

1963

## Mona McBroom v. Howard Kirtley McBroom : Plaintiff's and Respondent's Answering Brief

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Leland S. McCullough; Attorney for Respondent;

McBroom & Hyde; Attorneys for Appellant;

---

### Recommended Citation

Reply Brief, *McBroom v. McBroom*, No. 9702 (Utah Supreme Court, 1963).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/4092](https://digitalcommons.law.byu.edu/uofu_sc1/4092)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED  
MAY 15 1963

MONNA McBROOM,  
Plaintiff and Respondent,

Clerk

Supreme Court, Utah

v.

Case No.  
9702

HOWARD KIRTLEY McBROOM  
Defendant and Appellant.

---

PLAINTIFF AND RESPONDENT'S  
ANSWERING BRIEF

---

UNIVERSITY OF U

Appeal from the Decree of the Third District  
Court for Salt Lake County, Utah.  
Honorable Joseph G. Jeppson, Judge

OCT 29 1963

LAW LIBRARY

LELAND S. McCULLOUGH  
304 East First South  
Salt Lake City 11, Utah  
Attorney for Respondent

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

# TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1
ARGUMENT .....	13
POINT I. THE TRIAL COURT DID NOT ERR IN GRANTING CUSTODY OF THE MINOR CHILD- REN OF THE PARTIES TO THE PLAINTIFF.	13
POINT II. THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF \$200.00 PER MONTH FOR THE SUPPORT OF THE TWO MINOR CHILDREN, THE HOME OF THE PARTIES, THE FURNITURE AND FIXTURES IN THE HOME EXCEPT FOR CERTAIN ITEMS AWARDED TO DEFENDANT, AND THE PLAINTIFF'S OWN AUTOMOBILE. ....	14
POINT III. THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF \$1.00 PER YEAR ALIMONY AND \$750.00 ATTORNEYS FEES....	17

## CASES CITED

Allen v. Allen, 109 Utah 99; 165 P 2d 872 .....	18
Briggs v. Briggs, 111 Utah 418; 181 P 2d 223 .....	14
Lawlor v. Lawlor, 240 P 2d 271; 121 Utah 201 .....	17
McDonald v. McDonald, 120 Utah 573, 236 P 2d 1066....	17
Sampsell v. Holt, 115 Utah 73, 202 P 2d 550 .....	14
Smith v. Smith, 1 Utah 2d 75, 77, 262 P 2d 283, 284....	13
Stuber v. Stuber, 244 P 2d 650, 121 Utah 632 .....	14
Walton v. Kaufman, 110 Utah 1, 169 P 2d 97 .....	14
Wilson v. Wilson 5 Utah 2d 79, 84, 296 P 2d 977 .....	16

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

MONNA McBROOM,  
Plaintiff and Respondent,

v.

HOWARD KIRTLEY McBROOM  
Defendant and Appellant.

Case No.  
9702

---

PLAINTIFF AND RESPONDENT'S  
ANSWERING BRIEF

---

STATEMENT OF FACTS

With reference to the statement of facts as given by the defendant and appellant, the defendant has not attempted to set forth facts, but rather to malign the plaintiff with generalities which are not supported by the record and certainly in no sense supported by the findings of fact which were entered and signed by the Honorable Joseph G. Jeppson. In this regard the plaintiff feels it necessary to answer the defendant's statements in order that the court will not be mislead into believing the generalities which defendant has set forth.

It is true the court found for the defendant with

respect to the divorce itself. However, the plaintiff calls the court's attention to paragraph 7 of the findings of Fact (R. 39) which specifically sets forth the grounds upon which the decree was granted, to-wit:

"During the marriage of the parties the plaintiff has treated defendant cruelly causing him great mental distress and suffering, and more particularly: Plaintiff has in violation of the marriage contract gone out with another man."

