. (R. 40) Defendant's employment with his brother ended after two weeks when defendant obtained employment with International Harvester Company Branch with good opportunities. (R. 41) Plaintiff testified that she was unhappy living around defendant's relations and the Italian and Polish neighbors and that she asked defendant to find a place of their own but plaintiff agreed to wait until the results of defendant's draft board status was determined as he might be drafted and plaintiff and child would then have another place provided. (R. 39, 40 and 41) Plaintiff testified that in April 1956—about a month after their arrival in Connecticut—she asked defendant to give her a divorce and defendant refused (R. 40, 41 and 91) Plaintiff also testified that she asked defendant to let her go home and she was of the opinion that defendant didn't care if she left but he didn't want to let the child go. (R. 41) During April 1956 plaintiff's sister Wendy visited plaintiff and defendant at their home in Connecticut and plaintiff made a three- or four-day visit with her said sister in Boston, Massachusetts. (R. 80 and 81) Defendant testified that plaintiff's sister Wendy phoned plaintiff before leaving for Europe and plaintiff told defendant her sister urged her to leave defendant and to go home; but plaintiff says that she does not remember this. (R. 65 and 133) About June 1956 plaintiff received a letter or phone call from her mother and defendant tes-

tifies plaintiff thereafter told defendant her mother said she would disown plaintiff if plaintiff didn't leave defendant. (R. 107 and 134) Defendant agreed with plaintiff in June 1956 to sell the Porsche automobile and arrange for an apartment to move into and on or about the 12th day of July 1956 defendant traded the Porsche on a Studebaker car and was proceeding to arrange for an apartment. (R. 92 and 93) On July 17, 1956 before defendant left for his work in the morning he asked the plaintiff to bring their automobile that evening and pick him up at his place of work, which plaintiff agreed to do. (R. 60) Plaintiff failed to come to defendant's place of work to pick defendant up as arranged and when defendant arrived home he found a note from plaintiff stating: "Dear Charlie: By the time you read this we will be in Chicago. I'm sorry to have to run away like this, but neither of us could stand a whole lifetime in our circumstances. I had to leave. Don't blame it on anybody but you and me. Sheila." (Exh. 3 and R. 52) On July 17, 1956, plaintiff took their child and baggage and went to Hartford, Connecticut, before noon and stayed at a boarding house there until plane time—about 6 p.m.—and then boarded a plane with their child and came to Salt Lake City (R. 61) After July 17, 1956, defendant found a bank book on a Bristol, Connecticut, bank with deposits to the plaintiff. Plaintiff had secretly set up or had set up for her the account of which she admits she received \$200.00 from her step-father in April 1956 and several smaller sums amounting to \$60.00 deposited during the months of May and June, which she states came from defendant's earnings. (Exh. 4, R. 62 and 63) Plaintiff admits that de-

fendant knew nothing of these deposits and she kept them secret from him. (R. 63 and 64) Plaintiff states that her stepfather sent the money for her to leave defendant and come home. (R. 63 and 64) Plaintiff is possessed of quite some financial worth represented by stocks and bonds. (R. 94 and 95)

In the evening of July 17, 1956, defendant phoned plaintiff's mother's home in Salt Lake City and was informed that plaintiff's family did not know where plaintiff was. (R. 110 and 111) The morning of July 18, 1956, defendant again phoned plaintiff's mother's home in Salt Lake City and talked with plaintiff there. (R. 111) In the conversation plaintiff informed defendant that their marriage was through and for defendant to stay in Connecticut and not come to Salt Lake City and if he did come he would not be allowed to see their child (R. 111) On July 26, 1956, plaintiff wrote defendant a letter in which plaintiff admits defendant is not at fault but that plaintiff is at fault and that if defendant will stay in Connecticut and not come and contest a divorce plaintiff will not ask for support money or alimony. The letter is as follows:

“... I was, still am, and always will be very sorry for making a tragedy in your life. You are very good and don't deserve it, but there was no other fair way to end the mess we got ourselves into. I know that now you are thinking only of Gina, but you don't seem to realize that it would be terribly bad for her psychologically to be shuttled back and forth for the rest of her life. . . .

“I will start divorce proceedings as soon as possible and give you rights of visitation, but if you come out now, I’ll refuse to let you see her. . . .

“I don’t intend to ask for any alimony or support money, so I hope you won’t have much trouble paying off your debt. . . .

“It will take nine months for the divorce to be final, so don’t get married yet. . . .” Exh. 2, R. 51 and 52)

On or about October 1, 1956, defendant left his employment in Connecticut and came to Salt Lake City and through a mutual friend contacted the plaintiff on the phone and plaintiff agreed to and did visit defendant at his place of abode a few days later. (R. 25 and 119) Thereafter, plaintiff allowed a visit to defendant with his child on or about October 7, 1956. (R. 120) Defendant made attempts in this visit and others later to effect a reconciliation with the plaintiff. (R. 121) On or about the 17th day of October 1956 plaintiff brought to defendant a complaint and a waiver of service and answer and asked defendant to sign the waiver. (R. 46, 47 and 122) Defendant agreed to look them over. (R. 122) At the meeting defendant asked for a few hours’ visit with their child on October 20, 1956, the child’s first birthday, and plaintiff agreed to allow such visit. (R. 48 and 122) Defendant bought presents and made a cake for the child’s birthday. On October 20, 1956, plaintiff with their child, came to defendant’s residence and asked defendant if he had signed the waiver. (R. 49, 123) Defendant said no and called plaintiff’s attention to the marriage date set out in the complaint, namely January 30, 1955, as

being incorrect. (R45, 47 and 48) The complaint also asked for \$1.00 alimony per month. (R. 79) Defendant told plaintiff he would not sign the waiver and he tore it up. (R. 50 and 123) Plaintiff received the presents and cake for the child but told defendant if he would not sign the waiver he could not visit with the child and plaintiff and child left. (R. 50 and 123)

Defendant soon after arriving at Salt Lake City in October 1956 obtained employment with Victor Adding Machine Company as a salesman in and about Salt Lake City and was required to take a two-week training course at Sacramento, California, from October 23, 1956, to November 6, 1956, at which time he returned to Salt Lake City. Upon his return to Salt Lake City he had his attorney arrange visits with his child for two and one-half hours one day each week and on November 7, 1956, visited with said child. (R. 21) On November 7, 1956, defendant was served with the complaint in this action which recited January 30, 1955, as the marriage date. (R. 1) Defendant was allowed the two and one-half hour visits on Fridays to and including the 23rd day of November, 1956, just before defendant filed his answer and counter-claim in this action, after which plaintiff refused defendant visitation with the child. (R. 28) Thereafter plaintiff served defendant with an Order to Show Cause on or about the 27th day of November 1956 and it was heard December 3, 1956. The Court ordered payment of support money, temporary alimony and attorney's fees and visitation with the child. (R. 11 and 14) After defendant filed his notice of appeal and on or about February 1, 1957, and thereafter plain-

tiff refused defendant visitation again and defendant thereafter filed and served an Order to Show Cause and upon hearing the Court found the plaintiff in contempt and imposed a suspended jail sentence and admonished her to allow defendant visitation rights as ordered in the decree (R. 182 and in District Court files after this record came up to the Supreme Court).

