1969

Myra K. Butler v. Marvin Jay Butler : Brief of Appellant

In the Supreme Court of the State of Utah

MYRA K. BUTLER,
Plaintiff and Respondent,
vs.
MARVIN JAY BUTLER,
Defendant and Appellant.

CASE NO. 11662

BRIEF OF APPELLANT

Appeal from a Final Order of the Second District Court
Davis County, State of Utah

The Honorable Charles G. Cowley, Judge

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CASES AND AUTHORITIES CITED

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NATURE OF THE CASE

This is a petition of defendant for modification of a decree of divorce and for a ruling in contempt.

DISPOSITION IN LOWER COURT

The court dismissed the petition of defendant except that the court modified the decree to allow defendant (a) to take his minor children as dependents on his income tax returns and (b) to delete plaintiff as a beneficiary of his family trust.

RELIEF SOUGHT ON APPEAL

Defendant and appellant requests an order directing the court below either to amend the decree of divorce as prayed in his petition or, in the alternative, to find the plaintiff in contempt.

STATEMENT OF FACTS

On October 17, 1967, the District Court entered a decree of divorce terminating the marriage of the parties who were then residents of Davis County, Utah. Defendant is a commercial pilot employed by Western Airlines and has since moved to San Mateo, California, a suburb of San Francisco, his base of operations. Plaintiff married one Joseph Seethaler on February 14, 1968 and now resides in Provo, Utah.

Under the decree of divorce, defendant was granted custody of his minor children for three months, June through August, of each year. The decree required that defendant give notice on or before May 1 of each year of his intention to exercise his right of custody and of the date on which he would take custody.

The children of the parties and their dates of birth are as follows:

Jeff	July 30, 1946
Julie	February 17, 1952
Jon	November 17, 1955
Brett	July 11, 1961

The three last named children are minors.

From the date of the divorce until May 29, 1968, defendant visited his children and was visited by them on numerous occasions. The nature of his employment permitted him to provide transportation between Utah and California at minimum expense and discomfort. (R. 126-127)

On April 25, 1968, defendant delivered to plaintiff written notice dated April 20, 1968 of his intention to take

custody of the minor children on May 27, 1968 and requesting that he be allowed to pick up certain items of clothing and personal property on May 20, 1968. (Exhibit , R. 127-128)

Between April 25 and May 20, 1968, defendant had several telephone conversations with his children. His daughter, Julie, asked that he enroll her in summer school classes in English and driver's training, which he did. (R. 129) During this period, he received no indication that there would be any difficulty in obtaining custody of the children as provided in the decree.

On May 20, 1968, defendant went to plaintiff's residence in Provo for the purpose of picking up the requested items of clothing and personal property of the children. As a result of plaintiff's interference, defendant was unable to obtain the requested items, as the following testimony shows:

"Q. I see. Now did you go to Provo on May the 20th for the purpose of picking up these belongings?

A. I did.

Q. And what occurred when you arrived in Provo?

A. I drove to the house where they were living. I was driving a pickup truck. And I backed into their driveway. And my children came out the door.

They knew what I was there for. They came out the door, and I told them to bring their belongings.

My daughter, Julie, brought out her violin and a pasteboard box with some papers in it and a few scraps of sewing fabric, some miscellaneous items.

They brought two old bicycles. One that had previously belonged to John was of a size a little smaller than his and in total disrepair, and a bicycle that belonged to my daughter, and which also hasn't been used for several years.

Q. Did the children have new bicycles?

A. Yes. John and Bret had new bicycles.

Q. Who had purchased those bicycles?

A. I had. I gave Bret a new bicycle for his birthday, and about a week later he told me that his mother had provided him with a new bicycle. And it's my understanding that she claims having had no income whatsoever for that summer, and so I presume that inasmuch as I was providing her support that I had provided the bicycle for her.

Q. In any event, they had new bikes; Is that right,

A. That's true.

Q. But you didn't get them for that purpose? You didn't get them on May the 20th for the children?

A. No, no. No, I never did get those.

Q. Did you get the items requested on your notice?

A. No. The children came to me with these few things and I said: "Where's the rest of your belongings?"

And they told me their mother forbid them from bringing any other belongings.

And I said to Julie: "Will you please go and get the list and let's go over it?"

So she did. She went into the house and came out with the list. And it was very painful for her.

I asked her to go in and ask her mother about this or that, and she would go into the house—she went into the house two or three times. And the second time she came out in tears and I said: "Why are you crying?"

