

1963

# Katherine Irene Dearden v. Albert Errol Dearden : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

Brief of Respondent, *Dearden v. Dearden*, No. 9952 (Utah Supreme Court, 1963).

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# In the Supreme Court of the State of Utah

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SEP 25 1963

KATHERINE IRENE DEARDEN,  
*Plaintiff and Appellant,*

vs.

ALBERT ERROL DEARDEN,  
*Defendant and Respondent*

Supreme Court, Utah

Case No. 9952

## RESPONDENT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE  
FIFTH JUDICIAL DISTRICT OF THE STATE OF  
UTAH, IN AND FOR MILLARD COUNTY  
Honorable C. Nelson Day, Judge

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# In the Supreme Court of the State of Utah

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KATHERINE IRENE DEARDEN,  
*Plaintiff and Appellant,*

vs.

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## RESPONDENT'S BRIEF

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Respondent herein is in agreement with the statement set forth in appellant's brief concerning the nature of the case, the disposition thereof in the lower court and the statement of facts so far as the statement goes. However, there should be added to the statement concerning the nature of the case the fact that the complaint alleges in general terms cruel treatment by the respondent causing appellant great mental distress and anguish so that she can no longer remain married to respondent (R 1); and the amended cross-complaint of

respondent charges appellant in the first count with cruel treatment accorded him by appellant and in the second count with the commission of numerous acts of adultery at divers times and places and over a considerable period of time, more especially between the 27th day of December, 1962, and the 13th day of January, 1963 (R 22-23).

Also, there should be added to the statement of the disposition of the case in the lower court, the fact that after the trial the court made and entered its Findings of Fact and Conclusions of Law, and specifically found that "there was no sufficient reason and grounds to justify the plaintiff from leaving the home of herself and the defendant and that she is not entitled to a divorce from defendant upon the grounds stated in her complaint or otherwise." Finding No. 8 (R 50).

The court further found, Finding No. 9 (R. 50), that prior to the separation of the parties and after the plaintiff commenced working in a cafe in Fillmore, Utah, she became attached to and intimate with one Leo Brunson, who was then working as a cook in the same cafe; that she then became cool towards the defendant and their home life then deteriorated to the extent that several months prior to their separation she refused to cohabit with defendant, although living in their then household.

The court then found, Finding No. 10 (R. 50) that

shortly after plaintiff moved to Salt Lake City, the said Brunson likewise moved to Salt Lake City; that at least from the period of Dec. 27, 1962, and continually up to January 14, 1963, the said Brunson occupied the apartment of the plaintiff at such hours of the day and night when he was not working in a cafe or cafes; and between said periods the minor child of plaintiff and defendant was taken from plaintiff's apartment by both plaintiff and Brunson at very early hours in the morning to the apartments or homes of baby-sitters and left there during the times when plaintiff and Brunson were working; and the court specifically found, Finding No. 11 (R. 50), that the charges of cruel treatment of plaintiff toward defendant and the charges of adultery have been and are sustained.

The court further found, Finding No. 15 (R. 51) that the defendant is a fit and proper person to have the custody of the minor child of both parties, and that plaintiff is not either a fit or proper person, and the court further found that the best interests of said minor child (a girl of about two years of age) and the welfare of said child requires that its custody be awarded to the defendant, and that in keeping said child with him in the home of his parents said child would be living in a wholesome and welcome and affectionate environment and atmosphere.

Appropriate conclusions of law were made concerning custody in accordance with the findings and concerning a property settlement between the parties (R. 52-53).

The interlocutory decree made and entered was strictly in accordance with the findings and conclusions (R 54-55-56).

## ARGUMENT

### POINT I

#### THE COURT DID NOT ERR IN REFUSING TO GRANT PLAINTIFF A DECREE OF DIVORCE AGAINST DEFENDANT AND IN GRANTING DEFENDANT A DECREE OF DIVORCE AGAINST PLAINTIFF

A reading of the evidence of the plaintiff when she testified to her grounds of divorce will without doubt convince this Court that plaintiff had no substantial cause for complaint against the defendant; and a reading of the entire record will disclose without doubt that plaintiff left defendant because of her attachment to and desire to live with one Leo Brunson, a married man who had left his wife and three children to live with her.