With respect to defendant's statement that plaintiff fraudulently commenced this action, this statement is not true. See R. 287 of the record, wherein plaintiff testified with respect to the original complaint:

"Q. You stated in your affidavit that during the marriage of the parties Mr. Mc Broom had treated you cruelly causing you great mental and physical distress and suffering.

"A. True.

"Q. More particularly, that the defendant drinks to excess.

"A. True.

"Q. He has a violent, ungovernable temper and on many occasions has physically beat and abused you.

"A. True.

"Q. All this true?

"A. I don't know about "beating" but he has physically abused me.

"Q. You are afraid he will do you bodily harm?

"A. True.

"Q. Unless restrained and enjoined?

"A. True.

See also R. 360 and R. 395, R. 464, R. 565 of the record.

With respect to defendant's statement in his brief that the plaintiff had persistently disappeared from the home of the parties and stayed out all night, the defendant is again quoting solely from the testimony of Mr. McBroom without any corroboration whatsoever, and totally disregarding the testimony of Mrs. McBroom. See R. 546, R. 533, R. 534.

With respect to the reconciliation of the parties which took place in September, 1962, plaintiff testified that she and the defendant (R. 211), after the defendant had been away from home for approximately two weeks, discussed a lot of things between them, including her going out with a Bertram Jarvis and that they had both decided they had done things in their marriage that were wrong and that were not good for their marriage; and that they had decided to let bygones be bygones and go from there. The statements of defendant that plaintiff had been carrying on an immoral and adulterous relationship with a married man are without basis in the record; there is no testimony or evidence to support said statements. See R. 201, 207, 209, 251, 298, 309,

353. More significant than the testimony of either one of these parties is the fact that the court did not make a finding that there was any immoral or adulterous relationship being carried on between the plaintiff and any man.

With respect to the defendant's statement that the plaintiff deliberately set out in her own handwriting a design, scheme and plan to commence divorce and take from defendant his home, children and livelihood, this is purely imagination on the part of defendant. See Exhibit 6, also R. 214, 219 of the record wherein it states:

"July 22, 1961, be nice, but cold and definitely independent; be calm, quiet and considerate of the kids; do things with them; remember he is no longer your husband you are no longer his wife; you don't need him; make your own decisions; move out of the bedroom. If he insists on being a pig, do something, go to an attorney. Try it for one week; make a list of the good and bad, then tell him. The way you feel you couldn't be more divorced legally than you are in your own heart. From now on I will consider myself divorced, I will not live with him as a wife. If he cares to live here, he will be neat and clean and keep the house in the same order in which he finds it; otherwise I will be forced to make it legal."

Certainly this testimony as introduced by the defendant himself does not indicate in anyway an intent on the part of the plaintiff to scheme and take away the defendant's children, home and property;



but rather a sincere effort on plaintiff's part to determine what was wrong with their marriage and attempt to correct the difficulties. Furthermore, the statement of the defendant that the plaintiff had admitted in her own handwriting that her motive in attempting to terminate their marriage was not because of misconduct on the part of defendant but because of her relationship with Jarvis, is entirely untrue. See R. 191, 190, 193, 194, 195, 426, 197, 200, 214, 224, 245, 246, 218, 386, 388, 231, 256, 295, 296, 302, 306, 308, 316, 429, 551, 374, 455 and 402 wherein the plaintiff testified with respect to the defendant's drinking, the physical abuse, the defendant's relation with the other woman, Karen, his failure to assume any responsibility around the home with respect to yard work or cleaning up and keeping the home in proper order, or performing little tasks around the home which any ordinary husband should perform such as installing a front porch light, which the defendant would not do, and it was necessary for plaintiff to call in a neighbor to help her install it, or watering the lawn or painting. See further R. 545, 361, 368, 377, 379, 380, wherein the plaintiff testified that defendant had not allowed her to sleep for three nights in a row; and wherein she pled with defendant to allow her to talk to Mr. Ralph McBroom, the defendant's brother, and wherein the plaintiff asked Mr. Ralph McBroom to please tell Howard to let her get some sleep, that she was exhausted. See R. 384 where the plaintiff testified that she



requested the defendant to seek marriage counseling with her. Also R. 394, 397, 214, 404, 424, 426, 192, 441, 470, 471, 534, 547, 559, 439, 438, 402. A reading of the record certainly indicates a stormy marriage for these people, and if fault there be, it lies on the shoulders of both parties and not just one of these parties. See R. 404 where the plaintiff testified that defendant admitted to her he had been going out with women from the time Kirt was one year old.