And she said: "This is so difficult. Mother won't give me anything, and here you are to take them. And I don't know what to do."

And I comforted her. I told her that I loved her; there was no reason for her to have to go through this, and not to worry about it.

And my son, John, simply went into the house and disappeared. I didn't see him any longer.

That's all I got, and I left. (R. 130-31)

Defendant returned to California expecting to return to Provo on May 27 to assume custody of the children. On May 24, he received a telephone call from Julie and Jon who indicated that they didn't want to come to California, that they would come for part of the summer but not for the entire summer. Defendant told the children that he would expect them to be ready to go with him as previously arranged and the conversation terminated with the understanding that he would call for them in Provo between eleven o'clock and noon on May 27. (R. 132-33)

On May 27, 1968, defendant went to plaintiff's house in Provo to obtain custody of the children at the appointed hour. There was no one home although he remained at the house for some time. After repeated telephone calls from Provo and later from Salt Lake City, he reached Jon at

plaintiff's residence at seven-thirty in the evening. He instructed Jon to get his belongings together and to tell the other children to do likewise and that he would return to Provo within the hour to get them. Upon his return to Provo that evening, he found plaintiff's house dark. Although there were two cars in the driveway, no one answered the door. He attempted to telephone plaintiff's residence repeatedly until eleven o'clock without success, although he did receive a busy signal on one occasion. (R 134-35)

The next morning, May 28, he commenced calling plaintiff's residence at six-thirty, only to find the telephone busy. At seven o'clock he went to plaintiff's residence, concerning which he testified as follows:

> Q. And what happened at 7:00 o'clock in the morning?
>
> A. Little Bret came to the door, and I spoke to him and I—
>
> Q. (interposing) How old is he at the time, by the way?
>
> A. He was 6.
>
> Q. All right. And you spoke to him and what?
>
> A. I spoke to him, told him to get his things, and asked him where Julie and John were.
>
> And he said he didn't know and that he would get his things, and he closed the door.
>
> And then I waited for 15 minutes, and then I rang the bell again and a young man appeared at the door whom I had never seen before—a young man in his 20's, I judged.

And I asked him about Julie and John and he said: "They slept with friends last night."

And I said: "Do you know where they are?" And he said: "No."

And I said: "Do you know what friends?" And he said: "No."

And I said: "Did they stay at the same place or at separate places?" And he said: "At separate places."

And I said: "Did you take them there?" And he said: "No."

And I said: "You do know that they stayed at separate places, but you didn't take them there or you don't know where they are?" And he said: "That's right."

So I asked his name, and he said that it was Carl Seethaler. And he asked me mine. I told him my name and that I was the children's father and that I had come to get them. And he said: "I don't think they want to go."

And I said to him: "Well, that's a matter to be decided between them and me, and I've come to get them."

And he said: "That's your problem."

And I said: "Please bring their mother. I want to talk to her."

And he said: "No, I won't. She's asleep and I won't wake her."

And I said: "Please bring Bret to the door."

And he said: "I won't." And then he came out the door and seemed to go to his car, and left me standing on the front porch."

And in a moment he came back and asked me to move my car as it was blocking the driveway.

So I suggested to him that he might bring Bret to me while I moved my car, and he said: "Well, I'll tell him but that's all I'll do."

So I moved my car, and the young man left.

Q. Did Bret come to the door?

A. Then Bret came to the door.

Q. After the boy had left?

A. After the boy had driven away.

Q. All right.

A. Bret came to the door, and he looked at me in a rather pained way, and he said: "Daddy, I'll be here with my bag in a minute," and he disappeared.

I waited for a few more minutes on the porch and then I went back and sat in my car, and the only activity that I observed between that time and 8:00 o'clock in the morning was to see the young man return and disappear into the house.

Q. Carl Seethaler?

A. Carl Seethaler.

Q. Did Bret come back? Did Bret come?

A. No, Bret didn't come.

So at 8:00 o'clock I went back and rang the bell, the doorbell. And Carl Seethaler came to the door and I said: "Is Bret ready yet?" And he said: "No."

I said: "Please bring him, because I have an airplane to catch."

And he said: "He told me that he doesn't want to go." And he closed the door in my face.

