

1963

Katherine Irene Dearden v. Albert Errol Dearden : Brief of Appellant

Utah Supreme Court

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APR 16 1964

IN THE SUPREME COURT
OF THE STATE OF UTAH

KATHERINE IRENE DEARDEN,
Plaintiff and Appellant,

— vs. —

ALBERT ERROL DEARDEN,
Defendant and Respondent.

Case
No. 9952

APPELLANT'S BRIEF

Appeal From the Judgment of the Fifth Judicial District
Court for Millard County, State of Utah
HONORABLE C. NELSON DAY, *District Judge*

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AUG 16 1963

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

KATHERINE IRENE DEARDEN,
Plaintiff and Appellant,

— vs. —

ALBERT ERROL DEARDEN,
Defendant and Respondent.

} Case
No. 9952

APPELLANT'S BRIEF

NATURE OF THE CASE

The case on appeal herein involves a divorce action wherein plaintiff sought a decree granting her a divorce from defendant and also awarding her the care, custody, and control of the minor child of the parties, subject to the right of reasonable visitation privileges of defendant, plus alimony and child support in a designated amount. Defendant filed a Counterclaim against plaintiff seeking against plaintiff the same relief she sought against him.

DISPOSITION IN LOWER COURT

The Fifth Judicial District Court (Judge C. Nelson Day) granted a decree of divorce in favor of defendant and

against plaintiff and awarding defendant the care, custody and control of the minor child of the parties with the right of reasonable visitation in plaintiff for the reason and on the grounds that the plaintiff is not a fit and proper person to have custody of the child and because it is in the best interests of the minor child that such a judgment be decreed.

RELIEF SOUGHT

The relief sought in this appeal is as follows:

A. Reversal of the lower Court's decision.

B. Reversal in part of the lower Court's decision and an Order awarding plaintiff the care, custody and control of the minor child of the parties, with the right of reasonable visitation of defendant.

STATEMENT OF FACTS

Plaintiff, Katherine Irene Dearden, age 22 years (T-6), and defendant, Albert Erroll Dearden, age 24 years (T-4) were married on May 26, 1956, at Sugarville, Millard County, State of Utah (T-7). One child has been born as issue of said marriage, viz. a girl, Julie Kay Dearden, age 2 years, having been born on December 24, 1960 (T-7). At the time of the trial, plaintiff and the minor child of the parties were living separate and apart from defendant at 64 "F" Street, Salt Lake City, Utah. Plaintiff was employed as a waitress at the Post House Cafe in Salt Lake City. Defendant, who is a truck driver

for Wycoff Company (T-49), was residing with his parents in Fillmore, Utah. Prior to their separation in October, 1962, plaintiff and defendant lived together with their minor child in Fillmore, Utah.

During the course of the marriage, plaintiff worked in order to obtain income for family purposes. Most of this employment was as a waitress in Fillmore, Utah (T-11, 12, 13, 14). Plaintiff claims that she worked at the suggestion and with the acquiescence of defendant and because he thought it was best inasmuch as they were getting further in debt (T-32), and defendant admits that he had no objection to her working (T-70). All of the income acquired by plaintiff was used for payment of household expenses.

In October of 1962, plaintiff and defendant separated, plaintiff going to Delta, Utah, and then to Salt Lake City to seek employment to care for herself and her little girl. Defendant remained in Fillmore.

In November, 1962, plaintiff filed an action in the District Court of Millard County seeking a divorce from defendant on the grounds of mental cruelty and also seeking to have the permanent custody of the minor child awarded to her, subject to the right of reasonable visitation of defendant. Defendant Counterclaimed for divorce and custody of the minor child. The matter was tried before the Honorable C. Nelson Day in the District Court of Millard County on April 10, 1963, and after taking the matter under advisement, Judge Day granted

defendant a decree of divorce against plaintiff and awarded defendant the custody of the minor child, subject to the right of reasonable visitation of plaintiff.

ARGUMENT

POINT I.

THE COURT ERRED IN REFUSING TO GRANT PLAINTIFF A DECREE OF DIVORCE AGAINST DEFENDANT AND IN GRANTING DEFENDANT A DECREE OF DIVORCE AGAINST PLAINTIFF.