The sole complaint upon which plaintiff relies as to her grounds for a divorce from defendant are as follows:

That her husband told her she might as well get a divorce but that he would not pay for it (Tr. 9); that if she wanted a divorce to get one because he felt for a

long time that the marriage wouldn't work (Tr. 9); that he did not care where she went or what she did as long as she did not take the child (Tr. 10); that there had been *rumors* that he had a girl friend in Nephi and St. George (Tr. 10); that he wanted her to see a psychiatrist (Tr. 10); and that these things made her feel terrible, whereupon she went over to Delta and her dad helped her come to Salt Lake, where she filed the suit for divorce (Tr. 10).

Upon cross-examination Mrs. Dearden stated that trouble commenced between them because "she was supposed to have been seeing Leo Brunson" (Tr. 23); that there were rumors about such conduct but that her husband told her he did not believe the rumors (Tr. 24); that she never did find out whether there was any basis for the rumors that her husband was seeing some girls, and at the time of the trial she did not know whether there was any truth in such rumors (Tr. 25).

Rarely, indeed, has a plaintiff, in a contested divorce action, presented a case so devoid of any substantial grounds for divorce, and many trial judges would refuse a divorce upon the proof submitted even if uncontested.

As a matter of fact the defendant Dearden has denied practically every one of the few incidents relied upon by plaintiff as her grounds for divorce (Tr. 47 to 96), and the trial court chose to believe those denials.

It is elementary that the Supreme Court will not disturb the trial court's findings unless they are clearly not sustained by the evidence; and it is also elementary that the Supreme Court is in no position to and will not evaluate the credibility of witnesses as against the trial court's express findings.

In the very late case of *Tsoufakis vs. Tsoufakis*, — *Utah* —, 382 P2d 412, Mr. Justice Wade stated the rule that the Supreme Court will not disturb a trial court's judgment unless it appears to be unjust and inequitable to the point that there is an abuse of discretion. Moreover, the universal rule is as stated by Mr. Justice Wade in this case, "the trial court had the opportunity this Court does not have of seeing and hearing both parties and is therefore in a better position to determine controverted facts."

It is also elementary and fundamental that a reviewing court upon appeal must review the facts in the light most favorable to the party who prevailed below. (*Ortega vs. Thomas*, — *Utah* —, 383 P2d 406).

As respondent reads the appellant's brief the plaintiff does not seriously urge upon this Court that the findings of the trial court, excepting as to the charge of adultery, are not supported by the evidence. The appellant has not assigned as error the insufficiency of the evidence to support the findings.

Plaintiff's serious complaint is that the finding against her as to adultery is not justified from the evidence in this matter. It is then stated in her brief (page 8) "the basis for the court's finding of adultery on the part of the plaintiff was the testimony of B. F. Romano of Paramount Detective Agency of Salt Lake City." The trial court no doubt based the finding of adultery, not only on the evidence of Mr. Romano, but also on the evidence of Mr. Smith, a detective who worked with and assisted Mr. Romano in their investigative work. It was stipulated that Mr. Smith, if on the stand and testifying would testify to the same facts as testified to by Mr. Romano, both as to direct and cross-examination (Tr. 135).

The trial court was no doubt impressed with and believed the testimony of one Kenneth William Brunson. Brunson testified that while he was working in the cafe where the plaintiff and Leo Brunson worked, and in the basement of the cafe, he saw plaintiff and Leo Brunson in a most compromising position with their undergarments in a state of disarray; and that half an hour thereafter Leo Brunson stated to him "if you say one word of this, 'I will kill you' or 'you will get it'." (Tr. 143 to 146). The witness was confused as to the date of this episode but it happened prior to the time of the separation of plaintiff and defendant.