And I knocked on the door and I rang the bell several times, and there was no response, and I left. It was necessary for me to get back to work that day and I left." (R. 135-38)

During the ensuing week, defendant reached the children by telephone from California and told them that he would call for them on June 4. On that date, he was advised by his former attorney to enlist the assistance of the Provo City Police or the Utah County Sheriff in obtaining custody of the children. The Sheriff of Utah County refused to offer such assistance. (R. 138-40)

Defendant learned that plaintiff had moved but was unable to learn her new address. He therefore called the business establishment of plaintiff's husband, (Seethaler's, Inc. meat packing plant) where he was able to speak to his son, Jon, who, then twelve years of age, was working in the plant. He learned that plaintiff's residence was somewhere in the Indian Hills residential area of Provo. (R. 139-40)

Later in the morning of June 4, defendant went to Indian Hills where he drove around until he was able to identify plaintiff's residence by the cars parked in the driveway. He then secured the services of present counsel with whom he returned that evening at which time he was able to speak with Julie and learned that Jon and Bret had been taken to Heber City on a swimming trip by Carl Seethaler. (R. 141-42)

On the morning of June 5, defendant was able to obtain custody of Bret from the plaintiff and, over resistance and in spite of intimidation, succeeded in picking up Jon at the Seethaler plant where he was at work. Plaintiff refused, however, to provide other than a few items of old clothing for Bret and nothing for Jon. Defendant was unable to obtain custody of Julie. (R. 145-47)

Defendant took Jon and Bret to Salt Lake City where he purchased adequate clothing for them and then to the home of his brother in Ogden to spend the night before leaving for California. During the night, Jon called his mother, who instructed him to meet her at a certain intersection in Ogden. She and Mr. Seethaler then drove to Ogden and took Jon back to Provo, all without defendant's knowledge or consent. (R. 148-51)

On June 6, with the aid of counsel and the Provo City Police, defendant, after much difficulty, was able to again obtain custory of Jon who had returned to work at the Seethaler plant. (R. 150-54) Defendant then returned to California where he and the two boys had a pleasant and enjoyable summer together. (R. 154-56) After returning the boys to Provo at the end of the summer, defendant had a five-day visit with all three children at Flaming Gorge, Wyoming. The relationship between the defendant and his children is one of love and affection and was such at the end of the summer. (R. 157)

In view of the conduct of plaintiff as set forth above, defendant in September filed his petition requesting that he be given full custody of the children, or, alternatively, that sanctions be imposed adequate to secure defendant's rights under the decree. At the hearing of the petition,

defendant sought to introduce testimony of subsequent and continuing conduct of plaintiff in violation of the terms of the decree. The court refused to admit such testimony and refused to allow amendment of the petition to re-date it as of the date of the hearing. Defendant testified, however, that plaintiff had embarked upon a continuing course of conduct having as its objective the alienation of his children's affection. (R. 160-62)

The only evidence in this case was the testimony of the defendant, which was unrefuted. At the close of defendant's case, plaintiff moved to dismiss on the ground that defendant had failed to state a cause of action. With the exception of two minor modifications to the decree (allowing defendant to claim the children as deductions for tax purposes and to delete plaintiff as a beneficiary of his family trust), plaintiff's motion was granted.

ARGUMENT

POINT I

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR CHANGE OF VENUE.

In connection with his petition, defendant moved for a change of venue to the Fourth Judicial District for Utah County where plaintiff and the children reside. The governing law is Section 78-13-7 Utah Code Annotated (1953) which provides that venue in such actions must be "in the county in which the cause of action arises, or in the county in which any defendant resides at the commencement of the action." Although Mr. Butler is nominally the defendant and Mrs. Seethaler the plaintiff, it is clear that Mr. Butler

stands in the position of a plaintiff bringing an action against Mrs. Seethaler for breach of the terms of the decree and of the settlement agreement. The cause of action arose by reason of acts performed by Mrs. Seethaler in Utah Utah County.

By either standard, residence of "defendant" or county in which the cause of action arose, venue was proper only in Utah County, and the denial of defendant's motion for change of venue was in error.

A second and more persuasive reason for granting the defendant's motion for change of venue was the fact that it was a matter of convenience to the court and litigants to have the matter heard in Utah County rather in Davis County. All of the witnesses reside in Utah County, counsel for one of the parties resides in Utah County, the defendant was a resident of Utah County, the cause for complaint arose in Utah County, and the Provo Court is not substantially further in time and distance for counsel for the plaintiff. As a matter of orderly administration of the file and the availability of prompt relief, Utah County was the logical county to consider the petition of defendant. Section 78-13-9(3) Utah Code Annotated (1953) provides that, "when the convenience of witnesses and the ends of justice would be promoted by the change," the court may grant a change of venue.

