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Mona McBroom v. Howard Kirtley McBroom : Defendant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY OF UTAH

OCT 29 1963

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MONNA McBROOM,

Plaintiff and Appellant,

vs.

Case No. 9702

HOWARD KIRTLEY
McBROOM,

Defendant and Respondent.

Defendant's Answering Brief to Plaintiff's Brief
on Plaintiff's Appeal from the Order of the
Honorable Marcellus K. Snow, Third District
Court for Salt Lake County, Utah

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Clerk, Supreme Court, Utah

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Defendant's Answering Brief to Plaintiff's Brief
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Court for Salt Lake County, Utah

STATEMENT OF FACTS

We do not agree with plaintiff, Monna McBroom's, statement of facts set forth in plaintiff's brief with respect to the appeal by plaintiff from the order entered by Judge Marcellus K. Snow on the 19th day of July, 1962.

The trial court entered its findings of fact and decree of divorce, from which defendant, Howard Kirtley McBroom, is appealing to this court, on April 23, 1962. (R. 38-44.) On June 25, 1962, de-

fendant was forced to move the trial 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 the minds of the children 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 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 the defendant continued to prosecute this appeal and a suit against Bertram James Jarvis for criminal conversation with plaintiff, and plaintiff had continued to visit neglect and moral depravity upon the children since the trial. (R. 95-97.) Plaintiff filed a counter-petition 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 payment of support money, and to restrain defendant from coming on the premises of the home of the parties at 583 Cortez Street except to exercise his rights of visitation of the minor children. (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 defendant 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 purposes of hearing in this court.

The evidence at the hearing before Judge Snow was as follows.

Under the decree of divorce entered on April

23, 1962, the trial court erroneously granted custody of the minor children to plaintiff. The court did, however, grant defendant the right of reasonable visitation. (R. 38-44.)

Between the time of trial of the divorce action on March 13, 1962, and the date of the hearing before Judge Snow on July 9, 1962, plaintiff continually refused to permit defendant to visit the children except on certain Sunday afternoons between the hours of 12:00 o'clock Noon and 7:30 o'clock P.M. On those occasions defendant never knew whether he would have the children or not because, when he requested visitation, plaintiff would answer equivocally and say, "you come by on Sunday at noon." (R. 588, 597, 611.)

During the five month period between the time that defendant moved out of the home of the parties on January 31, 1962, (R. 11-12, 198, 477) and the date of the hearing before Judge Snow, plaintiff only permitted defendant to have the children with him overnight on one occasion, to-wit, on May 25, 1962, although defendant had continually requested that plaintiff permit him to have the children with him overnight. (R. 585-588, 598.)

During the period subsequent to the trial of this action plaintiff has used the children and refused defendant his rights of visitation in efforts to extort money from defendant. (R. 588-592.)

On Saturday, March 24, 1962, plaintiff told defendant that he could not visit with the children on the following Sunday afternoon unless the defendant paid her \$25.00 so that she could pay a water bill. Defendant had previously on two occasions given her money to pay this bill. Defendant replied to the plaintiff, "I am not going to buy my children." Plaintiff said, "Then you won't see them." Defendant pointed out to plaintiff that she was using the children and that it was not good for them, and plaintiff replied that it was not good for him either. (R. 588-589.) On the following day, Sunday, March 25, 1962, plaintiff had the little girl, age 6, and the little boy, age 8, call the defendant on the telephone and tell him that the plaintiff said he could have them that afternoon if he would pay the plaintiff \$25.00. Plaintiff broke in on the conversation and told the little girl to tell her father to bring the money in cash. The little girl was crying and the little boy was very upset. They pleaded with their father to pay \$25.00 in cash to the plaintiff so that they could be with him for an afternoon. The defendant explained to the children that it would not be right for him to pay money in order to see his children. The plaintiff, mother, then broke in on the conversation again and said to the children concerning their father, "The son-of-a-bitch wants the water turned off and he wants to hurt us all that he pos-

sibly can.” (R. 589-592.) Plaintiff on the witness stand in the hearing before Judge Snow admitted that she refused to let defendant have the children on this occasion because he would not pay her the money that she demanded. She did not deny the cruelty and moral depravity visited on the children on this occasion. (R. 628.) On another occasion plaintiff demanded that defendant pay her \$200.00. Defendant replied that he was mailing the \$200.00 to the clerk of the district court that day. Plaintiff then said, “If it isn’t in there when I say it is going to be in there, then you won’t see the children.” (R. 593.)