The trial court also was no doubt impressed with and believed the testimony of one Vance Ray Keel, a police officer for the City of Fillmore, and who testified substantially as follows: That in the early part of July, 1962, at about 3 o'clock a. m., he followed Leo Brunson; that Brunson went up to the Dearden residence, went to the door, then left and went around behind the house; that sometime later Brunson entered the home; that the door was opened to admit him and that Brunson remained in the home at least twenty minutes during which time the officer remained in the vicinity of the home; that Brunson had parked his car at a service station in the vicinity; that after going up to the door Brunson went away and came back in about fifteen minutes or about 3:30 a. m., that defendant Dearden was in the house the first time Brunson came there but left shortly thereafter; that a few minutes after Dearden left the house the lights came on in the house and Brunson then entered (Tr. 136 to 143). It should be remembered that Dearden was employed as a truck driver and his hours of employment made it necessary for him to work nights as well as in the daytime.

After Mrs. Dearden was confronted with the testimony of Officer Keele, and on rebuttal, she attempted to explain why Brunson was there. Her explanation was that "she was tending the Leo Brunson's baby, and Leo came in and said his wife was up trying to take the baby

—that she did not know Mrs. Dearden had the baby and not for Mrs. Dearden to let Mrs. Brunson have the baby but to take her (the baby) down to his (Brunson's) folks the next morning."

It will be observed that (from Mrs. Dearden's story) Brunson came to tell Mrs. Dearden about the baby at three o'clock a. m., but before coming to the house to have this discussion he left his truck at a service station several blocks or at least some distance away. It is difficult to imagine a more stupid and fishy explanation, and it is quite obvious the trial court did not believe any part of it. No doubt the trial court could not imagine why Brunson parked his car a distance from the Dearden home before going to the place; why did he go to the door and then around the back until Dearden left the house; why was it necessary for Brunson to be in the house after Dearden had left and at about 3:30 o'clock a. m., and why did the lights come on in the house after Dearden had left and apparently the door was open for him without his knocking.

Much is made by appellant concerning discrepancies in the testimony of the witness Romano (corroborated by Smith). It is well at this point to observe no attempt was made to attack the character or reputation of the two detectives, or their motives, nor has any part or portion of the testimony of these detectives been impeached or their credibility assailed.

In a matter of this kind and considering the length of the report of Mr. Romano, it is very easy to pick out a few of his answers on cross-examination and consider them out of context. Even a casual reading of his testimony, and the thoroughness thereof, will convince the reader that about every night for at least three weeks Leo Brunson stayed in the apartment of Mrs. Dearden all night; and taking into consideration the entire record, it would tax the credulity of any person to believe that Brunson occupied one room each and every night while Mrs. Dearden occupied the other.

The record shows that Leo Brunson was a married man and left three children of his own when he left Fillmore to go to Salt Lake City where Mrs. Dearden had then gone (Tr. 78). Brunson worked as a cook at the cafe in Fillmore where Mrs. Dearden also worked, and he followed her to Salt Lake about one month after she moved there (Tr. 78).

Respondent is in agreement with the general rule that circumstantial evidence of adultery must be of a clear and convincing nature, and that one alleging adultery has the burden of proof. However, as stated by the appellant in her brief "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." It is rare, indeed, when an actual act of sexual intercourse is witnessed.

The case of *Revier vs. Revier*, 48 Wash. 2d 213, 292 P2d 861, is a case somewhat in point. The court in that case, commenting upon circumstantial evidence concerning adultery states:

The evidence tending to show adultery was circumstantial. Where this is the case the evidence must show: (1) an adulterous disposition on the part of the defendant and the alleged paramour; (2) an opportunity to commit the act; and (3) circumstances tending to show guilt (citing *Barrinuevo vs. Barrinuevo*, 287 P2d 349). Here the evidence consisted, in the main, of testimony to the effect that appellant frequently and alone entertained, in her darkened home until the early hours of the morning, a man whom she had caressed and with whom she had imbibed in public. In our view, such evidence satisfies the test for a circumstantial civil case of adultery.