Defendant's statement in his brief wherein defendant testified that commencing in 1956 the plaintiff began disappearing from the home of the parties and returning late at night under the influence of alcohol, and the refusal of plaintiff to participate in the activities of the family with the minor children. All of these statements were denied by the plaintiff. See R. 546, 534, 573, 548, 245, 282, with respect to the Lagoon outing, concerning which the defendant makes such contention that the plaintiff refused to go with him, when in truth and fact, according to the plaintiff's testimony, the defendant did not even invite her. And on another occasion when she had stayed home to clean the house in order that the defendant's brother and wife could come and visit them that evening for a birthday celebration. R. 546, 571.

With respect to the statement of defendant that plaintiff stayed with Jarvis in his home in Kearns, the truth of the matter is that she was there in

his home approximately 45 minutes. R. 284. Or, that she had stayed in his apartment. She had been at his apartment only long enough to help him put some work pants on a stretcher, and then left. R. 301. And defendant's statement that she had been away in the canyons with him. This occurred on one occasion, and she returned home before eight o'clock in the evening.

It would seem strange that if the contentions of the defendant are true, as he has set forth in his brief, that the trial judge would not have made findings of fact which were more consistent with contentions of the defendant.

The defendant comments in his brief that the plaintiff commenced using contraceptives in August of 1961, when actually the contraceptives they speak of were purchased back in 1955. See R. 453, also R. 550, 551, wherein the plaintiff definitely testified that these contraceptives were never used for intercourse with anybody other than her husband. R. 550. The obvious conclusion is that they had been used by plaintiff and defendant since they were purchased in 1955.

At page 10 of the defendant's brief, defendant seems to make light of the fact that plaintiff kept a menstrual chart, Exhibit 21, which was a 1961 calendar. It is curious to note the notations which were placed on said calendar. "Monthly Record." "New toothbrushes." "Started 5-19-61 ended 9-10." "H. drank and brought up the paper." "How long

can I take it." Seven x's on December 19, 21, 22, 27, 29, 30 and 31. Said "x's" indicating the days that defendant was drinking. R. 360. "Saw him in front of the Pecan 12-2." "What a year, I hope I never have another one like that." Notations on the reverse side of the 1960 calendar are as follows: "Monthly Record." "He did it again." "Physical cruelty by Howard before kids." "Mrs. Hall did not work." "Mrs. Hall one half a day." "Tendency to have headache."

With respect to the defendant's contention that the plaintiff did not provide proper care for her children, Mrs. McDonald, the children's school teacher testified as follows R. 345:

"Q. You are familiar with Mrs. Mc Broom, are you not?

"A. Yes.

"Q. Is she active in any school organizations?

"A. Yes, she has been in PTA and always showed deep concern for the welfare of the children. I noticed it then and I notice it now."

Further, at R. 513, the testimony of Mrs. McDonald:

"A. Yes she has. Just today the nominating committee asked her to serve as president of the PTA for the year 1962-63." (referring to Mrs. McBroom)

Further, on cross-examination of Mrs. McDonald by defendant's counsel: (R. 513)

"Q. Mrs. McDonald are you aware of the

evidence that has been presented at this proceeding?

“A. Part of it.

“Q. The nature of it?

“A. Part of it from what you read the other day.

“Q. Did you advise the committee of this?

“A. I had nothing to do with the committee.

“Q. I see, as far as you know the committee is not aware of any of this evidence?