Plaintiff used the children, and denied defendant his rights of visitation, and threatened to remove the children from the State of Utah and never permit defendant to see the children again, if defendant continued to prosecute his appeal to this court from the decree of divorce entered by Judge Jeppson in this action. She also visited the same misconduct and cruelty upon the children and made the same threats if defendant continued to prosecute an action for criminal conversation against Bert Jarvis in connection with his and plaintiff’s adulterous activities. Just prior to Memorial Day, May 28, 1962, defendant called plaintiff and requested visitation of the children over the holiday. Plaintiff then asked defendant if he was going to

continue the adultery suit against Bert Jarvis and whether defendant was going to appeal to this court from the decree of divorce. Defendant replied that he was. Plaintiff thereupon refused to grant defendant permission to see the children over Memorial Day and refused to permit him to visit the children for three weeks thereafter. (R. 592-593, 614.) In the same conversation plaintiff told defendant that, if he continued with the lawsuit against Jarvis or with his appeal, she would take the children out of the state and he would never see them again. She also said that, when she got through with the children, they would never speak to their father. (R. 593.)

Since the trial of the divorce action plaintiff has beaten and punished the children for visiting with their father during periods when she was not permitting them to see their father at all. On one occasion defendant picked up the children after school and notified the plaintiff that he would return them to the home between 6:30 and 7:00 o'clock P.M. When the defendant took the children home, plaintiff slapped the little boy in the face and hit the little girl and caused her to fall down on the floor. (R. 605.) On another occasion defendant found his little boy riding his bicycle on the State Capitol grounds. When defendant approached the little boy, the little boy was terrified. His father told the little boy that he only wanted to talk to the

little boy for a few minutes. The little boy replied that he was afraid because he would get beaten by the plaintiff if he got in the defendant's car. The defendant suggested that they go call the plaintiff on the telephone and ask if they could play for twenty or thirty minutes. They did so. In the conversation the plaintiff said to the little boy, "If you're not home in five minutes I'm going to hit you six times with a stick instead of five." Thereafter the defendant let his little boy go home. (R. 604-605.) Defendant pointed out to plaintiff the damage she was doing to the children by punishing them for associating with him. Plaintiff in the conversation admitted that she punished the children for associating with their father. (R. 606.) Plaintiff also admitted on cross-examination that she punished the children for associating with their father. (R. 645-646.) The defendant testified as to the effect on the children of this conduct of the plaintiff. A week before the hearing before Judge Snow defendant went to see the children at a baby tenders. The little boy said, "What do you want, what do you want? I don't want to see you." The boy then explained that he did not want to see his father because he would get hurt by the plaintiff. (R. 606.)

Plaintiff has repeatedly since the trial of this action attempted to poison the minds of the children against their father and to alienate their affection

for him. She told the defendant that, when she got through with the children, they would never speak to him again. (R. 593, 606.) She berated the little girl to the point of tears because the little girl only gave her a homemade Mother's Day card and no other present on Mother's Day and then said to the little girl, "It's your father's fault and your fault. And you remember all those other little children that brought presents for their mother, but not you." When defendant confronted plaintiff with this incident, she replied, "So what." (R. 603.) She referred to the defendant as a son-of-a-bitch and told the children that he wanted to hurt them all he could. (R. 591.) Plaintiff testified as a conclusion over objection that she never degraded the defendant in the eyes of the children. (R. 627-628, Plaintiff's brief on appeal from the order of Judge Snow, (p. 9.) In the face of the uncontroverted facts, plaintiff's notions as to what is degrading do not conform to ordinary standards.

The evidence at the hearing before Judge Snow was that, subsequent to the trial of this action, the children were left at the homes of baby tenders all day while the plaintiff was working and even for extended periods when she was not working, rather than in the care of the defendant and their blood relatives. (R. 650, 610, 599.) Defendant at the hearing offered to care for the children at all times, with