In the case of *Barrinuevo vs. Barrinuevo*, 47 Wash. 2d 296, 287 P2d 349, the court states:

Adultery is seldom susceptible of proof except by circumstantial evidence. The quantum of proof required in civil cases is that it must be proved by a preponderance of the evidence. The court must take such evidence, as the nature of the case permits, bring to bear upon it the experience and observations of life, weigh it with prudence and care and give effect to its just preponderance. \* \* \* The disposition of this case is governed by the rule announced in many of our former decision, that the trial judge, having witnesses before him and an opportunity to observe their demeanor, display of candor and sincerity upon

the witness stand is in a better position to determine the truth of the issues than are we who read only the written record. We will not disturb his findings unless there is no evidence to support them or unless we can say that the evidence preponderates against them.

In the instant case it cannot be said there is no evidence to sustain a finding of adultery, nor can it be said that the evidence preponderates against such a finding.

In the case of *Paulson vs. Paulson*, 37 Wash. 2nd 555, 225 P2d 206, the court states:

Appellant urges that she should have been granted a divorce. The short answer is that the trial court did not have to believe her testimony. As we have said in *Braun vs. Braun*, 31 Wash 2d, 468, 197 P2d 442 \* \* \* confronted with a situation where there are only two witnesses, one of whom asserts and the other denies, a trial judge, if undecided whom to believe, may find that the acts complained of have not been established by a preponderance of the evidence; or, believing one and of necessity disbelieving the other, he may find that the things complained of did or did not happen.

## POINT II

### THE COURT DID NOT ERR IN ITS FAILURE TO GRANT PLAINTIFF THE CUSTODY OF THE MINOR CHILD OF THE PARTIES

The trial court, after a careful consideration of the entire record, and an evaluation of the plaintiff's con-

duct and lack of moral stature, made its findings and conclusions in effect that the plaintiff was not a fit and proper person to have custody of the minor child of the parties, that the defendant was a fit and proper person and that the best interests of the child required that the child's custody be awarded to defendant.

Plaintiff asserts in her brief that "the only reason for her unfitness would have to be the alleged adultery." What the plaintiff overlooks or chooses to ignore are the circumstances surrounding the numerous acts of adultery, and her conduct both before and after the separation of the parties.

This is not a case of a mother having committed one act of adultery. It is not a case of an act committed long *after* a separation. It is not a case of showing good conduct after the act or acts and a change of different and better circumstances of living. It is not a case of candor with the court and a showing of repentance and desire to live a clean and decent life. It is not a case of having committed the act with some single young man of her own age and in circumstances that might by some stretch of the imagination be considered excusable. This is a case of misconduct and lack of any moral standards, as testified to by Officer Keele when she entertained Brunson in her home at about 3:30 o'clock in the morning immediately after her husband left for work. This is a case of adultery committed in the basement of the

cafe during working hours, while still living with her husband and before the separation. This is a case of living in open adultery with a married man who had deserted his wife and three children, and over a period of at least the three weeks testified to by Romano and Smith. Since both Brunson and his family and the Deardens were living in Fillmore long prior to Brunson and Mrs. Dearden going to Salt Lake City, the Court can conclude that Mrs. Dearden was well aware of the fact her associations with, and her adulterous conduct were with full knowledge that her paramour was a married man who had deserted his family to be with her. This is a case also where the plaintiff is also guilty of perjury when she denied any acts of adultery or misconduct; and when she denied under oath that she had seen Brunson for three weeks or a month prior to the trial on April 10th, 1963 (Tr. 45), when as a matter of fact she was seen riding with Brunson in his car on March 31st. Romano testified that he and Mr. Smith were going down Main Street in Salt Lake City on March 31st and had tagged Brunson and Mrs. Dearden for a block and she was sitting right next to him (Tr. 116-117). This is corroborated by Mr. Smith, since the parties stipulated that Mr. Smith would testify substantially as did Mr. Romano (Tr. 136).