The case before the Court at this time is a divorce action involving a dispute between plaintiff and defendant over the permanent custody of Julie Kay Dearden, their minor daughter, aged 2 years. Although it is true in divorce cases, that the Supreme Court will not disturb the trial Court's judgment in the decision of property, awards of alimony, and child support unless it appears to be unjust and inequitable, *Tsoufakis v. Tsoufakis*, Utah, 382, P. 2d 412 (1963), yet the Court may and will review the facts as well as the law on appeal in child custody controversies between divorced parents. *Sampsell v. Holt*, 115 Utah 73, 202 P. 2d 550 (1949), and plaintiff prays the Court to review the facts on appeal herein and reverse the lower Court on the basis thereof.

The trial court found as a matter of fact that plaintiff "is not entitled to a divorce from defendant upon the grounds stated in her Complaint or otherwise." (Findings of Fact — P. 8.) In that regard, the grounds

for plaintiff's Complaint of divorce were acts of mental cruelty committed by defendant during the course of the marriage. Plaintiff testified at the trial, and her testimony was uncontroverted in this, that while she was living with defendant and on several occasions, some as late as October, 1962, defendant (1) told plaintiff to get a divorce but she would have to get a lawyer and pay for it (T-9) — (2) told plaintiff that he had known for a long time that the marriage wouldn't work, that he had wanted to get rid of her for a long time and that the only reason he stayed with her was because he felt he was obligated to her (T-9), and defendant testified that he does not recall but he may have told plaintiff this (T-95, 96) — (3) told plaintiff he didn't care where she went or what she did as long as she didn't take the little girl with her (T-10) and he didn't want plaintiff around (T-10) — (4) told plaintiff that he did not want the baby (T-10) and that plaintiff should see a psychiatrist (T-10). This conduct on the part of defendant during the course of the marriage and just prior to the separation of the parties so distressed the plaintiff and caused her such mental anguish that she cried on each occasion and she was unable to carry on her usual activities because of the way defendant's conduct made her feel (T-10). It was further testified by plaintiff that the difficulty between plaintiff and defendant first began approximately the time their child was born (T-22), and that it continued thereafter until the action was filed. Defendant asserts that after plaintiff left their home in Fillmore and when he took her to the home of her parents in Delta that he, defendant, asked Earl Sheehy, plaintiff's father,

for advice on the problem that had arisen in the marriage and Mr. Sheehy advised that the young couple get away from defendant's parents and make a life for themselves (T-87). Defendant, apparently thinking this was sound advice, said he had intended to do that but his wife left before he could take this action (T-87). Yet, knowing that Mr. Sheehy's advice was sound in suggesting that plaintiff and defendant get away from the latter's parents in order that their difficulties be solved and their marriage possibly salvaged thereby, defendant objected to plaintiff's wanting to "get away" for a while to go with her parents to Kansas on a vacation in an attempt to save the marriage (T-25, 27)

It was only after the divorce action had been initiated in this matter and after the relationship had deteriorated beyond recovery that defendant desired to see a marriage counselor with plaintiff (T-28).

While it is true that what constitutes cruelty causing mental distress depends upon the facts and circumstances of each particular case, *Stevenson v. Stevenson*, 12 U. 2d 153, 369 P. 2d 923 (1962), the Courts usually grant the wife a decree of divorce on the ground of cruelty on much less evidence than they do the husband, *Doe v. Doe*, 48 U. 200, 212, 158 P. 781, and in dealing with actual cases involving cruelty, the courts recognize that the nature and disposition of the plaintiff, as well as the conduct of the defendant, are important factors. *Button v. Button*, 95 Ore. 578, 188 P. 180. It takes a person of very little perception to realize that women, generally speaking,

are much more sensitive about matters of love, marriage, and things pertaining to the affections than are men. In the matter on appeal herein, plaintiff testified that the actions of her husband caused her mental anguish, that it was severe enough to cause her to shed tears and had such an effect on her physically that it interfered with her normal activity of being a wife and mother. Plaintiff asserts herein that unless the woman is callous, any wife and mother would have reacted as she did if told what defendant told plaintiff about his feeling for her and the marriage and that such actions are in fact cruel treatment causing great mental anguish and grief and that, as plaintiff testified in this matter, defendant's conduct did in fact cause her great mental suffering and emotional strain because she was interested in saving her marriage and holding the family unit intact.