his mother, Mrs. R. A. McBroom, and other competent help, when plaintiff was unable to care for them. (R. 619.) Plaintiff on the witness stand admitted, as she had done at the trial before Judge Jeppson (R. 205, 234-235, 250, 273), that the defendant was a good father. (R. 653-654.) On cross-examination she refused his offer to care for the children when she was unable to do so. She gave as her reason that it was damaging to the children even though he was a good father. When pressed for an explanation as to why it was damaging, she replied that it was bad for the children because he gave them presents, such as a race bug for his little boy and he spent \$41.00 on an outing for the children on one Sunday. (R. 649-650, 654.) For extended periods plaintiff hid the children from their father in the home of a strange baby tender. (R. 599.) Defendant was required to shadow her in order to learn of their whereabouts so that he could be advised as to their care and welfare. (R. 599.) On the little boy's birthday, June 8th, plaintiff refused to permit the children to be with their father and instead left them all day at a baby tender's home. (R. 598-600, 631-632.) The defendant went anyway and visited his little boy at the baby tenders for two hours on his birthday. (R. 599-600.) On the witness stand the plaintiff admitted that she refused to permit the children to see their father on the

following Sunday because he had gone and seen the little boy at the baby tender's on his birthday. (R. 631-632.) On Saturday, June 9, plaintiff refused to permit the children to go fishing with their father. Instead she sent the little boy fishing with a strange neighbor, whom the defendant had only seen on one occasion. (R. 600, 631-632.) On certain occasions subsequent to the trial of this action the children have been left alone and completely unattended. On one occasion defendant called the home of a baby tender where he knew the children to be staying. The little girl answered the telephone. She was crying and afraid because there was no one in the home except an infant child of the baby tender. The defendant thereupon went to the baby tender's home and cared for the child. (R. 611-612.) The children on one occasion contracted measles. The plaintiff refused to permit the children to stay with their father and instead left them during this period in the home of a baby tender. (R. 630.) On another occasion defendant went to the home of a baby tender and found the little girl running the streets alone in the neighborhood because the baby tender was not at the home. (R. 611-612.)

Since the trial of the divorce action plaintiff has continued to use obscene language and visit moral depravity upon the children. Specifically she and her mother taught the little girl, age 6, and the

little boy, age 8, two filthy jokes, one that had as the punch line, "Bitch, Bitch, Bitch," and another that ended with, "Jesus Christ shit his pants." (R. 613-614.) We regret the necessity of printing this material. However, the urgency of the situation with reference to the children before this court compels us to do so. This type of profanity is not the result of bitterness arising from a divorce action. It is the deliberate visitation of immorality upon children.

On direct examination by her own counsel plaintiff testified that she *had never* told the children any dirty jokes. (R. 37.) On cross-examination by defendant's counsel plaintiff reiterated the denial. (R. 639.) She was thereupon asked, as she had been asked at the trial of the divorce action, whether or not she had ever engaged in a conversation with defendant and the children in which she said, "Play with your teats, Howard. Are they growing. Look, Lisa, he is rubbing his teats." Twice under oath at the hearing before Judge Snow she categorically denied, as she had done at the trial before Judge Jeppson (R. 254), that any such conversation ever occurred. (R. 639-641.) She then stated under oath, as she had done at the trial before Judge Jeppson (R. 255-261), that she did not want the recording of this conversation played for the court. (R. 644.) Thereafter the hearing before Judge Snow was adjourned. (R. 665-666.) Plain-

tiff had again committed perjury with reference to her direct visitation of moral depravity upon the children. (See defendant's brief on appeal from the decree of divorce, pp. 23-24.) On the following day, July 10, 1962, plaintiff and her counsel found it necessary to move the court to re-open the hearing before Judge Snow to correct her perjured testimony. The court ordered the hearing reopened for the limited purpose of taking plaintiff's testimony with reference to this matter. (R. 110-111.) On July 11, 1962, plaintiff again appeared before Judge Snow and admitted that the conversation had occurred between herself, the two children and Mr. McBroom and that Exhibit 17 was a true and correct transcript of the conversation. (Ex. 17, R. 667-668.) It is again 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.

At the hearing before Judge Snow and on this appeal from Judge Snow's order plaintiff has asserted as an excuse for prohibiting the children from being with their father over week-ends and, in particular, on Sunday mornings, that she wanted to take the children to the L.D.S. Church herself on Sunday mornings. (R. 627, Plaintiff's brief on ap-

peal from the order of Judge Snow, p. 12.) The uncontroverted evidence at the trial of the divorce action before Judge Jeppson was that defendant always took the children to the Presbyterian Church, pursuant to an agreement of the parties that the children would be raised in the Presbyterian Church, and that defendant attended church with them and plaintiff did not except on rare occasions. (R. 482-484, 564, 607-609.) At the trial plaintiff was forced to admit that on one occasion she was consorting on Sunday morning with a married man in an apartment on the west side of Salt Lake City while her children were attending church with her husband. (R. 303.) The fact that the plaintiff and her attorney are raising a religious issue before this court is, in the light of plaintiff's conduct and standards of immorality, fantastic. At the hearing before Judge Snow on cross examination plaintiff admitted that she had not attended the L.D.S. Church with the children every Sunday since the trial of the action and, when pressed on the issue, she admitted that she did not even know what Sunday school class she was in or the name of the teacher of the class. (R. 653.)