The trial was held without jury on the 22nd day of December 1956. On the 28th of December a Decree was made and on January 2, 1957 the Decree was entered, allowing divorce to plaintiff, custody of child to plaintiff, support money, alimony for one year, attorney's fees and visitation rights with the child to defendant for three hours per week (R. 165 et seq.)

During the trial the court and plaintiff's counsel frequently interrupted the examination by defendant's counsel on the pretext of saving time or that the questioning was to "hurt or besmirch the child." (R. 43, 44, 45, 52, 53, 85, 87, 88, 93, 101, 141 and 142.)

Defendant filed a Motion to Amend Findings of Fact and Conclusions of Law and to Amend the Decree, and also a Motion for a New Trial. (R. 166 to 178 inc.) In Defendant's affidavit accompanying his Motion for a New Trial on the ground that he did not receive a fair and impartial trial he attests:

"... I verily believe that I did not receive a fair and impartial trial in the above entitled matter on the 22nd day of December 1956 and in the proceedings thereto and thereafter in that at my

appearance at the courtroom of the above entitled court in compliance with the Order to Show Cause filed herein to be heard on the 3rd day of December 1956, which was set for 10:30 a.m., I and my attorney arrived at the said courtroom at 10:00 a.m. and sat ththerein until about 10:25 a.m., at which time Mr. Ned Warnock, plaintiff's attorney, came out of the Judge's Chambers, whereupon I inquired of my attorney if the case was discussed by one attorney and the judge and he answered that it shouldn't be; and that it is apparent from the actions and statements of Judge Stewart Hansen made at the said Order to Show Cause hearing and at the trial that the matter was pre-tried and pre-judged out of the presence of myself and my attorney because the said Judge's statements would not have been within his knowledge but for discussions thereon between himself and the attorney for plaintiff and this contention is borne out by rulings showing in the record excluding evidence my attorney attempted to produce and also by the Findings of Fact and Conclusions of Law and Decree filed in the above entitled matter on the 2nd day of January 1957 when compared with the evidence in the record as produced at the trial; and that said Ned Warnock is a brother of the stepfather or adopting father of said plaintiff and he has been overzealous in his personal interest in the matter as is shown by his actions in the courtroom and as is shown in the other accompanying affidavits attached hereto; and that the court refused counsel for myself to admit evidence surrounding the marriage and immediately thereafter after the plaintiff's attorney opened up the matter and particularly near the conclusion of the trial as will show in the reporter's record; and that the court stated that it did not want or need any summation argument at the conclusion of presenting of evidence and my attorney was

refused an opportunity to make a summation argument; and that as soon as the defense attorney stated that he had no further questions the Judge immediately collected his papers and the plaintiff's attorney had his brief case closed and was at the cloak rack for his overcoat when my attorney inquired of the Judge about summation argument, all of which indicated that it was prearranged and that all during the trial the Judge and plaintiff's counsel were continually urging speeding up of the trial by my attorney, all of which indicated that everything was predetermined anyway; and that the actions and statements of the said Ned Warnock as shown in the accompanying affidavits bears out my contention that the matter was pre-tried and pre-judged and that I did not receive a fair and impartial trial."

The affidavit of Mr. Finn Z. Gurholt is as follows:

"I, Finn Gurholt, after first being sworn upon oath depose and say, That on the 22nd day of December 1956, I attended and heard the trial and testified as a witness at the trial in the divorce matter between Sheila Wherritt Graziano and Charles Benito Graziano before Judge Stewart Hansen at the Salt Lake County Court House in Salt Lake City, Utah; that thereafter and in the evening of the said 22nd day of December 1956, I and my wife were invited and attended a party as guests of Mr. and Mrs. Lester Blackner, at the home of Mr. and Mrs. Ben Lingenfelter, parents of Mr. Blackner, at 526 East 13th Avenue in Salt Lake City, Utah; that also as a guest at the said party was Mr. Ned Warnock, who is the attorney for the said Sheila Wherritt Graziano; that at said party at the start thereof, Mr. Warnock, aforesaid, and myself and my wife were congenial and as the party progressed and Mr. Warnock



became more intoxicated he became loquacious and he directed his remarks to the group of guests in general and stated in words and substance, 'That son of a bitch Graziano, meaning Charles Graziano, that dirty bastard, we will fix him'; that I then interjected, saying, 'Will you repeat that Mr. Warnock'; that then Mr. Lester Blackner stepped in asking me not to engage in argument; that then said Mr. Ned Warnock then shouted to me and my wife, 'You both get out of here Mr. Gurholt. You had better leave right now'; that I and my wife had on our coats and I stated to Mr. Warnock in the hearing of the host, Mr. Blackner, 'Yes, in deference to our host or otherwise you might get hurt badly'; that Mr. Blackner tried to excuse the actions of Mr. Ned Warnock and expressed his regrets thereof; that I and my wife then left the party.'

The affidavit of Jo Anne Fallentine is as follows:

"I, Joann Fallentine, after first being duly sworn upon oath, depose and say: That on the 28th day of December 1956, at the Balsam Inn at Brighton, Utah, Mr. Tom Warnock, son of Mr. Ned Warnock, who is the attorney for the plaintiff in an action between Sheila Wheritt Graziano and Charles Benito Graziano for divorce, engaged me in conversation in the presence of Mrs. Boyd Summerhays: that said Tom Warnock stated that 'The Judge called my dad and thanked him for being so patient with the defense'; that said Tom Warnock also related that 'Mr. Graziano was not going to receive visitation rights, was to pay alimony, support money and lawyer's fees'; that said Tom Warnock also stated 'Mr. Christensen, attorney for Mr. Graziano, didn't maintain an office and he had not been in practice of late'; that said Mr. Tom Warnock made many other derogatory

statements about Mr. Graziano and his attorney, Mr. Christensen.”

The only denials of the statements in the affidavits were not under oath and were made by Judge Hansen and Mr. Ned Warnock at the hearing of the defendant's Motion for a New Trial, and these denials were directed to the charges that the matter was discussed in chambers and that it was pre-determined. (R. 152 to 157 inc.) Defense counsel called the attention of the court at the hearing to the Rules of Procedure that counter-affidavits filed within ten days are the proper procedure in matters of this type. (R. 158) The Rules of Civil Procedure of Utah covering the matter is Rule 59 (c) and opposing affidavits are therein provided for. The Court questioned that he needed to make affidavit and proceeded to have his statements read into the record not under oath. (R. 152 to 157 inc.) The court allowed Mr. Warnock to read into the record his statements not under oath. Mr. Warnock stated he wouldn't file any affidavits. (R. 158) Defense counsel called the court's attention to the fact that the rules were made for just such cases as this. (R. 152) After the hearing on the Motions to Amend and Motion for a New Trial the court on January 22nd, 1957, denied all of the Motions. Thereafter and on January 23rd, 1957, an Amended Decree was filed which contained the same provisions as the former Decree. Thereafter defendant proceeded with his appeal to the Supreme Court.

