

1963

Mona McBroom v. Howard Kirtley McBroom : Brief of Appellant

Utah Supreme Court

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Leland S. McCullough; Attorney for Respondent;

McBroom & Hyde; Attorneys for Appellant;

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IN THE SUPREME COURT

of the
STATE OF UTAH

MAR 22 1963

MONNA McBROOM,

Plaintiff and Respondent,

vs.

HOWARD KIRTLEY
McBROOM,

Defendant and Appellant.

Clerk Supreme Court, Utah

Case No. 9702

UNIVERSITY OF UTAH

OCT 29 1963

APPELLANT'S BRIEF

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Appeal from the Decree of the Third District Court
for Salt Lake County, Utah
HONORABLE JOSEPH G. JEPPSON, JUDGE

McBROOM & HYDE
401 El Paso Natural Gas Building
Salt Lake City 11, Utah
Attorneys for Appellant

LELAND S. McCULLOUGH
301 East 1st South Street
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
POINT 1. THE TRIAL COURT ERRED IN GRANT- ING CUSTODY OF THE MINOR CHILDREN OF THE PARTIES TO PLAINTIFF.	39
POINT 2. THE TRIAL COURT ERRED IN AWARD- ING PLAINTIFF \$200.00 PER MONTH FOR THE SUPPORT OF THE TWO MINOR CHILD- REN AND ALL OF THE PROPERTY OF THE PARTIES.	47
POINT 3. THE TRIAL COURT ERRED IN AWARD- ING PLAINTIFF \$1.00 PER YEAR ALIMONY AND \$750.00 ATTORNEYS FEES	50

CASES CITED

In re Bradley (1946) 109 U. 538, 197 P.2d 978	42, 44
Graziano v. Graziano (1958) 7 U.2d 187, 321 P.2d 931	51
Holm v. Holm (1914) 44 U. 242, 139 P. 937	51
Jaques v. Jaques (1921) 58 U. 265, 198 P. 770	46
Johnson v. Johnson (1958) 7 U.2d 263, 323 P.2d 16	46
In re Olson (1947) 111 U. 365, 180 P.2d 210	42, 43
Sampsell v. Holt (1949) 115 U. 73, 202 P.2d 550	46
State of Utah in the interest of K---- B----- (1958) 7 U.2d 398, 326 P.2d 395	42, 44
Steiger v. Steiger (1956) 4 U.2d 273, 293 P.2d 418	39
Stuber v. Stuber (1952) 121 U. 632, 244 P.2d 650	46
Walton v. Coffman (1946) 110 U. 1, 139 P.2d 97	42

STATUTES

Utah Code Annotated, 1953:

Sec. 30-3-5	45
Sec. 30-3-10	45

IN THE SUPREME COURT
of the
STATE OF UTAH

MONNA McBROOM,

Plaintiff and Respondent,

vs.

HOWARD KIRTLEY
McBROOM,

Defendant and Appellant.

} Case No. 9702

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for divorce, award of custody of the minor children of the parties, property, alimony and support money.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a decree awarding defendant the divorce on his counterclaim and plaintiff \$1.00 per year alimony, and awarding plaintiff custody of the two minor children, the property of the parties, \$200.00 per month support money, and \$750.00 attorneys fees, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal as a matter of law of that part of the decree awarding plaintiff custody of the two minor children, the property of the parties, \$200.00 per month support money, \$750.00 attorneys fees and \$1.00 per year alimony.

STATEMENT OF FACTS

A preliminary statement is necessary to understand the circumstances giving rise to this divorce action.

Plaintiff fraudulently commenced this action on August 25, 1961, by swearing to and filing a verified complaint, which plaintiff admitted at trial was false, and having a restraining order issued, and defendant moved out of his home. (R. 1-9, 286-289, 395, 461.)

Plaintiff, prior to commencement of the action, had been guilty of a great many indiscretions and, in particular, had persistently disappeared from the home of the parties and stayed out all night. (R. 199-310, 444-457.) Defendant, nevertheless, in order to protect his home and family, sought a reconciliation, and without the aid of counsel personally entered into a stipulation with plaintiff's attorney, Leland S. McCullough, under which the hearing on the restraining order was continued without date and defendant moved back into the home. (R. 10, 456-457.)

The reconciliation was not successful. (R 292-320, 457-469.) On January 15, 1962, defendant discovered in a desk in his eight year old son's bedroom a diary, in the form of a little black book (Ex. 2), written in plaintiff's shorthand and certain miscellaneous shorthand notes (Exs. 6, 7, 9, 10, 11, 12, 18, 21, 22, 23, 24 and 26) written by plaintiff. Defendant submitted the diary and shorthand notes to his attorneys and caused the same to be translated by a shorthand expert, Mr. Clair Johnson. (R. 320-322, 339-340, 436-438.) Defendant thereupon discovered for the first time that from May 19, 1961, down through and after commencement of this action on August 25, 1961, plaintiff, unbeknown to defendant, been carrying on an immoral and adulterous relationship with a married man, who resides in Salt Lake County with his wife and three children. (R. 199-310, 237-239, 270.) The man's name was Bertram Jarvis. (R. 211.) He was employed as a truck driver for the telephone company. (R. 276.) Defendant further discovered for the first time that at the height of her affair with Jarvis plaintiff had deliberately set out in her own handwriting a design, scheme and plan to commence this divorce action and take from defendant his home, his children and his livelihood (Exs. 6, 18, R. 214-219, 269, 286-287.) and that plaintiff at the time had admitted in her own handwriting that her motive

in so doing was not because of misconduct on the part of defendant but because of her relationships with Jarvis. (Ex. 23, R. 268, 286-288, 315-318, 341-342.)

Defendant thereupon engaged Gordon I. Hyde of the law firm of McBroom & Hyde to represent him in the trial of this action and, for the purpose of obtaining an immediate and speedy trial, entered into a stipulation dated January 31, 1962 (R. 11-12, 198, 477), which stipulation provided the following: that pending the trial defendant would move out of the home; that defendant should have the right to visit the minor children in the home and out of the home at all reasonable times; that the fact that defendant so moved out of the home and entered into the stipulation should be without prejudice to the rights of defendant, and in particular, should not be construed by the parties or the court as an admission by defendant that plaintiff was a fit and proper person to have the care and custody of the minor children for any period of time and should not be construed as an admission by defendant that plaintiff had any right or justification for having defendant move out of the home; that plaintiff would forthwith file an amended complaint; and that, upon defendant's filing a responsive pleading, the case would be immediately set down for trial without a pretrial hearing.

The following statement of facts is, except where otherwise indicated, predicated on plaintiff's admissions and plaintiff's shorthand notes contained in her diary (Ex. 2) and translations thereof by plaintiff on the witness stand and the miscellaneous shorthand notes written by plaintiff with translations attached as testified to and corrected by plaintiff on the witness stand (Exs. 6, 7, 9, 10, 11, 12, 18, 21, 22, 23, 24, 26 and 27, R. 199-310.)

The parties were married ten years before trial on April 13, 1952. (R. 15, 13, 413.) Prior to the marriage defendant had no indication that plaintiff was an immoral or obscene person. (R. 414.)

There were two children born to the marriage, Howard Kirtley McBroom, Jr., age 8, referred to in the record as "Kirt" and Elizabeth McBroom, age 6, referred to in the record as "Lisa". (R. 15, 12, 175.)

Throughout the marriage Mr. McBroom had been employed as a salesman and during the four years prior to trial was an agent for Equitable Life Assurance Society at Salt Lake City, Utah. (R. 411.)