The Court found from the testimony at the trial of this matter that the charges of cruel treatment causing mental distress and adultery by plaintiff were sustained by the evidence. However, plaintiff urges upon this Court that such a finding, especially as to adultery, is not justified from the evidence in this matter. It is true that evidence relating to adultery is nearly always circumstantial because the act is generally done in secret and is not susceptible to proof; but it is frequently said by the Courts that the circumstantial evidence must be of a clear and positive nature. *Marshall v. Marshall*, 3 F. 2d. 344, 55 App. D. C. 173; *Brown v. Brown*, 27 Idaho 205, 148 P. 45; *Diehl v. Diehl*, 87 Pa. Super. 545, and although a clear preponderance of the evidence is necessary to establish

the act, there is a presumption of innocence on the part of the alleged offender and if the party's conduct is open to an interpretation of either innocence or guilt, the presumption of innocence will prevail. *Ovenu v. Ovenu*, 201 Ill. App. 607; *Hutzler v. Hutzler*, 161 La. 823, 109 So. 504; *German v. German*, 137 Md. 424, 112 A. 789; *McCrary v. McCrary*, 230 S.W. 187 (Tex. Civ. App). To prove adultery circumstantially, as was done in the instant case, it is not enough to prove that there was an adulterous disposition or that there was an opportunity to commit adultery, but the concurrence of both disposition and opportunity must be shown. *Allen v. Allen*, 285 F. 962, 52 App. D. C. 228; *Grundy v. Grundy*, 92 N. J. Eq. 687, 114 A. 552; *Torrens v. Torrens*, 94 N. J. Eq. 480, 120 A. 189; *Jacobstein v. Jacobstein*, 209 App. Div. 846, 204 N.Y.S. 918, affirmed 240 N. Y. 693, 148 N.E. 761. See also *Cooley Cas. Persons and Domestic Relations* (2nd Ed.) 142.

The basis for the Court's finding of adultery on the part of plaintiff was the testimony of B. F. Romano of Paramount Detective Agency of Salt Lake City who was hired by defendant to conduct surveillance activities of plaintiff between December 27, 1962, until January 14, 1963. Mr. Romano, a private detective, testified that he and a companion observed plaintiff, Mr. Leo Brunson, and plaintiff's apartment continually from the dates indicated. The essence of his testimony is that every day with the exception of approximately two, plaintiff and the said Brunson left her apartment at about 6:30 o'clock a.m. and returned each evening or they would be back in the apartment each evening when the detectives re-

sumed their **surveillance** activities at about 6:00 o'clock p.m. (T-100-134). Mr. Romano asserted that he occupied an apartment in another building north of plaintiff's apartment but at about the same height. He asserted that he observed the activities of plaintiff and Mr. Brunson in the former's apartment with high-powered glasses and he could see clearly (T-102) and that he was well acquainted with the layout of the apartment. Yet, under cross-examination, the detective admitted the following things about the apartment, the activities of plaintiff and Mr. Brunson:

(1) That from his observation place he could not see the front door of the apartment house in which plaintiff lived nor could he see the door that entered into plaintiff's apartment (T-100, T-120);

(2) He could not see the front of the apartment house at 64 "F" Street (T-118, T-120);

(3) He did not know there was a back entrance and exit to the apartment of plaintiff (T-119) even though he claimed to have thoroughly acquainted himself with the apartment house at 64 "F" Street and with plaintiff's apartment;

(4) He did not know the layout of plaintiff's apartment even though he watched it continually for two weeks (T-122);

(5) That it would have been possible for someone to walk out of plaintiff's apartment and out the front door

of the apartment house without him or his companion having knowledge of it (T-113);

(6) He is not sure that no one entered or left the apartment — all he can say is he did not see anyone do so (T-123);

(7) There were two bedrooms in plaintiff's apartment because he could see lights on in both (T-122);

(8) He didn't know where the minor child of the parties slept (T-123);

(9) That it is possible that Mr. Brunson could have been in the apartment without him knowing it (T-131);

(10) That he knew where plaintiff's bedroom was situated when in fact he didn't know at all (T-104, T-165);

(11) That he doesn't know or have any idea how many times plaintiff left the apartment and entered the apartment with the minor child (T-133, 134) yet, this was one of the important aspects of his surveillance;