## STATEMENT OF POINTS

1. APPELLANT'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD HAVE BEEN GRANTED, FOR THE REASONS:

- (A) THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS THAT PLAINTIFF SHOWED GROUNDS FOR DIVORCE BUT ON THE CONTRARY THE EVIDENCE IS SUFFICIENT TO SUPPORT DEFENDANT'S GROUNDS FOR DIVORCE, AND
- (B) THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE BEST INTERESTS OF THE CHILD WILL BE SERVED BY PLACEMENT OTHER THAN WITH PLAINTIFF.

2. APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED FOR THE REASONS:

- (A) THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE ARE NOT IN CONFORMITY WITH THE EVIDENCE, AND
- (B) THAT APPELLANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL.

3. THE COURT IMPROPERLY REFUSED TO ALLOW APPELLANT TO INTRODUCE EVIDENCE RELATING TO:

- (A) WHETHER PLAINTIFF'S MOTHER MADE STATEMENTS TO PLAINTIFF DEGRADING DEFENDANT IN HIS OCCUPATION, AND
- (B) APPELLANT'S EXPLANATION OF HIS ANSWER TO PLAINTIFF'S COUNSEL'S QUESTION AS TO HIS REASON FOR HIS MARRIAGE AS AN HONORABLE AND PROPER ACT UNDER HIS CHRISTIAN AND MORAL CODE.

## ARGUMENT

### POINT 1

APPELLANT'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD HAVE BEEN GRANTED, FOR THE REASONS:

- (A) THAT THE EVIDENCE DOES NOT SUPPORT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS THAT PLAINTIFF SHOWED GROUNDS FOR DIVORCE BUT ON THE CONTRARY THE EVIDENCE IS SUFFICIENT TO SUPPORT DEFENDANT'S GROUNDS FOR DIVORCE, AND
- (B) THE EVIDENCE IS SUFFICIENT TO SHOW THAT THE BEST INTERESTS OF THE CHILD WILL BE SERVED BY PLACEMENT OTHER THAN WITH PLAINTIFF.

The attempt of the plaintiff to show grounds for divorce may be separated into the following:

- (a) That defendant quit his jobs,
- (b) That the house defendant furnished for his family in Connecticut was inadequate and had no privacy,
- (c) That defendant's relatives and neighbors in Connecticut were not sociable,
- (d) That defendant's mother was illiterate, and likewise as to his other relatives, and
- (e) That in Connecticut plaintiff had no social and recreational activity and was unhappy.

It is to be noted that defendant's jobs in Salt Lake City were not a matter of terminating because of voluntary quitting or being discharged. In the case of the employment as a chef at Finn's restaurant the termination was due to Mr. Gurholt's returning to his post after recovering from an injury. (R. 96 and 97) In the case of the employment at Alta Club it was a temporary employment at its inception. Further it is noted in connection with this employment that plaintiff particularly stressed to defendant that she and her mother's family were embarrassed by friends of theirs mentioning meeting and seeing defendant at this position. So no doubt the plaintiff could be charged with desiring the termination of this employment. (R. 97) In the case of employment at Makoff's Tea Room the termination was a matter of discontinued operation and the entire staff was laid off. (R. 97)

There is no contention on the plaintiff's part that defendant failed in any respect to provide for plaintiff or their child. It is to be noted that during all of defendant's employments at Salt Lake City plaintiff continually told defendant that her mother kept telling her that defendant's occupation as a chef was degrading. (R. 79, 80, 105 and 106). It is to be noted that the defendant was very highly thought of by his employer and that he performed excellently at his trade (R. 97). Finally under cross-examination plaintiff finally stated that she did not complain about anywhere except in Connecticut. (R. 84) So during the trial when her contention about the changing

of jobs lost their merit she abandoned it and pointed thoughts only in Connecticut.

The evidence shows throughout that defendant kept himself fully employed and provided for his wife and child. When one of his employments ceased he immediately obtained other employment. The continual interference and derogation concerning defendant's occupation by plaintiff's mother's statements to plaintiff and relayed to defendant caused defendant to move from Salt Lake City to Aspen, Colorado, where he had pre-arranged employment at the Jerome Hotel as a chef. (R. 36 and 37) Defendant kept fully employed in Connecticut and as plaintiff admitted in her testimony defendant's employment with the International Harvester Company offered good opportunities. (R. 41) It is to be noted that it was this employment in which defendant was engaged when plaintiff took the child and abandoned the defendant and came to her mother's home in Salt Lake City, Utah. (R. 61) It was from this employment that defendant was forced to leave to come to Salt Lake City in October 1956 to protect his family rights and his obligations to his child. Defendant immediately after arriving in Salt Lake City obtained employment as a salesman. (R. 21 and 25) It is submitted that plaintiff's attempt to show lack of industry or irresponsibility on defendant's part by job changes is without merit and much can be assigned to plaintiff's and plaintiff's mother's attitude toward defendant and his occupation. It is interesting to note that plaintiff did little if anything to encourage or

help as a wife who is trying to make a success of a marriage does.

Plaintiff testifies that the house in which plaintiff, defendant and their child took residence upon arrival in Connecticut, which belongs to defendant's mother, was inadequate and she could have no privacy and it was all centered in the kitchen. (R. 39) Under cross-examination of plaintiff and testimony of defendant it is shown that the house is a fine nine-room, very modern first floor compartment of a two-story house with two kitchens, three bedrooms, living room, dining room, bathroom and sun room in the first floor compartment. The first floor compartment was very adequate for the residence of defendant's mother and the defendant and his family and the plaintiff had ample provision for privacy. (R. 55 and 108) Plaintiff under cross-examination finally admitted "there is nothing wrong with the house." (R. 55, line 29) It is submitted that plaintiff shows that her effort to sustain a ground of divorce on such a contention as the inadequacy of the house is entirely frivolous.

When plaintiff's point as to the house did not hold up she reverted to defendant's relatives and neighbors in Connecticut; and particularly stated that defendant's mother was illiterate. (R. 39) After much cross-examination plaintiff admitted that her accusation that defendant's mother was illiterate was wrong and that her complaint was that plaintiff meant ignorant but upon further examination it was shown that plaintiff's only complaint was that defendant's mother could not speak English or

only broken English but that after a short while she could understand the mother. Plaintiff admitted that after being there for a while and talking with defendant's mother she had no trouble understanding her. (R. 56, 57) Plaintiff also admitted that defendant's brother and his wife who lived in the second-story apartment of the house were not illiterate and were all right, as well as the neighbors. (R. 58) It is to be noted that defendant's mother worked days and at the same time defendant worked and that plaintiff had her time and place for the most part to herself during the daytime and there were two kitchens. Certainly the defendant's mother did not bother or interfere with the activity of the plaintiff about the home and nowhere does the plaintiff so contend. It is submitted that plaintiff retracted all of her contentions relative to the personal attacks on defendant's family members. This is corroborated in the note left by plaintiff when she abandoned the defendant, to wit: 'Don't blame anybody but you and me.' (Exh. 3) These frivolous and irrelevant contentions of plaintiff are tacit admissions of the fact that she was in dire want of some evidence to sustain her alleged ground for divorce.

