

1965

## Dora Varela Ryan v. Douglas P. Ryan : Brief of Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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DORA VARELA RYAN,

*Plaintiff,*

vs.

DOUGLAS P. RYAN,

*Defendant.*

Case No.  
10271

FILED

MAR 19 1965

BRIEF OF APPELLANT

Clerk, Supreme Court, Utah

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Appeal From the Judgment of the Third Judicial  
District Court, for Salt Lake County, Utah

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## TABLE OF CONTENTS

|                                      | Page |
|--------------------------------------|------|
| Statement of Kind of Case .....      | 3    |
| Disposition in the Lower Court ..... | 4    |
| Relief Sought on Appeal .....        | 4    |
| Statement of Facts .....             | 4    |
| Argument .....                       | 6    |
| Point I .....                        | 6    |
| Point II .....                       | 9    |
| Conclusion .....                     | 11   |

## CASES CITED

|  |      |
|--|------|
| Briggs v. Briggs, 111 Utah 418, 181 P2nd 223 .....   | 6    |
| In Re Bradley et al, 167 P2nd 978 .....              | 7, 8 |
| Baldwin v. Nielson, 170 P2nd 179 .....               | 7    |
| Baker v. Baker, 110 Utah 462, 175 P2nd 213 .....     | 9    |
| Steiger v. Steiger, 4 Utah 2nd 273, 293 P2nd 418.... | 9    |

## STATUTES CITED

|  |   |
|--|---|
| Section 30-3-10 Utah Code Anno. 1953 ..... | 8 |
|--|---|

IN THE SUPREME COURT  
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vs.

DOUGLAS P. RYAN,

*Defendant.*

} Case No.  
10271

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BRIEF OF APPELLANT

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STATEMENT OF KIND OF CASE

This is an appeal from a judgment of the Third Judicial District Court for Salt Lake County, Utah, entered the 18th day of November, 1964, wherein the defendant was awarded a Decree of Divorce, the custody of the minor children and household effects, furniture, fixtures and appliances for their use.

## DISPOSITION IN THE LOWER COURT

The case was tried to the court on Friday, October 16, 1964, on the complaint of the plaintiff and the Answer and Counterclaim of the defendant. The plaintiff was refused the relief prayed and the counterclaim of the defendant granted wherein he was awarded a decree of divorce, the custody of the minor children and household effects, furniture, fixtures and appliances for their use.

## RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have this court reverse the judgment of the lower court and the case remanded to the lower court with instructions that it enter a decree of divorce in favor of the plaintiff, including awarding her the custody of the minor children and \$150.00 per month as child support, together with the household furniture, fixtures and appliances accumulated during the marriage, and \$1.00 per month alimony as prayed for in her complaint and \$250.00 for the use and benefit of her attorneys.

## STATEMENT OF FACTS

The plaintiff and defendant were intermarried on the 12th day of October, 1955 at Los Angeles, California. That during the marriage there have been born as issue thereof three children, to wit: Mitchell Alan

Ryan, age 7 years; Darrel Lynn Ryan, age 5 years, and Gregory Phillip Ryan, age 1 year. That during the marriage the parties have accumulated certain items of household wares, fixtures and appliances and a 1959 Cadillac automobile. The plaintiff and the defendant moved to Utah approximately three years prior to the commencement of this action and have been residents of Salt Lake County ever since. During the marriage the defendant constantly bickered and nagged the plaintiff (R 36, 9-14), and caused her great emotional distress causing her to leave her job (R 36, 21-28, and R 37, 22-27). The defendant left the plaintiff (R 38, 29-30), and beat her physically (R 39, 3-5). Husband works for the Universal Form Clamp Co. (R 54, 2-5) and earns \$81.00 per week.

Defendant testified (R 57, 18-30) that his wife bragged one night when watching television that she had a lot of husbands. The defendant has been convicted of a felony and served time in a penitentiary for three years and five months (R 58, 4-11) on one occasion, but had been in prison twice (R 71, 20-26) for armed robbery and conspiracy for transporting narcotics. The record is replete that the defendant drank intoxicants and had used narcotics besides committing two felonies for which he was tried, convicted and imprisoned.

## ARGUMENT

### POINT I.

THE COURT ERRED IN GRANTING THE DEFENDANT A DIVORCE AND AWARDING THE CUSTODY OF THE MINOR CHILDREN TO HIM, TOGETHER WITH THE HOUSEHOLD EFFECTS, FURNITURE AND APPLIANCES ACCUMULATED DURING THE MARRIAGE.

Although a natural mother has no absolute right upon a suit for a divorce to the custody of her children of tender years, from age 1 year to 7 years, but certainly she must be proven an unfit and morally improper person to be refused their custody.