Plaintiff asserted at the hearing before Judge Snow and now asserts in her appeal from the order of Judge Snow that she has been entirely reasonable in permitting defendant to visit the children since

the trial of the divorce action. In support of this assertion, plaintiff testified in detail at the hearing, and set out in plaintiff's brief on appeal from the order of Judge Snow in detail, the times when defendant had visited the children since the trial of the divorce action. (R. 628-632, Plaintiff's brief on appeal from the order of Judge Snow, pp. 4-5.) From this, plaintiff argues in the brief that, "the plaintiff's testimony in detail is set forth in the statement of facts showing the times and places when defendant had taken the children prior to the hearing before Judge Snow, *and based thereon, certainly defendant could have no reasonable grounds upon which to complain that he was being denied visitation.*" (Plaintiff's brief on appeal from the order of Judge Snow, p. 11.) This is a deliberate and dishonest attempt on the part of the plaintiff to mislead this court. The uncontroverted facts are that, when defendant has visited the children subsequent to the trial, defendant has been forced to do so over the protest and without the consent of plaintiff under circumstances in which plaintiff was using the children in an effort to extort money from the defendant, punishing them and visiting cruelty upon them for seeing their father, and visiting immorality and neglect upon them. (R. 614, 585-588, 598, 611, 589-592, 628, 593, 592-593, 614, 645-646.)

The evidence at the hearing before Judge Snow

was that defendant had not touched the plaintiff since prior to the divorce action (R. 616), that defendant had never threatened to beat plaintiff (R. 620), and that defendant had not gone on the premises of the parties since the divorce action except for the purpose of carrying the children up to the door and leaving them after visitation (R. 614-616), and there was no evidence that defendant had harrassed plaintiff while at work.

The hearing before Judge Snow was held on July 9, 1962. Defendant was not in default, much less in contempt of court, for failure to pay support money. (Ex. D-A1, R. 621-623.)

Judge Marcellus K. Snow found all of the issues in favor of defendant (R. 78-81), and on July 19, 1962, entered an order granting defendant rights of visitation and issued restraining orders to guarantee enforcement. (R. 82-84.) Specifically Judge Snow found the following. (1) That since the trial of the divorce action plaintiff had repeatedly and persistently denied defendant his rights of visitation of his minor children and plaintiff had used the children and refused defendant his right of visitation for the purpose of attempting to force defendant to pay money to plaintiff. (2) That plaintiff since the trial of the divorce action had repeatedly attempted to alienate the affections of the children for defendant and attempted to degrade

defendant in the minds of the children. (3) That plaintiff had threatened to remove the children from the State of Utah and never permit defendant to see his children again. (4) That defendant had paid plaintiff all sums of money due and owing for support under the decree of divorce and that defendant was current in his payments of support money and not in contempt of the court in connection therewith. (5) That defendant had not, since the trial of the divorce action, gone on the premises at 583 Cortez Street except for the purpose of delivering the children to the doorstep of the home after visiting with the children and that defendant had not abused or molested the plaintiff. (R. 78-81.) Judge Snow thereupon entered an order fixing the times of visitation and restraining plaintiff from using the children and denying defendant rights of visitation for the purpose of attempting to force defendant to pay money to plaintiff and restraining plaintiff from taking the children out of the State of Utah for a period in excess of 30 days without express permission of the court, first had and obtained, on notice to defendant and a hearing thereon. Judge Snow further ordered plaintiff to disclose to defendant the location of any home in which the children might be staying and the telephone number of such home. He further provided in his order that defendant was current in his payments of support

money and that the next payment was to be made during the month of July, 1962. He thereupon awarded plaintiff a judgment against defendant in the sum of \$125.00 for attorney fees in connection with this hearing. (R. 82-84.)