It seems to the defendant that all of the reasons necessary for a change of venue existed in this case and were, in fact, compelling upon the court. The subsequent circumstances of this case, involving difficulty in getting to court and having the matter disposed of quickly and effectively, demonstrated the merits of defendant's request for a change

of venue. The court's failure to do so was an abuse of discretion.

POINT II

THE COURT ERRED IN EXCLUDING AS HEARSAY CERTAIN TESTIMONY OFFERED BY DEFENDANT.

At several points in the course of the hearing, defendant offered testimony as to conversations between defendant and his children for the purpose of showing that the children had been influenced by the mother in their decision not to go with defendant. Defendant also offered testimony as to statements by Joe, Al and Carl Seethaler to show their attempts to intimidate defendant and obstruct him in his lawful object of taking custody of his children. Most of such testimony was excluded as hearsay. (R. 142-45, 147-48, 1151-53) In excluding this testimony the court was in error.

It is widely recognized that in the interests of the children the usual prohibition against hearsay evidence must be relaxed in child custody cases.

> "It has many times been held that technical rules of practice and pleading are of little importance in determining issues concerning the custody of children. It is not only the right but the duty of the trial court to ascertain any and all facts, and make such investigations as, in his judgement, will assist him in reaching a proper conclusion as to the problems surrounding their custody to the end that he may determine the person who is best qualified and most suitable to furnish the proper environments and home in which they are to live." Conley v. St. Jaques, 110 S.W. 2d 1238

(Tex. Civ. App. 1937), citing Williams v. Guynes, 97 S.W. 2d 988 (Tex. Civ. App. 1936); cf. Annotation, "Consideration of Investigations by Welfare Agency or the Like in Making or Modifying Award as Between Parents of Custody of Children," 35 A.L.R. 2d 629 (1954).

The courts have been willing, for example, to permit the judge in a custody proceeding to interview the child in chambers and to base his award of custody in whole or in part upon such interview. Such a case is Oakes v. Oakes, 45 Ill. App. 2d 387, 195 N.E. 2d 840, 99A.L.R. 2d 949 (1964) in which the court observed,

> "To assume or hope that these proceedings are or can be molded in the character of a normal civil suit is naive and renders a disservice to the children who are the victims of this type of litigation." 99 A.L.R. 2d 953.

Thus in Callen v. Gill, 7 N.J. 312, 81 A.2d 495 (1951), where objection was made in a child custody case to testimony as to conversations with the child as hearsay, the court observed:

> "The rules of evidence are somewhat relaxed in trials having to do with a determination of custody of an infant where it is necessary to learn of the child's psychology and preferences. Therefore, it is sometimes pertinent to bring to the court's knowledge the temperament, disposition and reactions of the child by testimony that borders upon heresay in that it embraces a recital of the child's remarks." 81 A.2d 498.

The following text authority is also suggestive of an exception to the hearsay rule which would allow in evidence

not only hearsay evidence of statements by the children in this case but also statements by the Seethalers.

> "Statements may be original circumstantial evidence of facts in issue, and are then admissible. They are admissible because the fact of their making throws light upon the question of the truth or falsity of the disputed facts; not because they state anything in regard to the existence or non-existence of such facts, but because they in some way illustrate an attitude or state of mind or other evidential fact from which the main fact may be inferred. It will thus be noted that declarations, in this sense, are not heresay, except in a limited sense." McKelvey, Evidence. Section 208 (1944).

It is the general rule in Utah as elsewhere that hearsay evidence will be admitted where the words are offered not as being true but only as having been uttered.

In Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P.2d 1011 (1959), defendant's testimony in support of his application for expanded direct service between Ogden and the Salt Lake City Airport was "based upon his observations of the activities of others and in part upon their requests for and statements about desiring such service." In upholding an order of the Public Service Commission based upon this testimony, the court held that such testimony was not hearsay since it "did not purport to assure the truth of the statements but was a report about the conduct of people, including some of their verbal acts, as observed by him." 330 P.2d 1014.

In Hawkins v. Perry, 123 Utah 16, 253 P.2d 372 (1953), the Supreme Court held that it was proper to admit into evidence testimony that the witness had heard the purchaser

of property promise that he would take it in his own name until plaintiff became of age at which time it would be turned over to plaintiff on the issue of whether a constructive trust in favor of plaintiff should be imposed upon the property. In arriving at its conclusion, the Court quoted with approval the following language from Wigmore:

> "Where the utterance of specific words is itself a part of the details of the issue under the substantive law and the pleadings, their utterance may be proved without violation of the hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein." 253 P.2d 374. Cf. Webb v. Webb, 116 Utah 155, 209 P.2d 201 (1949).