The parties got along fairly well during the first four years of the marriage until after the birth of the child, Lisa, in 1955. Defendant testified, that commencing in the year, 1956, and continuing thereafter throughout the marriage, plaintiff periodically disappeared from the home of the parties and

returned late at night under the influence of alcohol and without satisfactory explanation and that during this period plaintiff refused to participate in activities of the family with the minor children. (R. 432-433.) Plaintiff on rebuttal generally denied this and, in particular, testified that she did not disappear from the home and refuse to engage in activities with the family in May and June of 1961. (R. 533-534, 546.) In this plaintiff perjured herself. Plaintiff had previously admitted on cross-examination that she had repeatedly and persistently disappeared from the home to consort with Jarvis during June of 1961, and continuing thereafter until the commencement of this action and that during this period she had persistently failed to engage in activities with the family. (R. 199-310).

On May 19, 1961, plaintiff, unbeknown to defendant, met Bert Jarvis in the 9th South Grand Central Market. (R. 213, 226.) She noted the fact in her diary and that Jarvis told her he would call her later. (R. 226.) She also wrote a shorthand note, dated May 19, 1961, (Ex. 9, R. 227-229) in which she again noted that Jarvis said he would call her and that she hoped he would.

Thereafter on June 1, 1961, Jarvis telephoned plaintiff and made an appointment to meet her on the following day at a barroom, referred to in the diary as the Old Zang, now known as the Blue

Angel. (R. 234.) Plaintiff met Jarvis at the Blue Angel on the following day, June 2. (R. 234.) Plaintiff and defendant had previously arranged to take their two children to Lagoon on the next day, Saturday, June 3, (R. 34, 235, 446.) Instead plaintiff, while she was consorting with Jarvis in the Blue Angel, made an engagement to meet him on Saturday in a park. (R. 234.) On Saturday, June 3, plaintiff went and stayed with Jarvis (R. 235) and plaintiff's husband took the children to Lagoon alone. (R. 235, 446.)

From this time on through the months of June, July and August and after the commencement of this divorce action on August 25, 1961, into September of 1961, plaintiff was in daily contact with Jarvis either in person or by telephone and repeatedly and persistently left her home, her minor children and the defendant to consort with Jarvis. (R. 199-338.)

During this period plaintiff repeatedly and persistently frequented barrooms with Jarvis in Salt Lake City and, in particular, establishments known as the Pecon, located under a hotel on West Temple and Third South Streets, the 451 Club, located on South West Temple, the Indigo and the Blue Angel. Plaintiff consorted with Jarvis in these establishments in the day time and at night until such hours as 1:00 A.M. (R. 204-205, 221, 234, 240, 247, 199-

310.) On substantially every occasion that plaintiff and Jarvis were together they drank alcoholic beverages. Plaintiff noted in her shorthand note following a meeting with Jarvis on September 10, 1961, that it was the first time they had been together without drinking and that she found it, "very dull." (Ex. 24, R. 304, 199-310.)

Plaintiff repeatedly and persistently stayed out all night with Jarvis until such hours as 2:00 A.M., 2:30 A.M., 3:00 A.M., 3:30 A.M., 5:00 A.M., and 8:00 A.M. (R. 204, 274, 281-283, 292.) On such occasions plaintiff admitted that she stayed with Jarvis in barrooms, *supra*, p. 7, in his home in Kearns while his family was away, in an apartment on the west side, and in canyons in parked automobiles. (R. 205, 241, 248, 294, 284, 301-303.)

Plaintiff denied that she and Jarvis were committing adultery. (R. 201, 353.) The evidence to the contrary is conclusive.

(1) On July 14, 1961, plaintiff picked Jarvis up sometime after 4:30 P.M., they drank in barrooms, then stayed out all night, and she didn't get home until 8:00 o'clock the next morning. Plaintiff noted in her diary on July 19, 1961, that she met Jarvis at 8:20 P.M., they went to a barroom and on this occasion she was, "*a good girl*". (R. 209.) Plaintiff noted in her diary on August 3, 1961, that she met Jarvis at 7:00 P.M., they went to a

barroom, that she didn't get home until 3:00 A.M., and that she, "*was bad again.*" (R. 274.)

(2) Defendant testified that he did not have marital relations with plaintiff from sometime prior to the first time plaintiff stayed out all night on July 14, 1961, until the time of the attempted reconciliation following the commencement of the divorce action. (R. 453, 459.) Defendant further testified that in July of 1961, plaintiff commenced sleeping alone. (R. 453, 459, 461.) In August of 1961 defendant discovered that his wife was using chemical contraceptives. (R. 453-454.) Plaintiff admitted that she commenced using contraceptives in August of 1961, and explained on the witness stand that she did so because she was having marital relations with her husband. (R. 550.) On July 22 and July 23, 1961, plaintiff wrote shorthand notes (Exs. 6 & 7) in which she set forth the following with reference to her relationships with her husband: "He is no longer your husband. You are no longer his wife. * * * Move out of the bedroom. Move Kirt into the bedroom with him as soon as possible. * * * From now on I will consider myself divorced. I will not live with you as a wife. * * * I will live my own life, coming and going as I decide and in effect acting as though I am a divorcee. * * * Sleep in your own bed." (R. 214-216.) These notes were written within one week after an occasion when

plaintiff stayed out all night with Jarvis, *supra*. p. 8-9. It is apparent that defendant was not having sexual relations with his wife and that plaintiff's testimony was perjured.

(3) Plaintiff kept a menstrual chart in 1961 (Ex. 21) on which she kept a detailed record of her periods of menstruation during the year, 1961. She noted on the menstrual chart the following, "Started 5/19/61. 45 minutes. 9th South Grand Central. Ended 9-10-61. What a year!!" (Ex. 21, R. 306-309.) May 19, 1961, was the first occasion on which plaintiff met Jarvis. (R. 213, 226, 306-309.) September 10, 1961, was the last date on which plaintiff admitted consorting with Jarvis. (R. 303-304.) If plaintiff was not committing adultery with Jarvis, there was no occasion for her to make these notations on her menstrual chart.

Plaintiff admitted that she repeatedly and persistently lied to defendant as to her whereabouts and activities and by the use of artifice and intrigue with Jarvis kept her relationship from the knowledge of defendant. (R. 248, 271, 283, 299.)

Plaintiff testified that, during her nightly escapades with Jarvis, she either left the children with baby tenders or with her husband and that, in any event, she was not worried about them because her husband was a good father and took care of them. (R. 205, 234-235, 250, 273.) Defendant testified

that he repeatedly came home at night after work and found the children left with young baby tenders and that his wife had left no information with the baby tenders as to her whereabouts or provision for care of the children in case of difficulty or emergency. (R. 449, 454, 457, 462.) Plaintiff admitted in a shorthand note written July 22, 1961, at the height of her escapades with Jarvis, that she was giving the impression that she wanted her children to sleep eighteen hours a day and that she was so busy with all of her "responsibilities" that she did not have time to answer her children's questions. (Ex. 6, R. 217, 218.)

During the period plaintiff repeatedly and persistently refused and neglected to engage in activities with her children so that she could consort with Jarvis. Typical examples are the following. On Saturday, June 3, 1961, plaintiff, pursuant to a prior appointment, consorted with Jarvis instead of going to Lagoon with her husband and children as the family had previously planned. (R. 234-235, 446.) On Friday, July 14, 1961, defendant's employer, Equitable Life Assurance Society, was giving an outing for its employees and their wives and children at Lagoon. On Thursday, July 13, 1961, plaintiff invited Jarvis to meet her on the 14th because her husband and children would be at Lagoon. Thereafter on July 14th defendant took the children

to the outing alone and plaintiff met Jarvis at approximately 4:30 P.M., drank with him in barrooms and stayed out with him all night. (R. 203-204, 449.) On Sunday, September 10, 1961, plaintiff went and consorted with Jarvis in an apartment in which he was staying on the west side in Salt Lake City. (R. 303.) On cross examination plaintiff was asked where the children were in the meantime. She replied that they were in church with her husband, Howard. (R. 303.) Jarvis was a married man with a wife and three children. (R. 237, 238.) Plaintiff met Jarvis on Jarvis' birthday, August 11, 1961, at 6:30 P.M., drank with him in barrooms and stayed out with him all night until 5:00 A.M. (R. 281-282.)