Defendant testified at the hearing before Judge Snow that, when plaintiff denied him the right to visit his little boy on his birthday, he told plaintiff he was going to apply to the court to define what reasonable visitation was; and, that plaintiff replied, "I don't care what the court says. I am going to do as I please." (R. 598-599.) Plaintiff's attorney asked plaintiff at the hearing before Judge Snow whether she ever told defendant that she would not live up to the order of the court. Plaintiff replied that she, "never, never did." (R. 638.) She thereupon proceeded to violate the order of Judge Snow (R. 114-115, 117-122, 675-691) and defendant was again forced 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 Judge Snow's order. (R. 675-691, 127-129.) Judge Ellett ordered plaintiff to comply with the order of Judge Snow and required her to make up for her previous violations. (R. 127-129.)

ARGUMENT

POINT 1.

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT PLAINTIFF A JUDGMENT FOR \$200.00 DELINQUENT SUPPORT MONEY.

Plaintiff, in her counterpetition before Judge Snow, claimed that defendant was behind one month in payment of support money as of the date of the hearing on July 9, 1962, and sought to hold defendant in contempt of court by reason of the alleged delinquency and sought a judgment against defendant for \$200.00 delinquent support money. The decree of divorce was entered on the 23rd day of April, 1962. Paragraph No. 3 of the decree provided as follows: "Defendant is hereby ordered to pay plaintiff *the sum of \$100.00 per month for each of said minor children*; for their support and maintenance; * * * said payments to commence as of the 23rd day of March, 1962, * * *." (R. 42-44.)

After defendant discovered the contents of plaintiff's diary and shorthand notes, defendant, in order to obtain an immediate and speedy trial of the divorce action, moved out of the home pursuant to the stipulation dated January 31, 1962, to the effect that defendant's so doing would be without prejudice to his rights. (R. 11-12, 198, 477.) Pursuant to the stipulation defendant agreed to pay plaintiff the sum of \$200.00 for the month of February, 1962, and \$200.00 for the month of March,

1962, pending a decision in the divorce action, which was set down for trial on March 13, 1962. (R. 18, 621.) Defendant expressly conditioned payment of the \$200.00 on plaintiff's signing and returning the stipulation to defendant as set forth on the receipt dated February 2, 1962, for payment of the first \$200.00. (Ex. D-A1.) The admitted facts are that, pursuant to the stipulation and the decree of divorce, defendant had made the following payments to plaintiff since defendant moved out of the home of the parties: \$200.00 on February 2, 1962, for the month of February as evidenced by the receipt dated February 2, 1962; \$200.00 on March 1, 1962, for the month of March as evidenced by the receipts dated March 1, 1962; \$200 on May 2, 1962, for the month of April as evidenced by the check and receipt dated May 2, 1962; \$200.00 on May 28, 1962, for the month of May as evidenced by the check dated May 28, 1962; and, \$200.00 on June 29, 1962, for the month of June as evidenced by the receipt dated June 29, 1962. (Ex. D-A1, R. 621-623.)

The hearing before Judge Snow was held on July 9, 1962. Defendant was not in default, much less in contempt of court, for failure to pay support money.

Plaintiff, in her brief on appeal from the order of Judge Snow, at page 10, asserts that defendant is not entitled to credit for any payments of sup-

port money made prior to entry of the decree of divorce. The decree of divorce was entered on the 23rd day of April, 1962, and provided for payment of \$200.00 per month commencing as of the 23rd day of March, 1962. The decree was entered after the month of March had expired. Defendant had already paid \$200.00 for the month of March. The effect of plaintiff's assertion is that, since defendant cannot have credit for any payments made prior to entry of the decree and since the month of March had already expired at the time of entry of the decree, and the decree expressly required payment of \$200.00 for the month of March; therefore, defendant must go back again after April 23rd and pay twice, or a total of \$400.00 for the month of March, in which month he had already paid \$200.00. This assertion is typical of the attitude displayed by the plaintiff throughout the marriage, during this litigation, and subsequent to the entry of the decree of divorce.

Furthermore, if we were to assume that plaintiff's assertion is correct to the effect that defendant is only entitled to credit for payments made subsequent to entry of the decree of divorce, defendant was nevertheless not delinquent in payment of support money at the time of the hearing before Judge Snow on July 9th. Subsequent to the decree of divorce defendant paid plaintiff \$200.00 on May 2,

1962, \$200.00 on May 28, 1962, and \$200.00 on June 29, 1962, as evidenced by Exhibit D-A1. The decree of divorce entered on April 23, 1962, provided that defendant pay plaintiff \$200.00 per month support money commencing as of the 23rd day of March, 1962. The \$200.00 payment made on May 2nd may be credited for the monthly period from the 23rd day of March, 1962, to the 23rd day of April, 1962. The \$200.00 payment made on May 28th may be credited for the monthly period from the 23rd day of April, 1962, to the 23rd day of May, 1962. The \$200.00 payment made on June 29th may be credited for the monthly period from May 23, 1962, to June 23, 1962. At the time of the hearing before Judge Snow on July 9, 1962, defendant had until July 23, 1962, in which to make the payment of \$200.00 per month for the period from June 23, to July 23, 1962.