Moreover, the record discloses that the child was taken from her apartment to the home of baby sitters

daily (Tr. 37); that the child was taken from the home in the early hours of the morning (Tr. 38) to be taken to baby sitters; and that if she (the plaintiff) found it necessary to work for the next five or ten years she intended to have baby sitters look after the girl for that period of time (Tr. 183).

Counsel for defendant have read and considered practically every case to be found at least in the Pacific Reporter touching on the question of custody of minor children where the mother has been charged with and/or found guilty of adultery, and we can say with certainty there is no case to be found wherein the mother has been found to be a fit and proper person and awarded the custody of minor children under circumstances such as encountered in the instant case.

It may be said at the outset that defendant has no quarrel with the legal principles as follows:

That generally adultery will not *necessarily* deprive spouse of care and custody of children; that in arriving at a determination as to what is best for the welfare and happiness of the child, the court will consider the ties of nature and association; that the question of custody is one addressed to the sound discretion of the court; that there is no absolute rule by which it can be determined which of two contesting parties is entitled to custody; that in determining the question of custody, the child's best interests has reference more particularly

to the moral welfare than to mere comforts, benefits, etc., and lastly, that each case must be decided upon its own factual situation.

The case most strongly relied on by plaintiff is the case of *Smith vs. Smith*, 9 Utah2d 157, 340 P2d 419. In that case it is stated "merely permitting another man to visit her after marriage had, for all intents and purposes, ended, did not constitute such immorality or indiscretion as would render wife unfit to have custody of her minor children, and that absent any evidence of her unfitness presumption that she was a fit and proper person should prevail." In that case the Court evidently was of the opinion the evidence did not show anything more than that the wife permitted a man to visit her after the marriage. So far as the Smith case opinion discloses there was no evidence of adultery (as in the case at bar both before and after the separation) nor was there any continuous living together by the wife with a married man not her husband, nor were the children "carted" around and "farmed out" at all hours of the day and night to various baby sitters. We do not believe that this Court would possibly hold that merely because a child of two or three years of age is not present during the numerous acts of adultery and unable to realize what is going on, is reason to permit a mother so lacking in morals to retain custody of the child; and this particularly when there is not one

shred of evidence in the record that the mother intends to bring up the child under different and better circumstances, but upon the contrary insists that she has done nothing wrong.

The case of *Steiger vs. Steiger*, 4 Utah 2d 273, 293 P2d 418, cited by plaintiff, is not a parallel case in any respect. In that case the court remarked:

Stating the case against plaintiff in the strongest possible manner, testimony of witnesses indicated that she (1) drank intoxicating liquors, two or three times to the point of mild intoxication, (2) was frequently seen with a man other than her husband and (3) was not a good housekeeper. All of this testimony, however, came from defendant's witnesses and was rebutted or explained by plaintiff and her witnesses. Reading the record as a whole, it appears that plaintiff has been in the past careless and indiscreet, but that her love for the child has caused her to work to provide for him, has caused her to spend her free time with him and care for his needs, etc.

In the above case there does not appear to have been any extended course of adultery involved, or such a low standard of morals as to permit a young wife to live with a married man who had deserted his wife and three minor children, and it does not appear that the mother was farming out her child to various baby sitters. In the *Steiger* case this Court announced the principle that a divorced mother has no absolute right to the custody of minor children, but the policy is to give

weight to the view that "all things being equal, preference should be given to the mother." And in the Steiger case this Court took occasion to remark that there was no proof that the mother drank excessively so as to render her unable to properly care for the child *nor is there any evidence of promiscuity.*

We ask this Court to take note of the fact that in the instant case the acts of misconduct have taken place both before and after the separation of the parties; and it has been stated by a Court (*Revier vs. Revier*, and *Paulson vs. Paulson*, heretofore cited in this brief) that how a parent conducts himself (or herself) after a separation has occurred may be more revealing than conduct fettered by marital supervision.