“A. I think they are because the president of the PTA has called in to get quite a lot of information.

“Q. Do you think they know quite a lot about this?

“A. Didn't you call Mrs. Huffner?

“Q. I don't know.

“A. I think you did.

“Q. I interviewed quite a good many witnesses.

“A. I think you did a pretty thorough job.

“Q. In spite of the evidence the committee apparently still wants her to govern our children in that area of the city?

“A. They may not accept your evidence.”

With respect to the defendant's assertion that he was a good father and that plaintiff had no concern when the children were with him, it is inter-

esting to note the plaintiff's testimony R. 205:

“Q. When he has those children you don't have to worry for one minute about their welfare, do you?

“A. Not unless he is drinking.”

To the defendant's contention on page 12 of his brief that plaintiff arrived home in the early morning hours under the influence of alcohol and neglected her children; that she was physically unable to care for her children—such was denied by the plaintiff. Certainly such testimony on the part of the defendant was not believed by the trial judge, otherwise he would not have found that plaintiff was a fit and proper person to have custody of the children. R. 38, 39.

With reference to the plaintiff attending church at the Presbyterian Church, the plaintiff testified, “I have frequently attended the Presbyterian Church, except when I was obviously not invited.” R. 56, 574.

Further, with respect to the plaintiff's caring for the children properly, see the testimony of unbiased and unprejudiced neighbors of plaintiff and defendant. The testimony of Mrs. Glade K. Jenson, R. 514 to 517. The testimony of Mrs. Beverly Chase, R. 355, 518, 519, 180. Mrs. Clarence R. Hall, in this respect also, R. 506- 511. Laurence McCormick, R. 384 to 389.

With respect to defendant's income, the defendant's gross income was \$8,200.00 for the year 1961,

with a net after deducting “automobile depreciation, mileage and other expenses,” of \$547.00 per month. R. 181. And while at page 21 of defendant’s brief, the defendant is extolling his virtues as to being a provider in the home, the plaintiff was also working and earning a monthly income of some \$370.00 per month gross income, which the plaintiff was contributing to the family expenses without the benefit of “deductible expenses.” Plaintiff’s monthly gross earnings at Kennecott were \$370.00 per month R. 185, from which plaintiff made her own monthly payment on her automobile, R. 185. With reference to plaintiff’s earnings, see Exhibit 1 and particularly attached thereto the employee pay statements showing net earnings of \$114.19 for one pay period and \$100.37 for the next pay period, showing a net income of \$214.56 per month. See also Exhibit 46.

It should be noted at this point that said paycheck stubs show a Credit Union deduction of \$45.00 per pay period. Said Credit deductions are applied as follows: \$74.00 payment on plaintiff’s automobile and the balance used for taxes and insurance on said automobile of plaintiff. R. 69, 66.

With respect to the defendant’s statement on page 32 of his brief, that the plaintiff offered no evidence of a constructive program for the care and protection of the children. Reference should be made to the testimony of the neighbors and school teacher, whose testimony the plaintiff offered, and compare the same with the naturally biased testimony which



the defendant offered through his 77 year old mother, and Mrs. R. A. McBroom, who has five children of her own to care for, and is the wife of the defendant's brother, Mr. Ralph McBroom.

Admittedly the plaintiff must leave the children with baby tenders while she is at work. However, the defendant could offer no other alternative. Surely if the defendant wants to pay sufficient to enable the plaintiff to stay home and care for the children on a full-time basis, she would be perfectly willing to do so. However, apparently he was not concerned about this during the four-year period during their marriage that the plaintiff was working. See defendant's brief page 53.

With reference to the Exhibits 28 through 37, pictures and other written documents, certainly the defendant was aware of these items being in the home. By the plaintiff's own testimony she did not even recall these items. R. 334, 335, 336. If the defendant had been so shocked and disgusted at these exhibits, certainly he would have destroyed them on his own in May of 1961 when he claims to have discovered them and would not have waited until January 15 of 1962 to take them with him when he removed his "financial records" from the home.