It should be noted at this time that the fact that the defendant agreed to pay plaintiff the sum of \$200.00 per month for the months of February and March of 1962, prior to the trial of the divorce action, is not to be construed by this court as an admission by defendant that the award by the trial court in the decree of divorce of the sum of \$200.00 per month support money to plaintiff is reasonable and not excessive. Defendant agreed to pay plaintiff \$200.00 per month for the months of February and

March of 1962 prior to trial of the divorce action pursuant to the stipulation dated January 31, 1962, in order to obtain an immediate and speedy trial in which defendant sought immediate custody of his children, and the stipulation expressly provided that it should be without prejudice to the rights of the defendant.

The irresponsibility and dishonesty with which plaintiff attempts to force defendant to pay her \$200.00 twice for the month of March, 1962, or a total of \$400.00 for that month, is patent in the face of the decree of divorce entered by Judge Jeppson, which effectively took from defendant his children and all of his property and left defendant with \$56.92 per month upon which to live before payment of rent and federal and state income taxes. (See, defendant's brief on appeal from the decree of divorce entered by Judge Jeppson, pages 47-49.) This irresponsibility is further demonstrated by the fact that there appears on the check dated May 2, 1962, in the amount of \$200.00, payable to the plaintiff, after the signature of Howard Kirtley McBroom, the words "McGoo vs. Magoo" in pen and handwriting identical to that of the endorsement by Monna McBroom on the reverse side of the check. (Ex. D-A1.) This is a serious matter. It is one more example of the irresponsibility and unfitness of plaintiff demonstrated throughout the entire record.

POINT 2.

THE TRIAL COURT DID NOT ERR IN REFUSING TO SET UP VISITATION RIGHTS FOR THE DEFENDANT IN ACCORDANCE WITH PLAINTIFF'S ANSWER AND COUNTERPETITION.

Judge Snow in his order granted the defendant the right to have the children visit with him every other week-end from Friday at 3:00 o'clock P.M. to Sunday at 7:30 o'clock P.M. and on the alternate week-ends from 9:00 o'clock A.M. to 7:30 o'clock P.M. on Saturday. (R. 82-84.)

Plaintiff in her counterpetition before Judge Snow sought to limit defendant's rights of visitation to one day every other week from 6:00 o'clock P.M. on Friday until 6:00 o'clock P.M. on Saturday and one-half a day on the alternate weeks from 1:00 o'clock P.M. to 7:30 o'clock P.M. on Sunday afternoons. (R. 98-101.)

Plaintiff argues that it was unfair for Judge Marcellus K. Snow to substitute the court's judgment for plaintiff's judgment with respect to defendant's rights of visitation with his children pending this appeal. (See, plaintiff's brief on appeal from the order of Judge Snow, p. 13.) This assertion involves an error on a basic assumption, to-wit, that plaintiff is competent to formulate a judgment as to what is in the best interest of the children in any respect including their relationships with their father. The record as to what has happened since

the trial of the divorce action demonstrates that she is not. See, Statement of Facts, *supra*. p 1, *et seq*.

Plaintiff asserts that the effect of Judge Snow's order is that she only has the children on Sunday every other week-end. (Plaintiff's brief on appeal from the order of Judge Snow, p. 7.) The effect of Judge Snow's order is that the defendant has the children with him only two days of every other week and one day during the daytime on the alternate weeks, or a total of six days a month.

Plaintiff asserts that defendant should be prohibited from having the children on any full Sunday so that she will be able to attend to their religious activities. (Plaintiff's brief on appeal from the order of Judge Snow, pp. 4 & 12.) This assertion is incomprehensible in the light of the record of plaintiff's conduct during the marriage and from the time of trial of the divorce action down to the date of the hearing before Judge Snow, *supra*. p. 13, *et seq*.