(12) Although he could see clearly into the apartment he could not tell whether Mr. Brunson was taking a bath or shower in the bathroom of plaintiff's apartment even though it is usual for one taking a shower to stand and for one taking a bath to sit (T-103);

(13) Nor could he tell the type or color of clothing worn by plaintiff (T-106, T-172);

(14) He indicates that plaintiff and Mr. Brunson were the sole occupants of the apartment between the dates of December 27, 1962 - January 14, 1963 (T-97-137), yet Mrs. Katherine Sheehy, mother of the plaintiff, was in Salt Lake City between those two dates and stayed overnight at plaintiff's apartment (T-187) and Detective Romano did not see her or was not aware of her presence in the apartment, and;

(15) He indicated that he had made a thorough examination of the back yard at 64 "F" Street and there was no way out in that direction (T-124), when in fact a back way out was in common use at the time by children in the neighborhood (T-124, 173).

It seems apparent that Mr. Romano actually knew very little about what the physical setup was of plaintiff's apartment, or what plaintiff's activities were. He knew just as little about the activities of plaintiff and Leo Brunson during the two-week period and yet this investigation and testimony was crucial in establishing by a clear preponderance of the evidence the act of adultery by plaintiff. The inconsistencies and lack of knowledge and understanding in the detective's testimony is apparent and this, coupled with the fact that the evidence of hired detectives will be subject to careful scrutiny by the Courts, since the detectives may be prejudiced in favor of proving what they are employed to prove, *Sargent v. Sargent*, 114 A. 428 (N. J. Ch.); *Fontana v. Fontana*, 182 App. Div. 717, 170 N.Y.S. 308; *Steele v. Steele*, 170 N.Y.S. 454; *Stewart v. Stewart*, 85 Pa. Super. 39; *Ovenu v. Ovenu*,

Supra; *German v. German*, Supra; *Diehl v. Diehl*, Supra, leaves one with no alternative but to cast serious doubt upon the reliability of the detective's testimony.

On the basis of the testimony and the evidence in the record, plaintiff urges that as far as the adultery finding is concerned, that the evidence is reasonably susceptible to interpretation as to her guilt or innocence in that there were two bedrooms in her apartment and it is reasonable to find that Mr. Brunson slept in a bedroom other than the one occupied by plaintiff; it is entirely reasonable to conclude that Mr. Brunson left the apartment unseen by Mr. Romano and his companion, and inasmuch as the detectives claimed they could see clearly into plaintiff's apartment yet they could not see clearly enough to ascertain whether Mr. Brunson was taking a shower or a bath, showing that their view into the apartment was anything but clear, and inasmuch as plaintiff's conduct is open either to an interpretation of guilt or innocence, the presumption of innocence prevails and the Court should order the striking of the finding of adultery and hence that of cruelty. It should be noted here that plaintiff has consistently denied that she and Mr. Brunson ever committed the act of adultery.

However, even if it is believed that plaintiff did in fact commit adultery, it should be noted by this Court that on the basis of the record such act would have occurred sometime between December 27, 1962, and January 14, 1963. Not that any such act is ever justified, but as far as this action is concerned and using such conduct of plaintiff by defendant as grounds for divorce as

causing him great emotional distress, anguish, and upset, it should be pointed out and considered by this Court that such action occurred at a time when the marriage had, for all intents and purposes, ended and the relationship between plaintiff and defendant was beyond saving several months before, and that the prior conduct of defendant toward plaintiff was undoubtedly a factor in bringing about plaintiff's later conduct. Certainly, defendant felt that the marriage was ended long before the decree of divorce was granted by Judge Day on April 19, 1963, because Mr. Dearden did not think it improper to date a young lady from Richfield at least 6 weeks before the trial of the divorce action.

It should also be pointed out with some emphasis and given due consideration by this Court that plaintiff had been encouraged by defendant and led by necessity to work in order to meet the family obligations and to acquire a home with the furniture, fixtures, and effects pertinent thereto; and that defendant, during the course of the marriage, drove a truck on the Fillmore-St. George and Fillmore-Salt Lake runs and by reason of their both working, the parties did not spend much time together nor did they see each other very often. None of these circumstances may be a justification for the conduct of either party, but they do point out possible and maybe probable reasons for the deterioration of this marriage starting with the birth of the child until its culmination with this divorce action.