In the case of *Christian vs. Christian*, 45 Wash. 2d 387, 275 P2d 422, the trial court found that the wife had been guilty of adultery and having denied it also committed perjury. The trial court found the husband had not been guilty of cruel treatment towards his wife as alleged by her and granted the divorce to the husband but awarded custody of the children to the wife. The Supreme Court of Washington reversed the case as to custody, holding "true it is that the court stated 'we have frequently held that a mother should not be deprived of custody of children of tender years unless it is clearly shown that she is such an unfit and improper person that her custody of the children will endanger

their welfare'." But the Supreme Court went one step further and stated:

We are constrained to hold that it would endanger the future welfare of the children involved to permit them to be reared by one who displays such a flagrant disregard to morality, the law, a solemn oath, and the sanctity of the home. It is not proper that such a person guide the spiritual, mental, moral and physical development of these children. It will endanger their welfare.

And in the instant case the trial court specifically found that the husband's parents, where he and the child are living, appear to be cultured, decent, law-abiding, moral citizens. It is respondent's intention to have his parents care for his daughter and thus be able to spend considerable time with the daughter since he is living with his parents.

The case of *Taylor vs. Taylor* 126 P2d 855 (Wash.) presents a factual situation very similar to the case at bar, and the court stated: "I am convinced that she does not possess the stable qualities that the two boys are entitled to in a mother."

While the factual situation is not the same, yet the Utah Supreme Court in the case of *Knapp vs. Knapp*, 73 Utah 268, 273 P. 512, stated:

We are clearly of the opinion that the moral surroundings into which the plaintiff placed the child awarded to her custody is a proper subject

of inquiry. It is equally clear that the character of the persons that Roger Michael Knapp was compelled or permitted to associate with during the time he was in the custody of the plaintiff should be inquired into, insofar as it may affect the moral welfare of the child (citing numerous cases).

See: *Wilson vs. Wilson*, 13 P2d 376;

*Hamilton vs. Hamilton*, 231 P2d 69 at page 72;

*Dodd vs. Dodd*, 229 P2d 761.

The case of *Merkel vs. Merkel*, 234 P2d 857, is a case where the Supreme Court of Washington practically upset a finding that a wife was not guilty of adultery, but that if the evidence did not establish adultery, it was abundantly clear that the wife conducted herself in a grossly improper manner over a period of time and the court remarked:

Viewing the record in its entirety, it is our considered opinion that the trial court's finding that respondent is a fit and proper person to have the custody of A and B is against the clear preponderance of the evidence. Proof that a child's physical needs are being met is not enough. They must be brought up in a wholesome, moral atmosphere, if they are to become good, upright, law-abiding citizens. Respondent has not been providing such an atmosphere for A and B and they should accordingly be removed from her custody.

The cases can be multiplied where courts have given custody to a mother under some questionable circumstances, and also where courts have given custody to

the father where the mother has been guilty of gross misconduct and/or adultery. But the legal principle applies "each case must stand on its own factual situation." We have been unable to find any case where the mother has been awarded custody under a factual situation similar to the case at bar.

The very last case decided by this Court involving the custody of a minor child is the case of *Stocks vs. Stocks*, — *Utah* —, 383 P2d 923, in which this Court held in addition to the statement "primary objective in custody cases is to provide for child's best interest and welfare" that "rule favoring mother in child custody cases is only one of many factors to be considered and is applicable *only if all things are equal*. And the Court had occasion to remark:

The trial court was in a much better position to understand and evaluate the testimony than we are. The court has observed the attitudes, manners and personalities of the parties and has had opportunity to evaluate the ability of the parties and the effect that association with these parties will have on the child's life. \* \* \* \* The trial court did not find that all things were equal but that it was in Billy's best interest to remain with his father.

## CONCLUSION

Respondent concludes by stating that the findings and conclusions are more than amply supported by the evidence and that the interlocutory decree, therefore, should be affirmed in its entirety.

*Respectfully submitted,*

CLINE AND CLINE,

*Attorneys for Defendant  
and Respondent.*