Defendant testified that, when plaintiff arrived home at early hours in the morning, she was repeatedly under the influence of alcohol and neglected the children and that on such occasions defendant did care for the children. (R. 432, 449, 452, 457, 461-462.) It is apparent that plaintiff, after her admitted nightly escapades in barrooms and staying out all night, could not possibly have been in a condition, physically or otherwise, to provide proper care for her children.

Plaintiff surreptitiously used family funds of the parties for the purpose of purchasing gifts for Jarvis and for the purpose of dissipation with Jarvis.

Defendant maintained a joint checking account with Walker Bank and Trust Company upon which plaintiff was permitted to draw. (Exs. 14 & 19, R. 264, 265.) On August 9, 1961, plaintiff drew check No. 3760 in the amount of \$20.00 on the account, payable to Par Men's Shop, for the purchase of a sport shirt for Jarvis at a price of \$12.80. (Ex. 19, R. 277-281.) In the check register (Ex. 14) plaintiff entered opposite check No. 3760, "Pars, dentist, tie, lunch, etc., \$20.00." On August 4, 1961, plaintiff noted in her diary that Jarvis telephoned her and wanted to know how much money she had given him the night before on August 3rd which was an occasion when she met Jarvis at 7:00 P.M., went with him to a barroom, stayed with him until 3:00 A.M., "and was bad again." (R. 274-275.) Defendant testified that throughout the summer of 1961, he purchased the groceries for the family. (R. 427.) Defendant produced checks cashed by plaintiff totalling \$498.26 at Grand Central Market during the period from May 22, 1961, to August 24, 1961, while she was consorting with Jarvis. (Ex. 43, R. 427.)

At the height of her affair with Jarvis plaintiff deliberately set forth in her own handwriting a fraudulent design and scheme to commence this divorce action against defendant and to take from defendant his children, his home, his property and

his money. (Exs. 6 & 7, 214-219.) Plaintiff admitted in her own handwriting that she commenced this divorce action because of her relationships with Jarvis and not because of misconduct on the part of the defendant. (Ex. 23, R. 286-288, 316.)

On July 14, 1961, plaintiff stayed out all night with Jarvis. (R. 204.) On July 18 plaintiff made an engagement with Jarvis for the following night. (R. 208.) On July 19 plaintiff spent the night with Jarvis in a barroom. (R. 209.) She thereupon on July 22, 1961, wrote shorthand notes, Exhibits 6 and 7, in which she laid the ground work for this divorce action and, in particular, made plans to work toward her goal, to keep records of her husband's business, to see that she got her share of the money, to rifle his desk, and to hire her own attorney and take legal action against him. (Exs. 6 & 7, R. 214-219.)

Three days later on July 25, 1961, plaintiff made the following false entries in the check register of the joint account of the parties with Walker Bank and Trust Company: Check No. 3716, "cash, \$15.00"; Check No. 3742, "difference in mistake of deposit, \$75.00"; Check No. 3718, "school clothes and winter pajamas, \$50.00"; Check No. 3741 "paint, \$20.00"; and, on July 31, 1961, Check No. 3749 with no designation, in the amount of \$20.00. (Ex. 14. R. 264-268.) Plaintiff in fact dated each of

these checks July 31, 1961, and made each of them payable to Murray First Thrift and Loan Company. (Ex. 15, R. 264-268.) On July 31, 1961, plaintiff opened a joint savings account in hers and her husband's name with Murray First Thrift and Loan Company, of which defendant testified he had knowledge. (Ex. 42, R. 264-268, 427.) On the same day, July 31, 1961, plaintiff opened a separate savings account in her name alone in the Murray First Thrift and Loan Company, of which defendant had no knowledge. (R. 264-268.) She deposited the checks No. 3716, 3718, 3741, 3742, and 3749, as to which she had made the false entries in the check register, in the account in her name alone. (Exs. 15 & 16, R. 264-269.) Plaintiff asserted at trial that defendant had knowledge of both the joint account and private account (R. 264) and then explained that she opened the private account because, *at the time when she commenced the divorce action, the defendant had closed the joint checking account.* (R. 264, 396.) The private account was opened on July 31, 1961. Plaintiff did not commence the divorce action and defendant did not close the joint checking account until one month later. (R. 1-9, 286-289.) It is apparent that plaintiff's testimony was false and that this whole transaction was a part of the deliberate plan set out in plaintiff's short-hand notes dated July 22, 1961, to divorce defendant and take his money.

For the next month, from July 25, 1961, to August 18, 1961, plaintiff was in daily contact with Jarvis, and spent her nights with him in barrooms, and on several occasions stayed out all night with him. (R. 269-286.) After Friday, August 18, Jarvis stopped contacting plaintiff. (R. 286, 287.) She, therefore, on August 23 made an appointment with McCullough to commence this divorce action and have her husband removed from the home because of Jarvis. (R. 287.) She noted in her diary that on Friday, August 18, Jarvis told her he would call her 'the next week. She thereafter made the following entries in the diary concerning Jarvis. Monday, August 21, "Not a word did I hear." (R. 286.) Tuesday, August 22, "Not a word again. I don't understand." (R. 286.) Wednesday, August 23, "It is now 12:30. No phone call today. *The message seems to be coming through loud and clear. I made an appointment to see Mr. McCullough.*" (R. 287.)

Plaintiff signed the complaint before McCullough on August 24, 1961. The complaint set forth under oath that defendant, "on many occasions physically beat and abused plaintiff." The verifications set forth that plaintiff had read the complaint, knew its contents and that the same were true of her own knowledge. It was signed by plaintiff and subscribed and sworn to by her before Leland S. McCullough, her attorney. (R. 1-4.) (R. 7-8.) Plaintiff testified

at trial that she did not know that defendant had ever beaten her. (R. 288.) She further testified, by way of explanation, that she signed the complaint without reading it. (R. 395.) The verification, sworn to before her attorney, expressly set forth that she had. (R. 4.) On August 25, 1961, defendant was removed from his home and children under the restraining order. (R. 288-292.)

On August 26, 1961, the day after the restraining order was issued, defendant, in an effort to save his home and children, attempted to effect a reconciliation and, without the benefit of counsel, entered into a stipulation with plaintiff's attorney providing that the hearing on the restraining order be continued without date. (R. 10, 457.) Defendant also on August 26 arranged with plaintiff to move back into the home, but plaintiff insisted that defendant remain away from the home until Sunday, August 27. (R. 292-294, 457.) She explained that she did this because she wanted to give her husband some time to "think" and because she wanted to find out about her "family problems". (R. 294.) She had in fact on Friday, August 25, the day she had her husband removed from the home, made an engagement with Jarvis to meet him at 3:00 P.M. on Saturday, August 26. (R. 291-294.) She met Jarvis at 3:30 P.M. on Saturday, August 26, and stayed out with him until 2:00 A.M. on Sunday, August

27. (R. 291-294.) Defendant testified that he in fact returned home on Saturday night at approximately midnight because the children had been left alone with a young baby sitter, and he was worried about them. (R. 457.) Defendant was at the home when plaintiff returned from her escapade with Jarvis at 2:00 A.M. on Sunday morning. (R. 457.) Defendant further testified that plaintiff told him that he had a filthy mind if he thought she had been out on a date and that she thereafter awakened the child, Lisa, and said, "Look at your father, isn't he nice, now he is crying." (R. 457.)