Other than the adultery allegedly and supposedly committed during December and January, the only tes-

timony relating to misconduct during the time that the marriage was supposed to be valid and effective was that of Kenneth William Brunson (T-143-149), wherein he claimed to have discovered plaintiff and Leo Brunson in the basement of the Cafe Ilene during the deer hunt which would have been in October or November of 1962. However, the evidence was uncontroverted that Mrs. Dearden was not employed there at that time and hadn't been for some six weeks to two months prior to that time. The occasion related by the witness seems either to have been a figment of his own imagination or that of someone else's imagination which he brought into court and related by rote to assist the defendant in this matter. A reading of that portion of the transcript relating to this witness's testimony reveals that he did not know what he was talking about and that the obtaining of such a witness to testify on behalf of the defendant for the sole purpose of injuring the plaintiff should cast some serious doubts on every aspect of the defendant's case.

On the basis of the record and transcript in this matter, the argument set forth in this Brief, the cases cited therein, and upon the equities in this matter, plaintiff prays that the decree of the trial court be reversed and that it be ordered that plaintiff be granted a decree of divorce in her favor and against defendant as per her Complaint heretofore filed in the District Court.

POINT II.

THE LOWER COURT ERRED IN ITS FAILURE TO GRANT PLAINTIFF THE CUSTODY

**OF THE MINOR CHILD OF THE PARTIES
SUBJECT TO DEFENDANT'S RIGHT OF
REASONABLE VISITATION.**

Plaintiff incorporates into Point II the facts, law, and argument set forth in Point I herein, and especially the portion relating to the Court's finding of adultery.

The Trial Court's finding in relation to the custody of the minor child is as follows: "11a. That plaintiff is and has been a neat and orderly housekeeper and there is no evidence that she has directly or intentionally mistreated the child. That on the other hand her actions and treatment of the child have not been for its best interests or welfare."

The finding under paragraph 15 was that defendant was a fit and proper person to have custody of the child and that plaintiff was not and that the best interests of the child required that she be given to defendant in order that his parents could keep her.

It is significant to review the uncontroverted evidence in the transcript relating to plaintiff's care and treatment of the child, her love for it and the child's love for her mother and the environment of the child in the apartment of the plaintiff. The testimony shows that during the course of the marriage, defendant chided plaintiff for the way she cared for the child because he thought his wife spent too much money on keeping the little girl clothed. Defendant's mother testified that she was sure the little girl loved her mother and that plaintiff loved the child and that the last information she had plaintiff

was a wonderful mother and housekeeper (T-159). Katherine Sheehy, mother of plaintiff, said that her daughter was a good housekeeper and mother, that she loved her child and that the child wants to be with her mother (T-189). Rosalie Phillips, an acquaintance of plaintiff's, asserted that plaintiff is an immaculate housekeeper and that Julie, her little girl, means more to her than anything else in the world (T-191, 192). The testimony of Cherie Watts is essentially the same as the others (T-193, 194, 195), as is that of Dorothy Carter who testified that she thought it would be in the best interests of the child to remain with her mother (T-196, 197) as did Jeri Sheehy (T-195, 196). There is, of course, the testimony of plaintiff that she loves her child and desires to have her and that the little child loves her mother. On the other hand, we find that the father has so little concern for his little daughter that he did not take or send her any birthday gift nor did he take her any Christmas gift, even though he knew that the child was in Delta and he went there to deliver gifts to friends. Mr. and Mrs. Dearden, the mother and father of defendant, who both profess to love Julie Dearden as one of their own, could not find the time or did not find it to delight the little two-year-old with a present from grandmother and grandfather at Christmas time (T-156-163). The finding then that plaintiff was not a fit and proper person to have custody of the child could not have been based upon any neglect of the plaintiff for her failure to provide for her physical needs or for love and affection because the record shows the contrary. The only other reason for her unfitness would have to be the alleged adultery.