Soon after arriving in Connecticut plaintiff asked defendant to get an apartment elsewhere than in his mother's house but upon knowing of the likelihood of defendant being drafted into the army she agreed to await the results from the draft board. (R. 39 and 40) Plaintiff attempted to show that defendant provided no social or recreational life for plaintiff during the marriage. However, further examination shows that defendant took her



to plays, theatres, socials, swimming, tennis and other activities very often during the time in Connecticut. (R. 113) Plaintiff stated that she was only complaining about the social activity and recreational activity in Connecticut. (R 84) It is interesting to note that plaintiff received more of such activities while in Connecticut than when in Aspen, Colorado, or Salt Lake City, but she insists on narrowing it to Connecticut. It is to be noted that plaintiff urged the acquisition of another apartment and complained of lack of activity and at the same time plaintiff was secretly each week during the months of May and June depositing parts of defendant's earning in her private bank account to supplement the \$200.00 her father sent to her to leave defendant in April.

Plaintiff stated that she lost twenty pounds during her entire period of marriage to defendant. (R. 42) It is not contended that plaintiff was made ill from weight loss and that it did not effect her health for she admits much physical activity in tennis, swimming and other activities in Connecticut and also in Salt Lake City after she abandoned defendant. (R. 83 to 89 inc. and 113, 136 and 137) Plaintiff would have it implied that her weight loss and sadness was due to defendant, where as a matter of fact the evidence shows it was due to her being constantly harassed by her mother, sister and stepfather urging her and conspiring with her to leave defendant. (R. 61, 63, 64, 79, 80, 105, 106, 133 and 134) Defendant's undenied testimony is that plaintiff was usually sad whenever she received phone or letter messages from her family members. (R. 132 and 133) It is not strange that her conscience

bothered her when she knew, as she expressed in her letter, that defendant was 'good and did not deserve it' and she was at the same time secretly preparing to abandon and hurt the defendant that she was under a strained sadness of her own making, coupled with conspiracy with her father, mother and sister. It is submitted that plaintiff may have made a better and more conscientious effort to fulfill her marital contract and obligations to her husband and child but for the constant urging and interference from her mother, sister and stepfather to leave defendant and cause a separation. It is also submitted that this contention of no social and recreational life is without merit under the evidence.

It is to be noted that plaintiff not only produced no evidence to sustain a ground of divorce while on the witness stand but that she tacitly admits that she had no ground for divorce in the following ways: (1) Plaintiff asked defendant to *give* her a divorce soon after arriving in Connecticut (R. 40, 41 and 91), (2) plaintiff threatened that if defendant left Connecticut and came to Salt Lake City he could not see their child (R. 51, Exh. 2), (3) plaintiff tried by quasi bribe to keep defendant in Connecticut by writing that if he stayed there and did not resist her divorce action she would not ask for suport money and alimony (Exh. 2), (4) plaintiff used courting favor and pressure methods alternately in refusing defendant visitation rights with their child—favors before defendant moved in the procedures of this action, spite and pressure after he made procedural moves—(R. 28), (5) plaintiff used pressure methods on defendant on the child's birth-

day to force defendant to sign a waiver of service and answer (R. 49 and 123), and (6) plaintiff testified she wanted a 'nice easy divorce' (R. 49, lines 17 and 18).

In desperation of failure to make a showing of some evidence of ground for divorce plaintiff's counsel using a leading question, "Did defendant tell you he no longer loved you?" to which plaintiff answered 'Yes.' (R. 41) The defendant emphatically denied this in his testimony. (R 138) Defendant's attempt at reconciliation after coming to Salt Lake City in October 1956 certainly shows that the plaintiff's affirmative answer is unreliable. (R. 35 and 121) It is the old story in divorce cases that if you haven't any ground just testify that your spouse said he no longer loves you.

Both the judge and plaintiff's counsel became obsessed with the thought that defendant was "trying to besmirch or hurt the child." It is submitted that plaintiff's counsel started this and impressed it upon the judge because that is the very phraseology and main contention that plaintiff's attorneys used in taking the defendant's deposition in this matter and it is the same phraseology the judge used in making remarks from the bench at the beginning of the hearing on plaintiff's Order to Show Cause on December 3, 1956, after being in chambers with plaintiff's counsel for about one-half hour before the hearing as is stated in defendant's affidavit accompanying his Motion for a New Trial, and the same statements of the judge from the bench at the commencement of the trial, as well as the repeated use there-

of during the trial. (R. 154, 174, 175 and 186) It is to be noted that the judge made the remarks at the beginning of the hearing on the Order to Show Cause before he had any access to the deposition and that adds weight to the contention that the judge and plaintiff's counsel discussed it in chambers before the hearing.

Let us examine this and see what occurred. To begin, the plaintiff insisted on alleging in her complaint an untruth as to the date of marriage. Defendant admonished her about it when she had it in the complaint she gave him accompanied with the waiver. Plaintiff and her counsel became incensed when defendant stated the correct date of marriage in his answer and counterclaim and made the obsessed idea of defendant 'hurting the child' in the defendant's deposition. Plaintiff in her testimony stated that the child was conceived out of wedlock and to defendant's counsel's question, "Who said the child was conceived out of wedlock?" plaintiff answered "I did." (R. 44) Also plaintiff was advised by defendant's counsel that many children are born within seven months of conception as was this child but plaintiff insisted on her answer. And at this point the court and plaintiff's counsel came vehemently forth with the hue and cry "Trying to hurt the child." An examination of defendant's deposition will show that defendant and defendant's counsel made a vigorous argument against any implication that the child was conceived out of wedlock and argued strenuously to the contrary. (R. 186) Plaintiff admits she eradicated the date on the marriage certificate. (R. 43) Now it is submitted that no persons

of plaintiff's and defendant's names were married in Elko, Nevada, on January 30, 1955, and the record would so show. Therefore, if a divorce had been granted under plaintiff's complaint it would have been of no force or effect. It is further submitted that if plaintiff had alleged the true date of marriage, defendant in his answer would have admitted it and the issue of date of marriage and implication of conception out of wedlock would never have entered the picture. Certainly any blame for the implication or the hurt or besmirch — real or fancied — is at the instance of the plaintiff. Especially so after defendant had called it to plaintiff's attention when she handed him a complaint and waiver on October 20, 1956 (R. 48) It is submitted that plaintiff and plaintiff's mother showed some false sense of shame in this matter in urging plaintiff and defendant to go to Connecticut soon after the marriage, eradication of date on marriage certificate, announcement of a false date of marriage, and insistence on alleging an untruth as to the marriage date in the complaint.

The judge's statement on two occasions of interruption to rush the matter and save time was that all he was interested in was that she was unhappy in Connecticut. (R. 59, lines 22 to 30 inc. and 60, line 1) Of course, many people are unhappy under certain circumstances and for periods of time. I submit that is no reason or ground for divorce — especially where the husband was doing his level best to make things pleasanter and especially where plaintiff had already decided she did not want the marriage and wanted a divorce. Most wives with any degree

of desire for making a marriage a success or any sense of mutual responsibility with their spouse will try to help and encourage in the rough times of the venture. It is submitted that plaintiff did not take her marriage seriously and was discouraged from the start from so doing by her parents. It is not a question of whether the plaintiff was unhappy of itself, it is a question of whether defendant caused the unhappiness, if it really existed, or whether he was responsible for any real or fancied unhappiness. It is submitted that defendant, laboring against heavy odds from the plaintiff and her family did his level best to properly provide and care for his wife and child and did so, and that the plaintiff's unhappiness, if any really existed, was entirely of her and her family's making.