Plaintiff asserts that, since Judge Jeppson awarded her custody of the children, she is a fit and proper person to have their custody; and, therefore, Judge Snow erred in refusing to adopt her notions as to what is in the best interest of the children with respect to their visitation with their father. (Plaintiff's brief on appeal from the order

of Judge Snow, p. 12.) This assertion involves an error on the basic assumption, to-wit, that plaintiff is a fit and proper person to have the care and custody of the children. The admitted facts at the trial of the divorce action and the admitted facts at the hearing before Judge Snow demonstrate conclusively that she is not. See, Statements of Facts, *supra*. p. 1, *et seq.*, and defendant's brief on appeal from the decree of divorce in which defendant is seeking custody of the children at this time, pp. 2-33, 39-47. Furthermore, this assertion involves an erroneous conclusion that plaintiff is capable of determining what is in the best interest of the children including their relationship with their father, in the face of the uncontroverted evidence that since the trial of the divorce action she has (1) repeatedly and persistently denied defendant visitation, (2) refused to permit defendant to see the children at all over extended periods, (3) used the children in efforts to extort money from the defendant, (4) left the children continually with baby tenders and at times unprotected and unattended, (5) punished the children for visiting with their father, (6) attempted to degrade the father in the eyes of his children and (7) alienate their affection for him, (8) repeatedly visited obscenity and moral depravity upon the children, and, (9) visited cruelty upon the children, *supra*. p. 4, *et seq.*

It must be noted at this time that defendant, pending this appeal, was forced to resort to the court to protect his children with respect to their visitation with their father. The fact that defendant at this time is taking a position in defense of Judge Snow's order protecting the matter of visitation must not be construed by this court as a concession in any sense on the part of defendant that plaintiff should be awarded custody of the children or that she is a fit and proper person to have their custody and control. The admitted facts at the trial of the divorce action and the uncontroverted and admitted facts as to her conduct subsequent to trial of the divorce action demonstrate conclusively that she is not and that it is in the best interest of the children that custody be awarded to the defendant.

See *Stuber v. Stuber* (1952) 121 U. 632, 244 P. 2d 650, in which 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; and, the evidence on behalf of the wife showed that the wife was living with her mother, 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. See, also, *Johnson v. Johnson* (1958) 7 U. 2d 263, 323 P. 2d 16, in which the court awarded custody of the 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.

POINT 3.

THE TRIAL COURT DID NOT ERR IN REFUSING TO RESTRAIN DEFENDANT FROM INTERFERING WITH PLAINTIFF ON PLAINTIFF'S JOB, OR HARRASSING THE PLAINTIFF AT HOME OR AT WORK, ON THE TELEPHONE, OR IN ANY OTHER MANNER, AND IN REFUSING TO RESTRAIN DEFENDANT FROM THREATENING PLAINTIFF WITH BODILY HARM.

Plaintiff complains in her appeal from the order of Judge Snow that the court failed to restrain defendant from interfering with plaintiff's job, or harrassing plaintiff at home or at work, on the telephone, or in any other manner, and from threatening plaintiff with bodily harm. (See plaintiff's brief on appeal from the order of Judge Snow, pp. 2 & 13.) Plaintiff, in her counter-petition before Judge Snow, did not seek such restraining order and merely sought an order restraining defendant, "from coming on the home premises at any time except to exercise his rights of visitation with the minor children as specifically set by the court." (R. 100-101.) The uncontroverted evidence at the hearing was that defendant had not gone upon the

premises of the parties since the divorce action except for the purpose of carrying the children up to the door and leaving them after visitation. (R. 614-616.) On one such occasion defendant did speak to the plaintiff and asked her if he could have his personal effects. Plaintiff replied by thumbing her nose at defendant in the presence of the children. (R. 615.) This evidence was uncontroverted. Defendant testified that he had never threatened to beat plaintiff and that he had not touched her. (R. 620, 616.) This evidence was uncontroverted. Defendant admitted on the witness stand that he told plaintiff he would use force, if necessary, to prevent her from taking the children out of the state so that he would never see them again, which plaintiff had threatened to do if defendant continued to prosecute this appeal or the action against Jarvis. (R. 592- 593, 614, 616.) Defendant further testified that he told the plaintiff that eventually he would not permit plaintiff to raise the children and that what he meant was that he had faith in the law. Plaintiff thereupon goaded him and said, "You mean law or no law, you're not going to let me raise the children?" The defendant then replied, "I am going to take those children. I can't permit this." (R. 617.) What man could say otherwise in the face of the uncontroverted and admitted facts before this court of visitation of cruelty, neglect and moral

depravity upon his children? Judge Snow specifically found that the defendant had not gone on the premises except for the purpose of delivering the children after visitation and that defendant had not abused or molested plaintiff. (R. 79.)