# ARGUMENT

## POINT I.

THE TRIAL COURT DID NOT ERR IN GRANTING CUSTODY OF THE MINOR CHILDREN OF THE PARTIES TO THE PLAINTIFF.

Even though defendant was awarded the divorce in this matter, the lower court specifically found plaintiff a fit and proper person to be awarded the care, custody and control of the minor children of the parties. Defendant's assertions, "that plaintiff visited insidious and immoral depravity upon the children" is not supported by the record and the lower court specifically found to the contrary.

In the case of SMITH v. SMITH, 1 Utah 2d 75, 77, 262 P.2d 283, 284, this court stated:

"The determining issue here is what will be for the best interest of the child. This is an ultimate question of fact which the trial court found in the mother's favor. Child custody cases are equitable in nature and so we must review both the law and the facts. Here we have a double problem of determining not only the occurrences and events here involved but the much more uncertain and controversial problem of trying to look into the future and see the effect on the happiness and well being of the child each course will bring, and thus determine which course will be for the best interest of the child. In making this decision we must keep in mind that the trial court saw and heard the witnesses when they gave their testimony and is thus in a much better position to understand and evaluate their testimony than we are from reading

the cold record. This is particularly true in determining which will best serve the interest of the child, for the trial court has seen the contestants in action, has observed their personalities, manners and attitudes, and has had the opportunity to evaluate the ability of each of the parties concerned to win the friendship, confidence, love and control of the child and the affect on its life that association with each of such parties may have. In view of these facts we hesitate to over turn the findings of the trial court unless we find them evidently erroneous.”

See also WALTON v. KAUFMAN, 110 Utah 1, 169 P.2d 97; BRIGGS v. BRIGGS, 111 Utah 418, 181 P.2d 223; SAMPSELL v. HOLT, 115 Utah 73, 202 P.2d 550; STUBER v. STUBER, 121 Utah 632, 244 P.2d 650.

The obvious conclusion from the evidence is that the trial court concluded that plaintiff was better suited to have the custody of the children awarded to her, and to this effect the court so found and so stated in its Findings of Fact, Conclusions of Law and Decree.

#### POINT II.

THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF \$200.00 PER MONTH FOR THE SUPPORT OF THE TWO MINOR CHILDREN, THE HOME OF THE PARTIES, THE FURNITURE AND FIXTURES IN THE HOME EXCEPT FOR CERTAIN ITEMS AWARDED TO DEFENDANT, AND THE PLAINTIFF'S OWN AUTOMOBILE.

Defendant's gross income for the year 1961 was \$8200.00 with a net after deducting “automobile depreciation, mileage and other expenses,” of some \$547.00 per month R. 181. In addition to the \$200.00

per month support money for the two minor children, defendant was ordered to assume the obligation to the Seaboard Finance Co. payable at the rate of \$31.00 per month, and to pay the loan on the stereo to Walker Bank, which loan amounted to \$114.00 at the rate of \$19.00 per month, and which should have been paid off by the 1st day of January, 1963. R. 68, 69. Said stereo was awarded to the defendant as his sole and separate property. The plaintiff on the other hand was ordered to assume and pay the obligation on her own automobile amounting to \$74.00 per month, which obligation the plaintiff is still paying. Defendant's statement in his brief at page 48 to the effect that plaintiff has a net income of \$370.00 per month from her employment is entirely erroneous, as the defendant well knows the plaintiff's gross monthly earnings were \$370.00 with net nearings of \$214.56 per month ater the credit union deduction. See exhibit 46. The defendant in his affidavit in support of his motion to amend the Findings of Fact, Conclusions of Law and Decree specifically stated that the total amount of his monthly obligations, in addition to the \$200.00 per month support money, amounted to the sum of \$146.00 per month. R. 68, 69. The plaintiff, in addition to the foregoing, must make the monthly payment on the home of the parties in the sum of \$82.50 per month. Based upon the foregoing, it is obvious that the trial court had sufficient basis upon which to make a finding that the defendant

should pay the sum of \$100.00 per month per child and the additional sum of \$1.00 per year as alimony.