Did plaintiff and plaintiff's family really believe that defendant's sense of family responsibility and love of wife and child was so shallow that mere money — not ask for alimony and support — threat of no child visitation and spiteful and resentful treatment of visitation with child would dissuade defendant from facing up to the situation and meeting the issues in a forthrightly manner? How mistaken they were!

Even after the appeal was filed they refused visitation and forced defendant to cite plaintiff for contempt and she was given a suspended sentence in order for defendant to gain his right of visitation.

Therefore, it is submitted that plaintiff certainly proved no ground for divorce against defendant and she

should have been denied the divorce and that the Findings of Fact and Conclusions of Law thereon are not in conformity with the evidence.

Now let us examine the evidence to determine whether the defendant showed ground for divorce under his counterclaim. The evidence shows the following facts: the plaintiff joined her mother and sister in continually telling defendant his occupation was degrading, the plaintiff joined her mother in directing the type and placement of plaintiff's and defendant's home furnishings to the embarrassment of the defendant, the plaintiff aided and abetted the harassment of defendant by indulging in reading pronographic books and literature until in one instance defendant found it necessary to take the book back to plaintiff's mother who furnished it to plaintiff, the plaintiff and plaintiff's mother resisted defendant in taking plaintiff and their baby from the hospital to plaintiff's mother's home and defendant found it necessary after some time to insist that his wife and child come to their home, the plaintiff insisted in relating her unchaste and illicit sexual affairs with her men acquaintances during several years before their marriage, and also making comparisons. The plaintiff does not deny any of her self-described illicit sexual affairs with named men. In plaintiff's cross-examination she definitely admits the persons, places and times as a foundation for defendant's testimony as to her sex relations with these persons. Plaintiff in no instance denies any of the defendant's testimony of her self-related affairs of unchastity and immoral background. Plaintiff in her own

testimony states that she does not believe in God or Christ and does not intend that her and defendant's child be given religious guidance and rearing. Defendant testifies that he is a lifelong member of the Catholic religious faith and a devout Christian. Defendant's concern and love for his child is shown throughout the entire case in the following instances:

(a) Plaintiff testifies it is her belief defendant did not care if she left, but he did not want the child to go and this expressed in her letter to defendant (Exhibit 2), (b) plaintiff used child visitation to court favor of and pressure on defendant because plaintiff knew defendant's keen concern and love for their child and (c) defendant's continuous insistence on visitation rights with their child in spite of all of plaintiff's resistant efforts to dissuade defendant. The plaintiff and her stepfather conspired to cause plaintiff to leave and abandon defendant by providing funds secretly, by encouraging plaintiff to leave defendant and separate from him, and by poisoning the plaintiff's mind with degrading statements about defendant and his occupation. The defendant was industrious, always fully employed, of good and conscientious reputation (R. 97), loves children and children love him (R. 97), had and has a deep sense of family responsibility and was and is particularly concerned about his own and plaintiff's child's welfare.

The plaintiff makes no contention that defendant did not properly provide for his wife and child. In fact, he did so and in the plaintiff's Order to Show Cause hearing



defendant states he was and is desirous of supporting their child (R. 19).

It is submitted that defendant has faced the issues fairly and straightforwardly and he is justifiably concerned about the environment under which their child is to be raised. It is his conviction — as is shown by reflecting on the whole of the evidence and proceedings herein — that his child be not influenced by the environment of pornographic attitudes, lack of Christian belief and understanding and unchaste habits, the very same environment under which the plaintiff was raised and which may result in the child developing as the plaintiff has. It is likely to be asked why then did defendant try to reconcile with plaintiff after returning to Salt Lake City in October 1956. The defendant is convinced that the environment of himself and plaintiff is vastly different from that of plaintiff, plaintiff's mother and stepfather, and that the influence he would be able to exert on plaintiff away from her folk's influence and his influence upon their child when constantly and daily being with plaintiff and the child would eliminate the undesirable traits of plaintiff. These influences of defendant cannot be effected by infrequent and short visitation periods under the present decree order. It is very apparent that under the present situation of no conciliation attitude of plaintiff which exists that it becomes the defendant's duty to urge some environment and custody in himself or his mother or some desirable custody other than plaintiff and her mother's family. Defendant has requested the custody and has shown that he is ready, willing and able to assume the

responsibility (R. 137 and 138) Defendant has agreed to provide a home and care in Salt Lake City or elsewhere with visitation rights to plaintiff.

The evidence also shows that plaintiff abandoned the support of the defendant and that in Aspen, Colorado, plaintiff failed to give proper attention to their child by leaving her alone for periods of time. (R. 117)

The history of plaintiff's behavior is that of a girl who had access to means for a college education and foreign travel as well as quite some financial worth, and that of a moral misbehavior with boy friends at college and in European countries. The foundation for the relation by the plaintiff of moral misbehavior is laid in plaintiff's testimony on cross-examination and the relating of the specific instances in detail is produced in defendant's testimony, all of which is undenied by plaintiff and in fact bolstered by plaintiff's counsel's question that plaintiff related these facts to defendant before marriage. (R. 67 to 71 inc. and 113 to 117 inc.) Also the undenied testimony of defendant as to the type of pornographic books owned by plaintiff's mother and read by plaintiff and defendant's taking a book from plaintiff and returning it to plaintiff's mother. This pattern of misbehavior of plaintiff ran true to form right into defendant's acquaintance and plaintiff very well summed it up in her written statement, "I was, still am, and always will be very sorry for making a tragedy in your life. You are very good and don't deserve it, but there was no other way to end the mess we got ourselves into.

. . . I know now that you are thinking only of Gina. . . .” (Exh. 2) The foregoing is an extract from a letter from plaintiff to defendant dated July 26, 1956, after she had taken their child and run away from defendant. The reputation and forthrightness of the defendant is testified to by his employer in Salt Lake City when he was and after he was first married. The defendant’s actions in doing the honorable and right thing toward the plaintiff, his keeping fully employed and providing for his family in the face of resistance from plaintiff’s mother and family, his deep concern for his child and his continued efforts for the child’s best interests attest to his goodness and corroborated his wife’s statement, “You are very good and don’t deserve it”—meaning the way plaintiff and her family had treated defendant. The evidence shows that the defendant is a God-fearing Christian and has had fine Christian upbringing. The plaintiff herself testifies that she does not believe in God or Christ and Christianity. The plaintiff herself testifies that she does not intend to nor will she give their child any orthodox Christian upbringing or guidance.