On Sunday, August 27, defendant took plaintiff and the two children on a trip to Jackson Lake and an outing sponsored by Equitable Life Assurance Society, from which they returned on August 31. They did not get along well on the trip. (R. 294-296, 457-460.) Defendant testified that on the way home plaintiff told him she was going to have a baby and that, if she did, he was responsible but he would never see it. (R. 296, 459.) Defendant was amazed because he had not had marital relations with plaintiff since prior to July 13, 1961. (R. 459.)

Thereafter on September 5, 1961, plaintiff took up with Jarvis again. She met him at 6:15 P.M., spent the evening with him in a barroom, and stayed out with him until 2:00 A.M. When she arrived home

she was sick and remained in bed all of the following day. She noted in her diary, "Poor Howard. He was worried about me and I was sick." (R. 297.)

The next day, September 7, she noted in her diary that Jarvis called again, he had a hangover and that she offered to bring him a record and some spaghetti to comfort him. (R. 300, 301.)

On Saturday, September 9, plaintiff went to a barroom and met Jarvis there. (R. 302.) On Sunday, September 10, plaintiff went and consorted with Jarvis in his apartment during the daytime. (R. 301-303.) On cross examination she was asked where her children were in the meantime. She explained that they were in church with her husband. (R. 303.)

On Monday, September 11, 1961, Jarvis did not call plaintiff. (R. 309.) Defendant testified that at this point plaintiff again insisted that he move out of his home by Tuesday, September 12, and told him that, if he did not, she would get another restraining order and have him moved out. (R. 447.) Defendant moved out of his home again on September 12. (R. 447.) Plaintiff wrote in her letter to Jarvis, shorthand note, Exhibit 23, the following concerning the event: "Your last words to me were: 'I will call tomorrow' (Monday). You didn't call Monday. I had a quarrel with Howard on Tuesday and insisted he move out. *I am tired of going to*

*the attorney again if he didn't. He did move. You didn't phone on Tuesday. You didn't phone on Wednesday. I was sick Wednesday night * * *.*" (R. 316.) The record is clear that on this occasion plaintiff again caused her husband to be moved out of his home and separated from his children because of her relationship with Jarvis under circumstances identical to those under which she commenced this divorce action on August 25, 1961, and had him thrown out of his home by use of a restraining order. (R. 286-288.) She also noted in her diary that Jarvis did not call from Tuesday, September 12, through Thursday, September 14, and on September 14 she wrote in her diary, "It is now 1:00 and so far no phone calls * * * The writing on the wall is pretty clear. Guess this is it * * *." (R. 309-311.) Thereafter she noted in her diary that she was sick in bed all day from Friday, September 15 to Monday, September 18, (R. 311) and she wrote in her letter to Jarvis, (Ex. 23), concerning the event that, "the doctor couldn't figure out what was wrong — but I knew and couldn't tell him." (R. 317.)

On Sunday, September 24, plaintiff noted in her diary that, "Howard came home. Thank goodness." (R. 311.) This demonstrates clearly that, having been jilted by Jarvis, plaintiff had no further reason to have her husband out of his home. On Wednesday, September 27, she noted in the diary

that her husband gave her \$300.00 for new carpeting. (R. 312.) This was the last entry in the diary.

After Jarvis jilted her, plaintiff wrote the letter to Jarvis, (Ex. 23), in which she blamed Jarvis for all of her difficulties and said of her husband that he had put forth extra effort to get along and was truly in love with her, "true his every glance, his every deed." (R. 315-318, 341.)

In the meantime, what was the defendant doing during the year, 1961, in addition to protecting and caring for his children and endeavoring to save his home and family? Defendant had been employed as an agent for Equitable Life Assurance Society only three years before. (R. 411.) The Salt Lake agency of Equitable Life Assurance Society covers the entire state of Utah and part of Nevada. (R. 412.) From June 5 to August 21, 1961, while plaintiff was engaged in destroying the family, defendant lead the entire agency in new policies sold and placed second in total production. (Ex. 39, R. 412.) In the fall sales campaign ending December 19, 1961, defendant lead the entire agency in both new policies sold and total volume. (Ex. 40, R. 413.) For the entire year, 1961, defendant placed third in the entire agency in total production. (Ex. 41, R. 413.) Defendant's net income, as shown by the record and found by the court, was only \$546.00 per month

because there had not been time for his renewal premiums to build up. (R. 181, 486-487.)

In an effort to establish condonation against defendant plaintiff testified on the witness stand that, after defendant returned to the home in September, 1961, she disclosed the affair with Jarvis to him. (R. 211.) This was bald perjury. Her testimony on cross examination, with reference to the so-called disclosure, was evasive and amounted to nothing more than a general statement to the effect that she and her husband had a discussion in which they stated that they would let by-gones by by-gones. (R. 211, 212.) On January 15, 1962, defendant discovered the diary (R. 320, 494.) Defendant recorded a conversation between himself and plaintiff on January 18, 1962. (Ex. 25, R. 320-322.) In the conversation defendant asked plaintiff if she was going to deny the contents of the diary that he had discovered. Plaintiff replied, "You're God-damned right I am." She then in the conversation proceeded to deny the contents of the diary, the specific events set forth therein, and stated that it was all a fiction. (Ex. 25.) Plaintiff knew that defendant was recording the conversation. She said at one stage to defendant, "If you want to try it on another tape I will say it on another tape for you." (Ex. 25.) Plaintiff admitted at trial that the transcript of the tape was true. (R. 320-322.) In any event there was no con-

donation because of the events that occurred between September of 1961 and January of 1962, when defendant discovered the diary.

Defendant testified that throughout the marriage and particularly in November and December of 1961, and January of 1962, plaintiff persistently used foul and obscene language and referred to defendant as a “son-of-a-bitch” and “bastard” and by other more obscene epithets in the presence of the children. (R. 415, 464, 466-469.) Plaintiff admitted that she customarily referred to defendant as a “son-of-a-bitch” and “bastard”. (R. 329-330.)

At this point plaintiff denied generally that she carried on other lewd and obscene conversations in the presence of the children and visited obscenity upon the children. (R. 254.) She was then asked on cross examination specifically whether or not in a conversation with defendant and the child, Kirt, age 8, and the child, Lisa, age 6, she had not said, “Play with your teats, Howard. Are they growing. Look, Lisa, he is rubbing his teats.” (R. 254-261.) She twice under oath categorically denied that any such conversation ever occurred. (R. 254.) She again committed perjury. She was then confronted with a tape recording of a conversation between herself, her two children and her husband on January 21, 1962, six weeks before trial, and asked whether or not she wished to have the recording

played for the court. She replied that she did not and stipulated that Exhibit 17 could be received in evidence as a true and correct transcript of the recording of the conversation on January 21, 1962. (R. 255-261.) In the conversation plaintiff said in the presence of her children, "Play with your teats, Howard. Are they growing?" Defendant pleaded with her to stop. She refused and thereafter called to the child, Lisa, and said, "Look, Lisa, he is rubbing his teats." (Ex. 17.) It is apparent that plaintiff is the type of woman that can come into court with a straight face and deny her insidious conduct with reference to the children; but, when confronted with specific proof, she is forced to admit the depravity visited upon them.