Plaintiff testified that while she occupied the apartment at 64 "F" Street in Salt Lake City, her child, who was fed, bathed and put to bed after she returned home each night, slept in a crib in a separate room with the door closed (T-167). Based on all the testimony taken at the trial there is no evidence that plaintiff was immoral or indiscreet in the presence of the child or in the sight of the child unless, as the court said in *Smith v. Smith*, 9 U. 2d 157, 159 (1959) it be immorality or indiscretion to permit a man to visit her after the marriage for all intents and purposes was an impotent and ended circumstance. And as the court said further,

We think such visitation without any further evidence of any indiscretion indulged in the presence or sight of her children, cannot brand her as being an unfit mother to have custody of her own children, and absent such evidence, the presumption that she was a fit and proper person calls upon us to send this case back with instructions to enter a finding of fact to the effect that plaintiff here is a fit and proper person to have custody under the conditions of the decree as we have construed it.

A further examination of the transcript fails to indicate that if plaintiff were indiscreet or immoral she intends to be so in the presence or sight of her child.

The law seems to be that a divorced mother has no absolute right to custody of minor children, but 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. *Steiger v. Steiger*, 4 U. 2d 273, 293 P. 2d 418 (1956). In that case, defendant husband was awarded a decree of

divorce on the grounds of mental cruelty and was also awarded temporary custody of the three-year-old boy of the parties. On appeal it was held that evidence that plaintiff wife drank intoxicating liquor two or three times to a point of intoxication, that she frequently was seen with a man other than her husband, and that she was not a good housekeeper failed to establish that she was unfit to have the custody of the three-year-old child of the parties, and especially where such evidence came from defendant husband's witness and where it appeared that plaintiff's love for the child had caused her to work to provide for him, had caused her to spend her free time with him and had caused her to fight for his custody.

One of the chief complaints of defendant in the instant case is that Julie Dearden was shuttled around to babysitters because plaintiff had to work to provide for her and how much better off the child would be with his parents. However, plaintiff's fitness to have the child is revealed in her working to provide for the minor, the spending of her free time with the baby and the fight plaintiff is putting up for custody. As the court said in *Briggs v. Briggs*, 111 U. 418, 181 P. 2d 223 (1947), ordinarily no one can take the place of a mother in the life of a girl of that age.

The cases are unanimous in declaring that a child of tender years should be awarded to its divorced mother unless she is grossly immoral or subjects the child to abuse or gross neglect, provided she is in other respects at least a fairly good parent. *Phillips v. Phillips*, 175 Or. 14, 149 P. 2d 967; *Richardson v. Richardson*, 182 Or. 141,

186 P. 2d 398, and further that the custody of little girls should not be taken from their mother in a divorce suit except for the most cogent reasons. *Claude v. Claude*, 180 Or. 62, 174 P. 2d 179.

At least one court has said that infatuation with a man other than her husband, and even adultery, if not promiscuous, does not necessarily mean that a mother should be deprived of the custody of a child of tender years. *Martin v. Martin*, 27 Wash. 2d 308, 178 P. 2d 284. And it was said in *Wilson v. Wilson*, 199 Or. 263, 260 P. 2d 952, that moral unfitness within the rule that a child of tender years should be awarded to the custody of its mother, notwithstanding she is the losing party in a divorce action, unless she is morally unfit, must be such as to have a direct bearing upon the welfare of the child, and the test is whether the mother's conduct is so depraved, immoral, and wicked that to permit her child to remain in her custody would be injurious to the best interests of the child. In this same vein, see also *Leverich v. Leverich*, 175 Or. 174, 152 P. 2d 303.

Plaintiff denies that she has had any sexual relationship with any man other than her husband and as indicated herein the presumption of innocence in that regard should be applicable. However, even if the court believes that there is no question that plaintiff has committed adultery as claimed by defendant, there is no justification for holding that the commission of that act alone has had any injurious affect on the child or its welfare. A far more important consideration it seems is that the

alleged conduct of plaintiff that is supposedly contra to the best interests and welfare of the child supposedly occurred on December 1962 and January 1963. There is absolutely no evidence of any misconduct on the part of plaintiff thereafter and, in fact, plaintiff specifically denies having even seen Leo Brunson for a month before the trial and that she did not know of his whereabouts (T-178). Mr. Romano indicates that he saw plaintiff and Mr. Brunson together in an automobile in Salt Lake City on March 31. Again, even if it is believed that plaintiff did in fact ride with Mr. Brunson on the date indicated, it may well have been an indiscreet thing to do, as was her other conduct, but certainly it does not show that she has committed adultery or that she is so morally depraved that her conduct is injurious to the welfare of her child.