Plaintiff, in her brief on appeal from the order of Judge Snow at page 7, infers that she lost a job since the divorce action at Kennecott Copper Corporation because defendant harrassed her at work and expressed concern about disclosing where she was presently employed. There is absolutely no evidence in the record that plaintiff did lose her job because of any action on the part of defendant or that defendant harrassed her at work. Plaintiff's counsel expressly stated to the court that he was not representing that defendant's actions had anything to do with plaintiff's losing her job. (R. 662.) The only evidence in the record that defendant ever contacted plaintiff at work was a general assertion by plaintiff that defendant called her on the telephone, without any statement of the number, time, or nature of the calls. (R. 664.) Although there is no evidence in the record on the matter, we concede that defendant did telephone plaintiff at work on a few occasions and then only for the purpose of attempting to determine the whereabouts of his children and arranging to see them.

POINT 4.

THE TRIAL COURT DID NOT ERR IN RESTRAINING PLAINTIFF FROM TAKING THE CHILDREN OUT OF THE STATE OF UTAH OR IN ANY MANNER CAUSING THE CHILDREN TO BE REMOVED FROM THE STATE OF UTAH.

Judge Snow in his order restrained plaintiff from taking the children out of the State of Utah or from in any manner causing the children to be removed from the State of Utah for a period in excess of thirty days without express permission of the court, first had and obtained, upon notice to defendant and a hearing thereon. Plaintiff concedes in her brief on appeal from the order of Judge Snow that the court did not err in issuing this restraining order against plaintiff. See, Plaintiff's brief on appeal from the order of Judge Snow at Page 15 wherein plaintiff says, "The plaintiff does not quarrell with the proposition as cited by this court and universally accepted to the effect that the court should maintain control of the minor children of the parties and maintain said children within the jurisdiction of the court." Plaintiff, having conceded that Judge Snow did not err in restraining the plaintiff from taking the children out of the state and keeping the children subject to the jurisdiction of the court, we are not required to answer Point 4 of the plaintiff's brief so far as it pertains to the issuance of the restraining order. Plaintiff, under Point 4 of her brief on appeal from the order of

Judge Snow, after conceding that issuance of the restraining order was not error, proceeds again to complain because Judge Snow did not issue an order restraining defendant from harrassing plaintiff and threatening to do her physical harm. (See, Plaintiff's brief on appeal from the order of Judge Snow, pp. 14-15.) We have already answered this latter contention under Point 3 of this brief, *supra*, p. 28, *et seq.* The evidence at the hearing before Judge Snow was conclusive that defendant has not touched plaintiff since prior to the trial of the divorce action and that defendant has not threatened plaintiff with physical harm or abused her. Based on this evidence Judge Snow expressly found that the defendant had not done so, *supra*, p. 28, *et seq.*

POINT 5.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$125.00 ATTORNEYS FEES IN CONNECTION WITH THE HEARING BEFORE JUDGE SNOW.

Defendant cross appeals from that part of the order of Judge Snow in which Judge Snow awarded plaintiff \$125.00 attorneys fees in connection with the hearing. (See defendant's statement of points by way of cross appeal, R. 89.)

The uncontroverted evidence at the hearing before Judge Snow and the findings of Judge Snow (R. 78-79) show that, pending defendant's appeal to this court from a decree of divorce, defendant was forced to resort to the trial court as a result of plaintiff's continued misconduct in order to pro-

tect his children and his rights of visitation under circumstances in which plaintiff was denying defendant his rights of visitation, refusing to permit the children to see their father over extended periods, using the children and denying defendant his rights of visitation in efforts to extort money from defendant, visiting cruelty upon the children for visiting their father, and visiting moral depravity upon them. The effect of awarding plaintiff attorneys fees against defendant in connection with this hearing is to penalize defendant for resorting to the courts to protect his children. In view of his findings Judge Snow could only have been prompted to award plaintiff attorneys fees in connection with this hearing from a mistaken notion that, every time a woman comes into court in connection with a divorce action, she is entitled to attorneys fees regardless of the circumstances of the parties and regardless of the fact that her own wrongdoing brought the parties into court. It should be pointed out that this litigation has been very costly for defendant and that his every effort from the date of filing of the complaint by plaintiff down to the present time has been for the protection of his children.

The italics are by the writer.

Respectfully submitted,

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