On cross examination plaintiff was confronted with Exhibits 28 through 37. (R. 332-337.) The documents are as obscene as it would be possible for the human mind to conceive. Exhibit 28 deals with a small girl of tender years becoming involved in a sexual relationship and thereafter conducting herself as a prostitute. Exhibit 29 deals with a small boy of the age of ten years, at the suggestion of his mother, being exposed to a degraded sexual relationship between his young sister and a third party in the home of the family. Exhibit 30 deals in an obscene manner with the physical and emotional aspects of sexual intercourse. Exhibit 31 is an obscene

parody on services in church, involving as principals a minister of the gospel, the women members and children. Plaintiff testified that she acquired this material prior to the marriage of the parties and that she kept it in a drawer in the downstairs of the home together with some other things belonging to her children. (R. 332.) She claimed she had not read the material for so long that she did not remember its contents and, therefore, could not identify it as the material she had gathered together and kept. (R. 332, 337.) She then testified that by reading the first three lines of Exhibit 28 she had a good idea as to the balance of the contents (R. 332.) and by reading the first two lines of Exhibit 29 she had a good idea of the balance of its contents. (R. 333.) The first three lines of Exhibit 28 and the first two lines of Exhibit 29 are completely innocuous. If plaintiff could tell the balance of the contents from reading those lines, either one of two things is certain. She remembered the contents of the documents or she has a completely depraved imagination. The alternative is immaterial so far as it pertains to her fitness as a custodian of minor children. Defendant testified that he first saw these documents when he discovered plaintiff reading them in May of 1961, that he told plaintiff to get rid of them because exposure would be extremely damaging to the children and that plaintiff said she would

get rid of them. (R. 416-419.) Defendant found the documents and took them with him when he was removing his financial records from the home after the discovery of plaintiff's diary on January 15, 1962. (R. 418.) The admitted facts are that plaintiff, unbeknown to her husband, brought this material into the marriage, that she carried it from home to home of the parties, and that she was keeping it in a drawer in an open room together with other things belonging to her children.

Plaintiff got a job during the months of November and December of 1961. (Ex. 1, R. 13, 354.) On December 28 or December 29, 1961, plaintiff left the home of the parties and attended a cocktail party given by her former employer. (R. 390-391, 354, 559.) She testified that she remained at the party from 12:00 Noon until late in the afternoon, that thereafter she drove another man to his apartment, and that thereafter she returned to her home. (R. 390-391.) Defendant testified that plaintiff returned home in a drunken condition and that defendant, who had been caring for the children throughout the day, thereupon took the children out to dinner in order to avoid their exposure to the situation. (R. 466.) Defendant further testified that thereafter plaintiff locked him and the children out of the home until approximately 11:00 o'clock P.M. when defendant broke into the house in order to

gain entrance for his children. (R. 466, 467.) Plaintiff denied that she locked them out. (R. 559.) The next door neighbor, whom plaintiff had called as a witness, testified that she observed defendant attempting to gain entrance into the home. (R. 516-517.)

On January 15, 1962, defendant discovered the diary and plaintiff's shorthand notes. (R. 320, 494.) He thereupon, in order to obtain a speedy trial and without prejudice to his rights and without admitting that plaintiff was a fit person to have custody of the children temporarily or otherwise, entered into the stipulation dated January 31, 1962, and moved out of the home pending trial. (R. 11-12, 198, 477.) The case was set down for trial on March 13, 1962, (R. 18.)

During the period between the time that defendant moved out of the home and the date of trial, plaintiff left the children a great part of the time with baby tenders. (R. 185, 472-473, 355, 515.)

Plaintiff asserted at trial that defendant had been having an affair with a young woman employed at Equitable Life Assurance Society. Plaintiff testified that in February of 1961, defendant admitted to plaintiff that he had been out with this woman. (R. 194-195, 224-225.) Plaintiff made the following entry in her diary on March 13, 1961: "It is out; it is over; it is in the open. 'Karen' is her

name. *He has never had her out*, but is mad about her. Sad!!” The only evidence as to any association between defendant and this young woman is the following. Defendant, in the company of plaintiff, saw the girl at an Equitable Life Assurance party at Lagoon. (R. 197.) Defendant also saw the girl in the office of Equitable Life Assurance Society, where both he and the girl worked. (R. 197.) The girl was a musician. (R. 428.) Defendant was a musician by hobby and owned a tape recorder. (R. 428.) The girl asked the defendant if he would make a recording of a musical trio, which included the girl, a young man, and an older lady, playing their musical instruments. (R. 428.) Defendant asked his wife if he could invite them to defendant’s home to make the recording. (R. 428.) Plaintiff replied that, if defendant did, she would be away. (R. 428.) Defendant thereupon went alone to the girl’s parent’s home at which the girl’s parents, her grandparents, her boy friend, and the older lady were present, and made the recording of these people playing their musical instruments. Thereafter defendant left the people and went home. (R. 428.)

Plaintiff further asserted at trial that defendant drank to excess. (R. 190.) Defendant denied the accusation. (R. 431.) Plaintiff’s own witness, called for the purpose of corroborating her testimony, testified on cross examination that he had

been in the company of defendant at several parties given by Equitable Life Assurance Society where liquor was served, that he had never seen defendant drink to excess, that defendant had always conducted himself as a gentleman, that defendant was never intoxicated. (R. 365-368.) Earl L. Maw, Certified Life Underwriter for Equitable, testified to the same effect. (R. 485-487.) At this point it should be noted that it does not lie in plaintiff's mouth to accuse defendant of excessive drinking or to set herself up as a judge of such a matter. Immediately following her affair with Jarvis in his apartment on Sunday, September 10, 1961, plaintiff wrote in shorthand note (Ex. 21) concerning the event, "It was the first time you have been together without drinking. How did you find it? Very dull." (Ex. 21, R. 304.) The record is replete with evidence of plaintiff's nightly escapades in barrooms on the west side of Salt Lake City, p. 199-310.

At trial plaintiff asserted, as an excuse for her misconduct that resulted in this divorce, that it made up for some of the hurt that she had suffered at the hands of defendant. (R. 328.) When Jarvis terminated his relationship with plaintiff, she blamed Jarvis for all of her difficulties and wrote in Exhibit 23 the following concerning Jarvis, "If I could only turn some of the hurt I feel for myself into hurting you." (R. 315.) It is apparent that, re-

gardless of the type of man with whom plaintiff associates, she blames her difficulties upon the man.

It is submitted that plaintiff's accusations against defendant were irresponsible and groundless; and, in any event, she admitted that he was a good father, and she did not in any respect remotely infer that defendant ever neglected or visited moral depravity upon his children.

At trial plaintiff on the witness stand repeatedly represented to the court that she was ashamed, contrite and apologetic about her misconduct. (R. 213, 227, 270.) The evidence in her own handwriting completely refutes this. In February of 1962, less than a month before trial, she wrote the following note to her husband (Ex. 27.) "You certainly are a sneaky bastard. Aren't you? You must feel pretty darned good (inside that is). I don't want to make this difficult for you to read. *How did you enjoy the notes out of my little black book — I made it easy on some of them, didn't I? You didn't even have to figure them out in shorthand.* But anyway, I wish you could have borrowed them without folding them down the middle. But I know what a Sloppy Pig you are. You will notice that I capitalize all the names I call you." (R. 328-329.)

Plaintiff offered the testimony of Mrs. Dorothea M. McDonald, one of the children's school

teachers, to the effect that, when the children came to school, they appeared to be well fed and clothed and that on the occasions that Mrs. McDonald had met plaintiff, plaintiff appeared to be interested in her children. (R. 511-512, 345-346.) Mrs. McDonald admitted that she had only seen plaintiff on three occasions, once at a Parent Teachers Association meeting, once for a few moments at the school, and once for a few moments just before the trial. (R. 352.) Mrs. McDonald knew absolutely nothing about plaintiff's immoral activities and her neglect and visitation of depravity upon the children. (R. 346-352.)