The evidence shows that immediately following plaintiff’s and defendant’s marriage plaintiff and her mother desired that plaintiff and defendant go from Salt Lake City to Connecticut, that plaintiff related to defendant repeated statements assigned to plaintiff’s mother that the occupation of defendant as a chef and such were degrading; that plaintiff’s mother officiously prevailed upon plaintiff to will all of her property and possessions to plaintiff’s mother; that plaintiff’s mother officiously di-

rected the type and placement of plaintiff's and defendant's home furnishings; that plaintiff's mother moved plaintiff and said child from the hospital to plaintiff's mother's home and stayed there so long that defendant found it necessary to demand that plaintiff and their child come home; that plaintiff's mother and stepfather held out inducements to plaintiff to come home at their expense after plaintiff and defendant moved to Aspen; and that plaintiff's mother and stepfather secretly and about a month after plaintiff and defendant arrived in Connecticut sent funds for plaintiff to leave and abandon defendant. The plaintiff's sister and mother pleaded and coerced plaintiff into running away from defendant and take their child with her.

Early in her Connecticut residence plaintiff wanted a divorce. Early in that period her stepfather sent \$200.00 to her to leave defendant. Just before going to Connecticut plaintiff was visiting from Aspen, Colorado, at her mother's home in Salt Lake City and quite likely there was planted the idea of separation and plaintiff quite likely went to Connecticut so she could leave defendant and return to Salt Lake City where defendant would be far away and less likely to come so far to contest a divorce action in the event he refused to give her a requested divorce. When defendant refused to give her a divorce she had the groundwork laid for her abandonment. That she made a strenuous effort to get defendant and keep him at a distant place is evidenced by the contents of her letter using refusal of visiting child as a threat and to not ask for support and alimony as

inducement for defendant to stay away and not contest her contemplated divorce action. Plaintiff's attitude toward the solemnity of her marriage is shown in her statement that she wanted a "nice easy divorce."

Defendant has continuously and repeatedly shown that his primary concern is to his family and particularly to their child. Defendant has continuously and justifiably shown his concern about the lack of moral upbringing and activities of the plaintiff and the lack of God-fearing Christian belief of plaintiff as it will affect their child's life if the child is raised under the influence that the plaintiff was raised under. The very results of the plaintiff's life is a living example of the likely results of their child's life under those environmental circumstances.

Regardless of what may be the final decision in this matter relative to the child's future rearing in particular, and whether or not defendant's grounds for divorce is determined to be well taken and that plaintiff failed to sustain any ground for divorce, the defendant will be able to face the future knowing full well that, in spite of all the numerous acts of resistance by plaintiff and her family, he has in all his actions including these court actions done all he could to effect what is for best interests of their child and maintain his responsibilities thereunder as he sees it and he can go forward with a clear conscience knowing that no future events as to the child's life can be because he did not meet the problems and duties forthrightly.

In *Wilson v. Wilson*, 124 Cal. App. 655; 13 P. 2d 376, the court held: Award of custody of two minor children to husband granted divorce for wife's adultery, with provisions permitting wife to visit children at reasonable times, was for the best interests of the children and fair to spouses.

In *Larsen v. Larsen*, 134 Kans. 436; 7 P. 2d. 120, the Court held: Where husband obtained divorce for wife's misconduct, custody of minor children were properly granted to husband's mother rather than to wife.

In *Barnett v. Barnett*, 158 Okla. 270; 13 P. 2d 104, the court held: In wife's action for divorce wherein husband filed cross petition, awarding custody of children to father who obtained divorce was proper under the evidence.

The case of *Holman v. Holman*, 94 Utah 300; 77 P. 2d. 329, is applicable in many respects to the case at bar and the reasoning therein is interesting to this case. In the Holman case there was no question of immoral background or lack of Christian beliefs and rearing as in this case. However, the court pointed out that provision for custody of the child for a portion of the year to the father should be provided.

Therefore, it is submitted that plaintiff failed to prove any ground for divorce; that defendant proved more than sufficient grounds for divorce under his counterclaim and that defendant should have been and should be awarded a divorce; that the best interests of the child will be served by awarding the custody of the child to the

defendant as he proposes in his testimony or at least to remove the child from the environmental influence of the plaintiff and plaintiff's family as it now exists.

## POINT 2

APPELLANT'S MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED FOR THE REASONS:

- (A) THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE ARE NOT IN CONFORMITY WITH THE EVIDENCE, AND
- (B) THAT APPELLANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL.

The argument set forth under Point 1 above fully covers the (A) part of Point 2 and is made a part hereof by reference.

As to part (B) of Point 2, the affidavits of the defendant, Mr. Finn Gurholt and Miss Joann Fallentine are set out in the Statement of Facts herein (*Supra*, pp. 11-15) and support the contention of the defendant that the judge and counsel for plaintiff discussed the case before the plaintiff's Order to Show Cause hearing and that the judge manifested by his statements, actions and attitudes during the trial that he had pre-judged and pre-determined the matter. (R. 153) Let us analyze what occurred. Defendant and his counsel arrived at the court room at 10:00 a.m. the day of the Order to Show Cause hearing and sat therein until about 10:25 a. m., at which time the plaintiff's counsel came out of the judge's chambers. Defendant made the inquiry of his counsel whether the

case was discussed by counsel for the plaintiff with the judge. Court convened at 10:30 a.m. and the judge made comments from the bench relative to "besmirching the child" and other remarks about the case that he could not have known but for a discussion with plaintiff's counsel. Both the judge and plaintiff's counsel became obsessed with the thought that defendant was "trying to besmirch or hurt the child." It is submitted that plaintiff's counsel started this and impressed it upon the judge because that is the very phraseology and main contention that plaintiff's attorneys used in taking the defendant's deposition in this matter and it is the same phraseology the judge used in making remarks from the bench at the beginning of the hearing on plaintiff's Order to Show Cause on December 3, 1956, after being in chambers with plaintiff's counsel for about one-half hour before the hearing as is stated in defendant's affidavit accompanying his Motion For a New Trial, and the same statement of the judge from the bench at the commencement of the trial, as well as the repeated use thereof during the trial. (R. 154, 174, 175 and 186) It is to be noted that the judge made the remarks at the beginning of the hearing on the Order to Show Cause before he had any access to the deposition and that adds weight to the contention that the judge and plaintiff's counsel discussed it in chambers before the hearing. Plaintiff's counsel must have impressed the judge with the thought "hurt or besmirch the child" at a discussion, otherwise it is hard to conceive why the judge was always so alert and overzealous to concern himself time after time throughout the trial, in many instances without plaintiff's counsel's intervention, and be joined



by the plaintiff's counsel in the hue and cry. Especially so when every act in the case that might cause a reflection on the child was initiated by the plaintiff. It is interesting to note that at no time and no place did the defendant in this matter bring the child into the picture with relation to the feature of conception out of wedlock. A perusal of the defendant's deposition will reveal that defendant and his counsel strenuously objected to any implication that the child was conceived out of wedlock. (R. 186) Time after time defendant's counsel informed the court that the testimony trying to be adduced had nothing to do with the child. (R. 44, 142 and 155)

During the trial the court and plaintiff's counsel continually tried to rush the matter by statements of saving time as follows:

Lines 24 and 25, page 45 of the Record: "Let's see what he has got in mind, *Mr. Warnock, and save time.*" (Italics writer's) Record, p. 52, line 30: "Mr. Warnock: I am just trying to *save time* here." Record, p. 53, Lines 1, 2, 3 and 4: "Mr. Christensen: We have plenty of time. This case is contested, and I don't think that I am going to prejudice the interests of my client by *rushing* for the benefit of opposing counsel, your Honor."