The question of the fitness of the parent to have custody of a minor child refers to his or her fitness at the time of hearing and one court has held that misconduct of the wife that took place after the parties had separated and after the commencement of the divorce action was immaterial to the determination of the issue of whether such misconduct rendered her unfit to have custody of a minor child. *Revier v. Revier*, 48 Wash. 2d 231, 292 P. 2d 861. Certainly there has been no showing that in February, March, or April plaintiff was guilty of the misconduct she was accused of having committed in December and January and there is no showing or reason to infer that if she was guilty of the misconduct in January she would continue to be.

It seems that the reason defendant thinks that plaintiff is unfit to have custody of the child is that the little girl had to be tended by a babysitter during the day while the mother worked. This, we think, is no basis for unfitness because it relates to plaintiff's financial status and that alone is not sufficient to justify an award of custody. *White v. White*, 160 Kan. 32, 159 P. 2d 461; *Jones v. Jones*, 23 Wash. 2d 657, 161 P. 2d 890. Apparently, what is required for the best interests of the minor is not the ideal situation, but after a balancing of many factors, what then will be for the child's best interest. The factors generally considered are reasonable permanency of address, opportunity to develop friendships, schoolmates and playmates, and continued attendance at accessible schools, churches and recreational facilities. *Emerson v. Quinn*, 79 Idaho 358, 317 P. 2d 344; *Briggs v. Briggs*, *supra*.

The child in the instant case is so young that at this time the usual considerations are not quite so important as that of the child being with her mother, and the important factor here is that the minor is a little girl, two years of age, who at this point needs the care, attention, and affection of her mother and from every indication she has received that from plaintiff and will continue to do so.

To deprive plaintiff of the custody of this child under the facts of this case is to punish plaintiff for past conduct and hence is punishment for the child. *Nye v. Nye*, 411 Ill. 408, 105 N.E. 2d 300.

As the Courts have said in wrestling with child custody in divorce actions, the child's welfare and not the shortcomings of the parent is determinative of right of custody. *Newell v. Newell*, 146 Cal. App. 2d 166, 303 P. 2d 839; and again, custody of children in divorce cases must always be determined upon the basis of the children's welfare and cannot be used as a means of punishment or reward of either parent. *Kalousek v. Kalousek*, 77 Idaho 433, 293 P. 2d 953.

CONCLUSION

Appellant urges upon the Court that based upon the testimony at the trial of the divorce action defendant did in fact treat plaintiff in a cruel manner causing her great emotional upset and the defendant's conduct led to the separation of the parties and the ultimate dissolution of their marriage relationship. The finding of commission of the act of adultery by plaintiff is not supported by the evidence and after viewing the evidence most favorable to defendant and against plaintiff on that point, at the very least the evidence is susceptible of a finding of either guilt or innocence on the part of plaintiff and hence the presumption of her innocence must prevail, and that the lower court's judgment granting defendant a decree of divorce in his favor and against plaintiff should be reversed.

Probably the most important aspect of the case on review is the custody of Julie Dearden, the minor child of the parties. After all is said, plaintiff desires that the custody of the minor child be awarded to her, subject to the right of reasonable visitation privileges of defendant.

Plaintiff loves the child and always has and will always do so. She not only desires to have the child awarded to her, but she needs to have the child as this little girl of tender years needs to be with her mother to be cared for by her and to receive the love and affection that plaintiff has for her child and that plaintiff has always been free to bestow on her.

Julie Dearden is at an age where she needs the care, comfort, and love of her mother more than she needs many of the more desired material things of life. But since it is difficult to see the yearning and desire of a two-year-old girl for the companionship of her mother and it is easy to see a new dress or a bright shiny pair of shoes, often the former is not given its proper weight in considering the matter. It is better for Julie Dearden to be with her mother who loves her and wants her in the home she provides for her than to be with the grandparents in their spacious home in Fillmore.

Appellant respectfully prays and requests the Court to reverse in part the trial Court's decision and to award plaintiff the custody of the minor child, subject to the right of defendant to reasonable visitation of his daughter.

Respectfully submitted,

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