Plaintiff also offered the evidence of Mrs. Beverly Chase, one of plaintiff's neighbors, to the effect that the children were always clean, well clothed and well fed and that the home of plaintiff appeared to be physically clean. (R. 355-356, 518-519.) Mrs. Chase knew absolutely nothing about plaintiff's adulterous activities and her attendant visitation of neglect and moral depravity upon the children. (R. 356, 357, 519.) The same was true of Mr. Lawrence McCormack, Mrs. Glade J. Jensen, and Mrs. Clarence L. Hall, called as witnesses on behalf of plaintiff. (R. 384-389, 514-518, 506-511.)

The uncontroverted facts are that defendant always took the children to the Presbyterian Church and attended with them and that plaintiff did not.

See: testimony of Rev. Walter J. Kalvesmaki. (R. 482-484.) Plaintiff offered as an excuse that prior to the marriage she had been L.D.S., defendant had attended the Catholic Church, and that they agreed they would not send their children to the L.D.S. Church or Catholic Church, and therefore attended the Presbyterian Church. (R. 564.) Plaintiff's conduct, inclinations and standards of morality, exemplified throughout the entire record, negate any notion that she was remotely exposed to, much less influenced by, the moral precepts and teaching of the Church of Jesus Christ of Latter-Day Saints.

Plaintiff offered no evidence of a constructive program for the care and protection of the children if she were awarded their custody. Between the time that defendant moved out of the home and the date of trial, plaintiff left the children a great deal of the time with baby tenders. (R. 185, 472-473, 355, 515.) Her evidence was that they would be left with baby tenders all the time she works (R. 185, 198) and at such times as she engages in other activities commensurate with her inclinations. (R. 199-310.) Defendant's evidence was as follows. He is prepared to spend a maximum amount of time with his children. (R. 203-235, 303, 432, 449, 452, 457, 461-462, 482, 472, 473.) His mother, Mrs. R. A. McBroom, Sr., returned home from Florida and is prepared to expend her entire time caring for the

children. (R. 480-481, 500-501.) Defendant had engaged a competent lady, who is familiar with children, to care for the home and assist his mother in caring for the children. (R. 481.) Defendant's sister-in-law, Mrs. R. A. McBroom, testified that her own children get along very well with defendant's children, that she loves the children, and is prepared at any time in the event of an emergency or other difficulty to take the children into her home and care for them with her own. (R. 502-504.)

Plaintiff worked, off and on, for a total of 48 months during the ten years of marriage. (Ex. 1, R. 184.) The combined income of the parties for the ten years was \$80,046.27, of which defendant earned \$65,496.08 and plaintiff earned \$14,231.19. (Ex. 46, R. 479-480.)

Defendant became ill in the summer of 1957 and was hospitalized for approximately one month. (R. 434-435.) Plaintiff claimed that, when defendant became ill, she went to work and supported the family over an extended period of time because as a result of the illness defendant did not make sufficient money to support the family in 1957. (R. 361-363.) In fact, defendant went to work upon release from the hospital in the summer of 1957 and was only off work six weeks. (R. 435.) Defendant's average net income for the ten years of marriage was \$6,546.90 per year. (Ex. 46, R. 479-480.) De-

fendant's net income from his earnings during the year, 1957, was \$6,454.13. (Ex. 46, R. 479-480.) Plaintiff's contention was without merit.

During the marriage the parties acquired the following property: a home located at 583 Cortez Street, Salt Lake City, Utah, purchased on October 15, 1954, of the approximate value of \$16,000.00, subject to a mortgage in the approximate amount of \$11,300.00; household furniture and fixtures located in the home; a stereo set; a 1959 Chevrolet automobile, customarily driven by defendant; a 1956 Cadillac automobile purchased for plaintiff in November of 1961; and, life insurance on the life of defendant in the face amount of approximately \$35,000.00, of which \$12,000.00 was term insurance. (R. 176-180.)

During the marriage the parties incurred the following obligations testified to at trial: mortgage on the home, in favor of Equitable Life Assurance Society, in the amount of \$11,300.00, upon which the monthly payments were \$90.00 per month; mortgage on the household furniture, in the amount of \$700.00, payable in monthly installments of \$31.00 per month; mortgage on the stereo set in the amount of \$114.00, payable in monthly installments of \$19.00 per month; mortgage on the 1959 Chevrolet in the amount of \$650.00, payable at \$78.00 per month; and, mortgage on the 1956 Cadillac automobile in

the amount of \$1,350.00, payable in monthly installments of \$78.00 per month; and, certain current obligations as to which plaintiff offered no evidence. (R. 177-180.) Affidavits filed by defendant in support of defendant's motion for new trial and alternative motions to amend the findings of fact and decree showed the amount of these current obligations to be \$1,088.02. (R. 53.) The total insurance premiums, payable by defendant under his insurance policies, were \$27.18 per month for life insurance covering the mortgage on the home (R. 59) and \$18.00 per month for other life insurance premiums. (R. 52.)

Plaintiff was working at time of trial and earning \$370.00 per month. Defendant was earning \$546.00 per month. (R. 39.)

The trial court awarded the defendant the divorce and plaintiff \$1.00 per year alimony. (R. 42-44.) He then proceeded to find plaintiff to be a fit and proper person to have the care and custody of the minor children (R. 38-39), awarded plaintiff custody of the children, awarded plaintiff all of the property of the parties, with the exception of the 1959 Chevrolet automobile and the stereo set, awarded plaintiff \$200.00 per month for the support of the two minor children, ordered defendant to pay all of the obligations of the parties with the exception of the mortgage on the home and the mortgage

on the Cadillac automobile, ordered defendant to keep his life insurance in force for the minor children, and awarded plaintiff a judgment against defendant in the amount of \$750.00 to assist her in paying her attorneys fees for fraudulently bringing this action. (R. 42-44.)

The defendant, in an affidavit in support of a motion for new trial and to amend the findings of fact and decree, set forth that he was without funds to pay the current obligations and plaintiff's attorneys fees, which totaled \$1,838.02, and that defendant would be required to finance the payment of same through a collateral loan upon which the monthly payments would be \$115.90 for eighteen months. (R. 52-54.)

Under the decree, therefore, defendant is earning a net income of \$546.00 per month and is required to pay installment obligations, including \$200.00 support money, totaling \$489.08 per month, leaving defendant a net income upon which to live in the amount of \$56.92 before payment of rent and federal and state income taxes.

Under the decree plaintiff has a net income of \$370.00 per month from her employment, \$200.00 per month support money, or a total of \$570.00 per month and is only required to pay \$168.00 per month in installment obligations, leaving plaintiff with \$402.00 per month for the support of herself and

the two minor children and no obligation to pay rent because the court awarded her defendant's home.