In the case of *Briggs v. Briggs*, 111 Utah 418, 181 P.2d 223, which was a habeas corpus proceeding for the custody of a child under ten years of age, between divorced parents, this court said in paragraph 2 on page 227 of the Pac. Report:

“Since the child is less than ten years old and there is no claim that the mother is immoral or incompetent, she is entitled under the statute (30-3-10, U.C.A. 1953) to the custody of the child unless it is made to appear that she is an ‘improper person.’ ”

In the case at bar the evidence against plaintiff is self-serving derogatory statements of the defendant as noted in the statement of facts. And such statements

that she advised the defendant that she intended to cease her employment and get welfare so that the defendant would have to pay more support and alimony to her (R 22, paragraph 7) are not consummate facts. Certainly she has never been convicted of two serious felonies as has the defendant, who was awarded the custody of the minor children by the lower court, and we think there was error committed by making such an award when the moral record of each of the parties are compared and the criminal record of the defendant considered. Again, in the same case, this court said on page 228 of the Pac. Report: "In view of all the facts and circumstances presented we are not convinced that the best interests of the child require that the mother be deprived of her custody and she be awarded to her father."

Cases involving the custody of a child are cases in equity and the Supreme Court on appeal is required to determine the facts as well as the law. *In re Bradley. Bradley et al. v. Miller et ux.*, Supreme Court of Utah, April 15, 1946, 167 P.2d 978, Ut.; *Baldwin v. Nielson*, 170 P.2d 179, Ut.

So, here the court may examine the whole record to determine independently whether or not the lower court made a proper award to the defendant of the custody of the children and granting him a divorce in contrast to the record of the plaintiff and her prayer for a divorce, custody of her small minor children, support and alimony and attorney fees.

The policy of this state relative to the custody of children under ten years of age is to award such custody to the mother, unless she is found, by a preponderance of the evidence, to be an immoral, incompetent or otherwise improper person. A thorough reading of the whole transcript of the testimony in this case will show that the evidence as between the party litigants in this action, greatly preponderates on all of these issues and requirements in favor of the plaintiff, the natural mother of the children, as against their father.

This court is required by its own declaration to make such independent findings as the evidence in the record may disclose. *In re Bradley*, above cited.

The Utah statute appurtenant to this matter is set forth in Sec. 30-3-10, and provides as follows:

“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, that if any of such children have attained the age of ten years and are of sound mind, they shall have the privilege of selecting the parent to which they will attach themselves; 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.”

Under this section, Supreme Court reversed action of trial court in awarding custody of two children, ages approximately 2½ years and 14 months at the

time of the divorce trial, to the father, even though the father in his answer to his wife's complaint alleged that he was not the father of the younger child, and even though the court found as facts that both the father and mother were "fit and proper" persons to have the complete care, custody and control of the children. *Baker v. Baker*, 110 Utah 462, 175 P.2d 213.

A divorced mother has no absolute right to the custody of the minor children, but all things being equal, preference should be given to the mother in awarding custody of a child of tender years, notwithstanding the divorce is granted to the father. *Steiger v. Steiger*, 4 Utah 2nd 273, 293 P.2d 418.

## POINT II

THE COURT ERRED IN REFUSING TO GRANT THE PLAINTIFF A DIVORCE AND AWARDING HER THE CUSTODY OF THE MINOR CHILDREN, THE FURNITURE, FIXTURES AND APPLIANCES, CHILD SUPPORT, ALIMONY AND ATTORNEY FEES.

There is nothing in the court's findings of fact which is so derogatory to the character of the plaintiff as to disqualify her to have been granted the custody of her children as their natural mother. No immorality was found. Such statements as, "The court further finds that the plaintiff *advised the defendant that she in-*

*tended to cease her employment and get welfare so that the defendant would have to pay more support and alimony to her,"* (R 22, paragraph 7) does not make her advice a consummate fact that she did go on welfare to make the defendant pay to the plaintiff more support and alimony. Nor the finding of the court, "that the plaintiff advised the defendant that she would give him the children of the parties after the divorce and that she did not want the children," does not make such advice a consummate fact that she did or would give up the custody of the children after the divorce. The fact that she first brought the action for divorce and prayed for the custody of the children in her complaint, goes to prove the falsity of such claimed advice. Furthermore, the finding "that the plaintiff made the statement to one of the witnesses before the court that she, the plaintiff, could be found in bed with another man and not lose the custody of the children," proves no immoral conduct on her part as there is no finding that she, as a married woman, was found in bed with another man.

The so-called advice that the court found the plaintiff gave the defendant does not prove any fact of immorality or immoral conduct. The derogatory matters found by the court against the plaintiff originate principally in the self-serving testimony of the defendant.

The lower court appears to have been strongly impressed by the declarations of religious conversion

and reformation of the twice-convicted defendant for serious felonies. (R 67, 17-24; R 71, 23-27; R 73, 9-13; R 73, 30; R 74, 1; R 74, 19-30; R 75, 1-8.)

## CONCLUSION

It is respectfully submitted that an examination of the evidence in this case can logically only lead to one conclusion and that is, that the plaintiff, and not the defendant, should have been granted the divorce, awarded the custody of her minor children whose ages the court found range from 1 year to 7 years, (R 21, paragraph 4 et seq.), and should have been awarded the household effects, furniture and appliances, child support, alimony and attorney fees. The plaintiff respectfully requests this Honorable Court to remand the case to the lower court with instructions to the Judge thereof to enter a decree of divorce in accordance with the prayer of her complaint.

Respectfully submitted,

Glen S. Hatch  
A. M. Marsden

ATTORNEYS FOR THE  
PLAINTIFF