Record, p. 85, lines 28, 29 and 30, and p. 86, lines 1 to 8 inc.:

"The Court: We can go on all day with this, Mr. Christensen.

"Mr. Warnock: We can go on all week.

"Mr. Christensen: You refuse to allow that question?

“The Court: No. I can’t just see any point in it.

“Mr. Warnock: I object.

“The Court: The only place she has complained about is Bristol.

“Mr. Christensen: I want to show she could have friends, like she had tried in these other places.

“The Court: Go ahead *to save time*, if you think it is important.”

(This is a good example of the court wanting to try the defendant’s case as counsel for defendant. The attitudes of let’s get it over, I’ve got it determined anyway, prevails all along.)

Record, p. 87, line 30 and p. 88, lines 1 and 2:

“The Court: *All I am doing, I am trying to cut this thing down.* It is fine to do these things and take all the time you want, but let’s keep the thing relevant. That is all I am asking.

“Mr. Christensen: That was her direct examination, complaining about it, and I am just following through.

“The Court: Go ahead.”

Record, p. 93, lines 17 to 30, inc. (It was about noon with about two hours of trial having been used.)

“The Court: I am going to ask you how much longer you are going to be first.

“Mr. Christensen: I think I am through with this now, and I will reserve the right to ask questions when we return.

“The Court: How long are you going to take with the defendant?

“Mr. Christensen: About as long as with her.

“The Court: Let’s come back at one o’clock and see if we can’t finish. . . . I am not trying to tell you how to try your case. *I am just trying to cut down a little time.*”

Record, p. 101, lines 23 and 24:

“The Court: Let him go ahead, *Mr. Warnock. I think we will save time.*” (All italics are writer’s)

At the conclusion of the presentation of evidence the court and plaintiff’s counsel had their papers and effects together and were in the act of leaving when defendant’s counsel inquired as to summation argument, to which the court answered that it didn’t want or need any. (R. 148) The whole trend of the trial was a “rush act” on the part of the judge and plaintiff’s counsel, particularly after the direct testimony of plaintiff. An atmosphere of nothing else matters why prolong it prevailed. As a matter of fact, the trial consumed less than four hours. The defendant’s contention that the court was prejudiced is emphasized further by the court in its statements, to-wit:

“The Court: She said she was unhappy there. That is the only thing I care about.” (R. 59, line 30 and 60, line 1)

The court’s attitude was one of allowing anything that showed plaintiff was unhappy and nothing to show the cause of unhappiness if any existed and whether or not it

was merely a concoction in the plaintiff's mind and whether or not defendant had anything to do with her being unhappy. That defendant had nothing to do with any real or fancied unhappiness of plaintiff or whether he was doing his best to make a success of the marriage and to make his family happy seemed to be of no concern in the thoughts and attitude of the court and it manifested an attitude of disregard and indifference toward the defendant's side of the case. It is little wonder that the court's attitude during the trial, coupled with the other occurrences set out in the affidavits accompanying the Motion for a New Trial caused these lay persons to feel that the defendant was not receiving a fair and impartial trial.

Near the conclusion of testimony the court "jumped" at a conclusion and argued with defendant as follows:

Record, p. 141, lines 24 to 30 inc. and p. 142.  
By Mr. Christensen:

"Q. Mr. Graziano, you heard your wife testify. On or about the 1st of March 1955 where were you?

"Mr. Warnock: Well, if the Court please, I object to this as being *improper redirect*.

"The Court: It is.

"Mr. Christensen: He (meaning plaintiff's counsel) came up with this in this last and said, your Honor, that he married her knowing all this. Now I am going to show the situation there. He (meaning plaintiff's counsel) opened that up.

“The Court: The situation for what: Why he married her?

“Mr. Christensen: Yes.

“The Court: Oh, no, we are not going into that. They got married and they go this child, and I am not going to let anything in this world — I don’t care who it is, and if it is going to the Supreme Court it will have to — but there is not going to be anything in this record that is going to *reflect on this child. I don’t care a darn about these parties.*” (Italics writer’s)

(It is interesting to note here that the court, when plaintiff was on the stand, did not stop any reflection on child due to her statements and her untruthful pleadings.)

“Mr. Christensen: I didn’t say about this child.

“The Court: That is what you are not going to get into.

“Mr. Christensen: I am going to show the defendant did the honorable thing and married her.

“The Court: That is what I am talking about, you are not going to do.

“Mr. Christensen: He would explain he would have married her despite her telling some of these cases before the marriage.

“The Court: He already volunteered that statement himself.

“Mr. Christensen: What?

“The Court: Exactly what you just said. He has volunteered it himself. He has already said that.

"The Witness: (Mr. Graziano) When did I say that?

"The Court: You just got through saying it a minute ago. It is in the record.

"The Witness: Would you read it for me, please?

"The Court: You are not going to read it. It is already said. *Leave this child alone.*

"Mr. Christensen: *I am not talking about the child.* I am talking about the plaintiff and the defendant. May I proceed?

"The Court: As long as you lay off that stuff it is all right. Go ahead.

"Mr. Christensen: He (meaning plaintiff's counsel) opened that up.

"The Court: He has already said, Mr. Christensen, that he wouldn't have married her if he hadn't been on the spot, or words to that effect. He has already said. I don't know what more you want about this.

"Mr. Christensen: All I want to know, when he returned — that he can testify when he returned from Reno on the job of taking moving pictures, she requested that he marry her, and he suggested that she go down and talk to her mother. She came back and then he agreed to marry her.

"The Court: Well, that is your proffer of proof, and you can put it in the record.

"Mr. Christensen: Can't he testify to that after they bring up this matter?

"The Court: No, sir. You have made your proffer and it is in the record.

"Mr. Christensen: Miss Reporter, let the record show that counsel was refused an opportunity

to explain the matter brought up by counsel for plaintiff relative to the occurrence at the time the defendant made arrangements for the marriage with the plaintiff on or about the 1st of March 1955, and counsel for defendant saves all exceptions relative thereto."

It is submitted that the court surely indicated a pre-judging and pre-determination thereon. And on the subject of argument between the judge and defendant witness the court would not allow the defendant through his counsel to further question defendant to explain his statement, "That he had no alternative" but to marry plaintiff in answer to the question of Plaintiff's counsel. The judge assumed only one interpretation and that is his own, "He said he was on the spot and that is all there is to it." Defendant wanted to explain that he did not marry plaintiff because he was "on the spot" as the judge said, but because under his, the defendant's, moral and Christian rearing and sense of right and wrong it was the honorable thing to do and the right action to take under the circumstances, and that he had a love for and care for the plaintiff at the time of and after his marriage. Also defendant could testify that he refused plaintiff's suggestion at the time to have an illegal operation. But the court adamantly refused his pretext of "hurt the child" thought that he was obsessed of during the entire proceedings. In situations of this type one must face the realities and if certain features exist they must surface to have a just determination. One cannot always cover up the unsavory incidents of behavior as plaintiff and her family has been accustomed to doing and as the judge

attempted to and did in this case. A fact is a fact and in litigation they must surface to arrive at justice to all of the parties concerned. Defendant knew that he could not have been forced at the time to marry plaintiff as the court would indicate the answer meant. It is submitted that the action and attitude of the judge on this point, coupled with the other demonstrations of his attitudes during the proceedings, definitely shows prejudice and pre-determination as is stated in the defendant's affidavit.