By way of explanation the following should be noted with reference to plaintiff's appeal in this matter. The trial court entered its findings and decree on April 23, 1962. (R. 38-44.) On June 25, 1962, defendant moved the court for an order, pending this appeal, fixing defendant's rights of visitation, restraining plaintiff from punishing the children for visiting their father, restraining plaintiff from attempting to degrade their father in their minds and from attempting to alienate the children, and restraining plaintiff from removing the children from the State of Utah, (R. 92-97) because plaintiff had repeatedly and persistently denied defendant rights of visitation of the children, punished the children for visiting with defendant, used the children and refused defendant his rights of visitation in attempts to extort money from defendant, threatened to remove the children from the State of Utah if defendant continued to prosecute this appeal and plaintiff had continued to visit neglect and moral depravity upon the children. (R. 95-97.) Plaintiff filed a counterpetition in which plaintiff agreed to submit the matter of visitation to the court (R. 98), and sought to hold defendant in contempt on a false claim that defendant was behind one month in pay-

ment of support money. (R. 98-101.) A hearing was had on this matter on July 9 and July 11, 1962. (R. 582-674.) The trial court, Judge Marcellus K. Snow presiding, found all of the issues in favor of defendant (R. 78-81), and on July 19, 1962, entered an order granting defendants rights of visitation and issued restraining orders to guarantee enforcement, and thereupon awarded plaintiff a judgment against defendant in the sum of \$125.00 for attorneys fees in connection with this hearing. (R. 82-84.) Plaintiff thereupon proceeded to violate the court's order (R. 114-115, 117-122, 675-691) and defendant was again required to bring plaintiff into court on contempt charges (R. 114-115) before Judge A. H. Ellett on the 27th day of July, 1962, (R. 675-691) in order to procure enforcement of the order. (R. 675-691, 127-129.)

Plaintiff appeals to this court from the order of Judge Snow and defendant cross-appeals from that part of the order awarding plaintiff the additional \$125.00 attorneys fees. The parties stipulated in this court that defendant's appeal from the decree of divorce and plaintiff's appeal from the order of Judge Snow entered on July 19, 1962, may be consolidated for purpose of hearing in this court.

ARGUMENT

POINT 1.

THE TRIAL COURT ERRED IN GRANTING CUSTODY OF THE MINOR CHILDREN OF THE PARTIES TO PLAINTIFF.

The trial court felt that, under the decision in *Steiger v. Steiger* (1956) 4 U.2d 273, 293 P.2d 418, it was justified in awarding custody to the plaintiff and not to the defendant. In *Steiger v. Steiger* the Supreme Court held that the wife was entitled to the custody of the three year old child against her husband where the evidence, interpreted most strongly against the wife, was that (1) on two or three occasions she drank alcoholic beverages to the point of mild intoxication, (2) was frequently seen with a man other than her husband, (3) was not a good housekeeper, and (4) there was no evidence of adultery on the part of the wife and (5) there was no evidence that the wife's conduct ever rendered her unable to properly care for the child and (6) the evidence showed that the wife's parents were better able to offer assistance to the wife and the child than were the husband's parents and (7) evidence showed that the wife's love for the child caused her to spend her free time with him, and (8) the evidence showed that the father, while he was with the child, was abusive to it and had little concern for the child's welfare. The court is so holding said at 293 P.2d p. 420:

“Stating the case against (the wife) in the strongest possible manner, testimony of witnesses indicated that she (1) drank intoxicating liquors two or three times to the point of mild intoxication, (2) was frequently seen with a man other than her husband, and (3) was not a good housekeeper. *All of this testimony however came from defendant's witnesses and was rebutted by plaintiff and her witnesses.*

* * * *

“*There is no proof in the record that this mother drinks excessively so as to render her unable to properly care for the child, nor is there any evidence of promiscuity.*

“Reading the record as a whole it appears that (the wife) has been in the past careless and indiscreet, but that her love of the child has caused her to work to provide for him, *has caused her to spend her free time with him*, and care for his needs, and has caused her to fight for his custody. In the light of these facts it cannot be said that she is an unfit mother.

“This court has stated that a divorced mother has no absolute right to the custody of minor children under U.C.A. 1953, 30-3-10, *Sampsell v. Holt*, 150 U. 73, 202 P.2d 550, *but the policy of our decisions has been to give weight to the view that 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. * * * And this view is based upon the oft-stated purpose of the award of custody to provide for the child's best interest and welfare * * *.

*“ * * * The (wife's) parents are better able to offer financial assistance to (the wife) and the child than are (the husband's) parents * * *. Additionally, there is no evidence that the mother has ever neglected the child, although she has had his sole care while the father was serving in the army; there is some evidence that the father was somewhat abusive to the child when he did have contact with him, and has been little concerned with the child's welfare.”*

The decision in *Steiger v. Steiger* does not support the trial court's award of custody of the children to the plaintiff. It is authority directly to the contrary. The evidence is conclusive that the plaintiff repeatedly committed adultery; that she did not spend her free time with her children, but spent it in dissipation and illicit relationships; that she repeatedly stayed out all night, drank alcoholic beverages, and did not provide care for the children; that she subjectively visited insidious and immoral depravity upon the children; that defendant never was abusive to the children, was a good father, and provided adequate care and protection for the children, particularly during periods of his wife's depravity and neglect; and, that defendant's family is prepared to offer every assistance in the care of the children, and there is no evidence that plaintiff's family has or will offer any assistance in the care of the children. The evidence shows that plain-

tiff has, and intends to, continuously leave the children with baby tenders.

In cases where the evidence shows adultery, use of intoxicants over an extended period, or other dissipation, on the part of a parent and that evidence is coupled with neglect of the children, or with visitation of immorality upon the children, the Supreme Court has uniformly approved depriving the parent of custody of the children. See: *Walton v. Coffman* (1946) 110 U. 1, 139 P.2d 97; *In Re Olson* (1947) 111 U. 365, 180 P.2d 210; *In Re Bradley* (1946) 109 U. 538, 197 P.2d 978; and *State of Utah in the Interest of K----- B-----* (1958) 7 U.2d 398, 326 P.2d 395.

In *Walton v. Coffman* (1946) 110 U. 1, 139 P.2d 97, the evidence showed that the mother associated with men other than her husband, used alcoholic beverages over an extended period, and that at such times she neglected the children, who were nine and ten years of age. The Supreme Court reversed the trial court, deprived the mother of custody of the children and awarded custody to the grandparents on the ground that it was in the best interest of the children. The Supreme Court held that abstinence by the mother from such misconduct from the time of commencement of the action down to the date of trial was not of sufficient probative value to overcome the admitted evidence of her

misconduct up until the time of commencement of the litigation because of the inherent inclination on the part of the mother to refrain from such conduct while the litigation was pending. The evidence in this case shows such misconduct on the part of Mrs. McBroom both before and after commencement of the action.

In re Olson (1947) 111 U. 365, 180 P.2d 210, the evidence showed that the father used alcoholic beverages over an extended period and, during this period, left the child, age eight, with an aunt and grandparents and did not provide personal care for the child. On appeal to the Supreme Court the father claimed that because the child was receiving adequate care from other relatives, it was not a neglected child and, therefore, the trial court erred in depriving him of custody and granting custody to the aunt and grandparents. The Supreme Court affirmed the trial court and held that evidence that other relatives provide care for a child personally neglected by a parent, does not negative the fact that the parent has neglected his parental responsibility and that the child is a neglected child. In the case before this court the admitted facts are that Mrs. McBroom continuously spent her time in bar-rooms and carried on her immoral and dissipated relationships all hours of the day and night and that, while she was so doing, she left the children with either young baby sitters or the defendant, and

she testified that she was not concerned about the childrens' care because her husband was a good father. She persistently refused and by lying and artifice avoided caring for, and engaging in activities concerned with, the welfare of the children.

In re Bradley (1946) 109 U. 538, 197 P.2d 978, the evidence showed that the mother engaged in relations out of wedlock and over a three month period left the child in question in the care of an aunt and uncle and during this period neglected the child. The Supreme Court held that, where the evidence showed immorality on the part of the mother and neglect of the child over a three month period, the child was a neglected child and affirmed the trial court in depriving the mother of custody of the infant and awarding custody to the aunt and uncle.