The plaintiff's as well as the defendant's accumulated earnings enabled the parties to acquire the home and furnishings of the parties. The fact that the court awarded the home and furnishings to the plaintiff is further evidence that the court considered the plaintiff to be a fit and proper person to have custody of the children, and that the home and furnishings were necessary to enable her to properly care for said children. Here again the recent decisions of this court have affirmed the position that the distribution of property by the trial court should not be interfered with unless there is indicated a clear abuse of discretion.

In the case of WILSON v. WILSON, 5 Utah 2d 79 page 84, 296 P.2d 977, the court stated:

“It is true, as defendant contends, that a divorce proceeding is equitable and that it is within the prerogative of this court to review the evidence and to substitute its judgment for that of the trial court under proper circumstances. The more recent pronouncements of this court, and the policy to which we adhere, are to the effect that the trial judge has considerable latitude and discrimination in such matters, and that his judgment should not be changed lightly, and in fact, not at all, unless it were such a manifest injustice or inequity as to indicate a clear abuse of discretion.”



See also McDONALD v. McDONALD, 120 Utah 573, 236 P.2d 1066; LAWLOR v. LAWLOR, 240 P.2d 271; 121 Utah 201.

The property of the parties although meager in nature was accumulated by the joint efforts and earnings of both parties and the fact that the trial court awarded the home and furnishings to the plaintiff does not represent an abuse of discretion.

### POINT III.

THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFF \$1.00 PER YEAR ALIMONY AND \$750.00 ATTORNEYS FEES.

Defendant's statement to the effect that the plaintiff's suit was commenced fraudulently is entirely groundless as shown by plaintiff's statement of facts. With respect to the question of attorneys fees being awarded to the plaintiff, the defendant cites the case of Holm v. Holm, 44 Utah 242, 139 P. 937, and Graziano v. Graziano, 7 Utah 2d 187, 321 P.2d 931. Certainly the Graziano case is in no way comparable to the situation in the case at bar. In the Graziano case the defendant husband had no income except as an inducted G.I. soldier. And in that instance the plaintiff wife declared her ability to take care of her own needs. The case of Holm v. Holm is similar to that of the Graziano case, and is not comparable to the case at bar.

As the court can readily determine from the voluminous record in this case, considerable time was spent in the preparation and trial of this action,



the actual trial lasting four days. The lower court in making an award of counsel fees to the plaintiff specifically stated R. 43:

“Defendant is hereby ordered to pay to plaintiff to assist her in paying her attorneys fees the sum of \$750.00 and plaintiff is hereby awarded judgment against defendant for said amount.”

It was specifically agreed between plaintiff and defendant that the question of attorneys fees and the amount thereof would be left to the discretion of the trial judge. R. 410.

This court has said on many occasions that it will not substitute its judgment in a divorce proceeding relative to alimony and division of property for that of the trial court unless the record clearly discloses that the trial court's decree in such matter is plainly arbitrary. See ALLEN v. ALLEN, 109 Utah 99, 165 P.2d 872. Certainly there is no showing that the trial court abused its discretion or was arbitrary in this matter. The court felt that in view of the necessity for the plaintiff to work to assist in the support and maintenance of herself and the minor children, and the income of defendant, that the retention of \$1.00 per year as alimony was necessary and proper. The necessity of plaintiff making application for alimony in the event of illness or other matters rendering her destitute would require such protection.

Furthermore, the awarding of \$750.00 attorneys fees to the plaintiff to assist her in payment of her counsel fees is not unreasonable and does not show an abuse of discretion on the part of the lower court.

Respectfully submitted,

LELAND S. McCULLOUGH

304 East First South

Salt Lake City 11, Utah

Attorney for Plaintiff and  
Respondent