The trial was on December 22, 1956, and at a party on the evening of that date the affidavits—uncontested and undenied—shows plaintiff's counsel stated, "That son of a bitch Graziano, that dirty bastard, *we'll fix him!*" Now who is the "we"? Let us connect that with the affidavit of Miss Joann Fallentine that at a lodge in Brighton, Utah, on the evening of December 28, 1956, the date the judge made his decision, the son of plaintiff's counsel stated that the judge talked with his dad and congratulated him on handling the case, etc. Now fitting the remarks in the affidavits of Mr. Gurhol and Miss Fallentine together it is a reasonable conclusion that the "WE" is the judge and the plaintiff's counsel. At any event, the two affidavits came to defendant's attention and he and Mr. Gurholt, both of whom were present during the entire trial and heard and saw it all, felt that the judge had not been fair and impartial and had pre-determined the matter. Defendant brought the foregoing facts to his counsel and requested that he do something about it. Of course, counsel was aware of all but the contents of the affidavits and as defendant counsel feels much the same



about the men's conclusions, defendant's counsel, upon the insistence of defendant, prepared the affidavits based entirely upon affiant's statements and prepared the Motion for a New Trial and argued it at the hearing.

Defendant's counsel at the hearing of the Motion for a New Trial, when the judge and plaintiff's counsel were anxiously making statements, not under oath and being made a part of the record, of denial of parts contained in the affidavits, were advised by defendant's counsel that the rules of procedure provide that the proper method is to file opposing affidavits within ten days of service of the Motion. The judge indicated that he didn't have to or need to make affidavit or statement under oath. (R. 158)

Defendant's counsel advised the court that the rules were made to cover just such cases as this and he and plaintiff's counsel were being charged with unfairness and partiality. (R. 152, lines 10, 11, and 12) To defendant's counsel's reference to the Rule 59 (c) for filing opposing affidavits plaintiff's counsel said, "I won't file anything." (R. 158, line 9) Both the judge and plaintiff's counsel were disturbed mostly about the charge of discussing the matter in chambers and pre-determination and their statements not under oath and for the record were to denying these features of the charges only. Of course, these features are somewhat circumstantial but the foregoing facts and the actions of the judge and plaintiff's counsel all through the proceedings prove defendant's contention thereon, it is submitted. There is

no attempt by the judge or plaintiff's counsel to deny any of the statements otherwise contained in any of the three affidavits and that is understandable as they are a matter of the record and any parts thereof not a part of the record, if any, are not denied. Plaintiff's counsel falls back on his legal and social graces or errors to cover his actions mentioned in Mr. Gurholt's affidavit, and he manufactures a warped version of his son's statements to cover that slip or occurrence, but he does not make any attempt to deny the contents of Miss Fallentine's affidavit and he refused to file any opposing affidavits.

Rule of Civil Procedure of Utah 59 (c) reads:

“Affidavits; Time for Filing. When the application for a new trial is made under subdivisions (1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.”

It is submitted that the court and plaintiff's counsel were cognizant of the rule and it is submitted further that being officers of the court, under charge, and in charge of the hearing, the rule should be doubly applicable to them.

A comparison of the evidence in its entirety and the Findings of Fact filed in the matter clearly indicated

and corroborates defendant's contention that the matter was pre-determined. The Findings of Fact are clearly one-sided and not in conformity with the facts adduced in evidence. A reading of the Findings of Fact would leave one to wonder whether plaintiff's action was even contested. It is submitted that a comparison of the Findings of Fact proposed by defendant and accompanying his Motion to Amend the Findings of Fact and the evidence are in conformity.

It is therefore respectfully submitted that defendant did not receive a fair and impartial trial and that the evidence does not support the Findings of Fact filed in the matter.

### POINT 3

THE COURT IMPROPERLY REFUSED TO ALLOW APPELLANT TO INTRODUCE EVIDENCE RELATING TO:

- (A) WHETHER PLAINTIFF'S MOTHER MADE STATEMENTS TO PLAINTIFF DEGRADING DEFENDANT IN HIS OCCUPATION, AND
- (B) APPELLANT'S EXPLANATION OF HIS ANSWER TO PLAINTIFF'S COUNSEL'S QUESTION AS TO HIS REASON FOR HIS MARRIAGE AS AN HONORABLE AND PROPER ACT UNDER HIS CHRISTIAN AND MORAL CODE.

As to the (A) part of Point 3, I refer to the Record, p. 79, lines 24 to 29 inc., which is as follows:

“The Court: Did you tell the defendant that your mother told you that being a chef was degrading?”

“The Witness (Mrs. Graziano): I could have.

“Q (By Mr. Christensen): And did your mother tell you that?

“Mr. Warnock: I object to that.

“The Court: Objection sustained.”

It is submitted that plaintiff was the one who was talking to her mother and plaintiff (the witness) knew whether it was said to her or not by the person with whom she was speaking. It is certainly not hearsay and it is relevant in that the defendant pleaded in his counter-claim that plaintiff's mother interfered by telling plaintiff defendant's occupation was degrading. In fact, defendant in his counter-claim specifically pleaded the interference and in the reply plaintiff denied it. The evidence is proper to prove the allegation.

As to part (B) of Point 3, it is quite fully set out by extracts from the Record under Point 2, at pages 41 to 44, supra, and is made a part hereof by reference. It is submitted that when plaintiff's attorney opened up the subject on his cross-examination of defendant and obtained an answer on the new subject it is proper re-direct examination to allow the defendant an opportunity to explain the answer by question and answer from his counsel. It is submitted, however, that the court's main reason for not allowing the further examination was his stated “hurt the child” contention and not the reason assigned by plaintiff's counsel that it was improper re-direct examination.

It is therefore submitted without further argument that the court erred in not allowing the introducing the evidence mentioned in Point 3.

## CONCLUSION

Counsel for Appellant respectfully submits that plaintiff failed to prove any ground for divorce; that defendant proved sufficient grounds for divorce and that defendant should have and should be awarded a divorce; that the best interests of the child will be served by awarding the custody to the defendant or at least to remove the child from the environmental influences of plaintiff and plaintiff's family; and that the lower court erred in denying defendant's Motion to Amend the Findings of Fact and Conclusions of Law and Amend the Decree.

It is further respectfully submitted that the Findings of Fact and Conclusions of Law are not in conformity with the evidence; that defendant did not receive a fair and impartial trial; and that the lower court erred in denying defendant's Motion for a New Trial.

It is further respectfully submitted that the lower court erred in denying the introduction of the evidence as set out under Point 3 hereof.

Therefore, Counsel for Appellant respectfully submits that the Findings of Fact, Conclusions of Law and Decree should be reversed and the matter found as set out in defendant's Motion for Amendments or a new trial granted.

Respectfully submitted,

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