In *State of Utah in the Interest of K----- B-----* (1958) 7 U.2d 398, 326 P.2d 395, the Supreme Court in depriving the father of custody of his child said in its opinion that the obscenity visited upon the child should be spared the light of print and therefore did not set it out in its opinion. In the case before this court the moral depravity visited by plaintiff upon the children is of such a nature that it likewise should be spared the light of print.

If it were assumed for purposes of argument only that plaintiff is a fit person to have the custody of the children, the trial court nevertheless erred in

awarding custody to plaintiff because it is in the best interest of the children that custody be awarded to defendant.

Sec. 30-3-5, U.C.A., 1953, provides: "*When a decree of divorce is made* the court may make such orders in relation to the children * * * as may be equitable * * *." Sec. 30-3-10, U.C.A., 1953, provides: "*In any case of separation of husband and wife having minor children*, the mother shall be entitled to the care, custody and control of all such children * * * (under the age of ten years) * * *; provided * * * that if it shall be made to appear to a court * * * that the mother is an immoral, incompetent or otherwise improper person, then the court may award the custody of the children to the father * * *."

The Supreme Court has repeatedly held that the provision of Sec. 30-3-10, requiring a finding that the mother is an immoral, incompetent or otherwise improper person as a condition to the awarding custody of children under the age of ten years to the father, applies only to cases of separation and not to cases of divorce. The court has held that Sec. 30-3-5, in providing that, when a decree of divorce is made, the court may make such orders in relation to the children as may be equitable, authorizes the court in cases of divorce to award custody of the children to the father when it is in the best inter-

est of the children without a finding that the mother is unfit. See: *Johnson v. Johnson* (1958) 7 U.2d 263, 323 P.2d 16, in which the court awarded custody of an eight year old child to the father where the evidence showed that the mother was living alone and working because it was in the best interest of the child; *Jaques v. Jaques* (1921) 58 U. 265, 198 P. 770, in which the court awarded custody of the two children ages seven and ten, to the paternal grandmother even though the court found the mother to be a fit and proper person because it was in the children's best interest; and, *Sampsell v. Holt* (1949) 115 U. 73, 202 P.2d 550.

In *Stuber v. Stuber* (1952) 121 U. 632, 244 P.2d 650, the wife brought an action to regain custody of the child from the husband. The court awarded custody of the child to the wife because the evidence showed that, while the child was living with the husband, the husband, his mother and his second wife were working and the child was required to spend extended periods of time with baby tenders while they were working; and, the evidence on behalf of the wife showed that she was living with her grandmother, the maternal grandmother was not working and the maternal grandmother and the wife were prepared to offer the personal care of a blood relative for the child at all times. In the case before this court the evidence shows that defendant

is prepared to offer the care of himself and blood relatives for the children at all times and that plaintiff persistently and continuously leaves the children with baby tenders over extended periods.

In the final analysis the ultimate question before this court is, what is in the best interest of the children? To be raised in a background of insecurity, moral irresponsibility, neglect, depravity and baby tenders; or, to be raised in a background of security, moral responsibility, integrity, adequate care and protection, by their own relatives.

POINT 2.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$200.00 PER MONTH FOR THE SUPPORT OF THE TWO MINOR CHILDREN AND ALL OF THE PROPERTY OF THE PARTIES.

If it were assumed for purposes of argument only that plaintiff is a fit person to have the custody of the children, which we do not admit, then in such event the trial court abused its discretion in awarding plaintiff \$200.00 per month for the support of the two children and all of the property of the defendant with the exception of his 1959 Chevrolet automobile and a stereo set.

At the outset it must be remembered that plaintiff, while she was carrying on an adulterous and immoral relationship, consorting in barrooms, staying out all hours of the night with a married man, and forsaking her children and her home, de-

liberately conceived and set out in her own handwriting a scheme and plan to commence this divorce action and take from defendant his children, his home and his money and, right at the time of commencement of the action, plaintiff admitted in her own handwriting that she did so, not because of misconduct on the part of defendant, but because of her relationship with Jarvis.

The financial situation of the parties was not good at the time of trial. It is small wonder when viewed in the light of plaintiff's conduct.

Under the decree, the defendant is earning a net income of \$546.00 per month and is required to pay monthly installment obligations, including \$200.00 support money, totalling \$489.08 per month, leaving defendant a net income upon which to live in the amount of \$56.92 before payment of rent and federal and state income taxes. Under the decree plaintiff has a net income of \$370.00 per month from her employment, \$200.00 per month support money, a total of \$570.00 per month, and is only required to pay the installment payments on the home and her Cadillac automobile in the amount of \$168.00 per month, leaving plaintiff with \$402.00 per month for the support of herself and the two minor children and no obligation to pay rent.

In cases where the wife has not been guilty of misconduct and has been awarded the divorce be-

cause of the husband's misconduct, it has been standard practice not to award the wife more than \$50.00 per month per child where the financial circumstances are similar to those of the parties.

We earnestly submit that, if plaintiff were a fit person to have the custody of the children, under no circumstances should she be awarded more than \$50.00 per month per child for support.

The home and the household furnishings and fixtures, together with the life insurance on the life of defendant, represent substantially all of the worldly accumulations of the parties. If the defendant is awarded custody of the minor children, in view of plaintiff's misconduct, defendant should be awarded the home and the household furnishings and fixtures. If it were assumed for purposes of argument only that plaintiff is a fit person to have the custody of the children, then in such event plaintiff should not be awarded more than a one-half interest in the home, and the home should be ordered sold under the supervision of the court at such time as both children have attained the age of majority and the proceeds should be divided equally between the parties. Plaintiff in the interim should be required to make the monthly payments on the home and not be entitled to credit therefor because she is living in the home of the defendant fraudulently.

POINT 3.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$1.00 PER YEAR ALIMONY AND \$750.00 ATTORNEYS FEES.

The effect of the trial court's decree is to actually reward a parent for adultery, dissipation, immorality, neglect of the parent's children and an utter lack of any regard for the sanctity of marriage. But, in the face of the admitted facts that plaintiff falsely and fraudulently instituted and maintained this divorce action for the purpose of carrying on an immoral relationship with a married man, to award plaintiff \$750.00 attorneys fees to assist her in so doing is absolutely unconscionable.

The same is true of the \$1.00 per year alimony. It is no answer to say that the award of \$1.00 per year alimony to plaintiff is of no consequence. It is apparent from her record of immorality and dishonesty that she will hold this over defendant's head for the rest of his life.

Furthermore the record in the case before the court shows the following. The sworn complaint, upon which the restraining order issued causing defendant to be thrown out of his home, expressly set forth that defendant had beaten his wife on many occasions. It was subscribed and sworn to by plaintiff before her attorney, Mr. McCullough, acting as a notary public. The verification expressly

set forth that the plaintiff appeared before McCulough and swore under oath that she had read the complaint, knew its contents and the same was true. Plaintiff admitted at trial that defendant had never beaten her and explained that she had signed the complaint without reading it. It was incumbent upon plaintiff to read the complaint and see that its contents were correct. As a result plaintiff has caused defendant to be maliciously libeled and a public record to be made to the effect that Mr. McBroom is a wife beater.

In situations where the misconduct of the wife was far less reprehensible than that in the case before this court, the Supreme Court has denied the wife any alimony and has refused to allow her any attorneys fees. See, *Holm v. Holm* (1914) 44 U. 242, 139 P. 937; and, *Graziano v. Graziano* (1958) 7 U.2d 187, 321 P.2d 931.

The italics are by the writer.

Respectfully submitted,

McBROOM & HYDE

401 El Paso Natural Gas Building
Salt Lake City 11, Utah
Attorneys for Appellant