A further exception to the hearsay rule of value in this case, is that for words offered as indicative of present mental state or feelings at the time of the utterance. In Sine v. Harper, 118 Utah 425, 222 P.2d 571 (1950), an action for reformation of a deed on the ground of mutual mistake, the court held admissible for the purpose of showing the beliefs of the purchasers at the time of purchase statements made by them to their agent at that time. In support of its decision, the court quoted with approval the following language.

> "When the intention, feelings, or other mental state of a certain person at a particular time, including his bodily feelings, is material to the issues under trial, evidence of such person's declarations at the time indicative of his then mental state, even though hearsay, is competent as within an exception to the hearsay rule." 222 P.2d 577.

At issue in this case is the question of plaintiff's willful and unlawful interference with and denial of defendant's

right to the custody of his children. Clearly relevant and material in that connection is evidence, in the form of statements by the children, of any influence or pressure applied by the mother or others associated with her. Such testimony goes to the motive and state of mind of the child in refusing to accompany the father. Similarly relevant and material are statements by the Seethalers to defendant, offered not to establish their truth, but only to evidence the determination of those who made them to interfere with defendant's lawful rights. The court's exclusion of the offered testimony was manifest error.

POINT III

THE COURT ERRED IN FAILING TO FIND PLAINTIFF IN CONTEMPT OF COURT AND IN FAILING TO ENFORCE DEFENDANT'S RIGHT UNDER THE DECREE TO CUSTODY OF THE CHILDREN.

It is generally recognized that contempt is an appropriate remedy and means of enforcement where a spouse disregards the terms of a divorce decree by denying visitation rights or custody to the plaintiff. In Baker v. Baker, 119 Utah 37, 224 P.2d 192 (1950), the Utah Supreme Court upheld a decree of the District Court finding the wife in contempt of court for depriving her husband of visiting rights contrary to the terms of the divorce decree. Cf., Kellogg v. Kellogg, 187 Ore. 617, 213 P.2d 172 (1949).

The ordinary method of enforcing custody and visitation rights is a contempt proceeding. For example, where a wife refuses to permit her husband to exercise his visitation rights, she is guilty of an indirect contempt of court and

the husband may institute a civil contempt proceeding to enforce his rights. Divorce and Separation, 8810, 24 Am. Jur 2d 920 (1966).

In Goetz v. Goetz, 181 Kan. 128, 309 P.2d 655 (1957), the evidence supported a judgment of contempt against the divorced wife on the ground that she willfully refused to comply with the order of the District Court which had granted the husband the right of visitation of the minor children on alternate weekends away from their home and to have their care and custody for the first half of the summer vacation notwithstanding that the wife allegedly acted upon the advice of counsel.

Plaintiff's conduct in denying and preventing defendant's lawful custody of his children was, under the foregoing authorities, a clear contempt of court. By the exercise of its power to hold plaintiff in contempt, the court could have enforced the terms of its decree ad afforded defendant the relief to which he is lawfully entitled. By its refusal to exercise that power the court acted in a manner inconsistent with its own decree and committed reversible error.

POINT IV

THE COURT ERRED IN FAILING TO CHANGE CUSTODY OF THE CHILDREN FROM PLAINTIFF TO DEFENDANT.

The widely accepted and prevailing view is that conduct of a parent having custody of a minor child which tends to alienate the affection of the child from its other parent is grounds for taking custody from the parent guilty

of such conduct. Annotation, "Alienation of Child's Affections as Affecting Custody Award," 32 A.L.R. 2d 1005 (1953).

Although the Utah Supreme Court has not decided this question, there is abundant authority from neighboring states, including the leading case of Thurman v. Thurman, 73 Ida. 122, 245 P. 2d 810, 32 A.L.R. 2d 996 (1952). The recital of facts in that case included just such frustrating incidents of denial of visitation rights and alienation of affection as comprise the record here. In granting a change of custody, the court, citing numerous authorities, stated the rule as follows:

> "The acts and conduct of the custodial parent, resulting in the alienation of the love and affection which children naturally have for the other parent, is a vital and very serious detriment to the welfare of such children and is grounds for modification of the decree with respect to such custody." 245 P.2d 814, 32 A.L.R. 2d 1003.

The court further observed that

> "Animosity on the part of the custodian toward a parent having a right to visit the child, inculcation of hate and disrespect on the part of the child for the other parent, refusal to comply with the provisions of the decree as to visitation privileges, mental incompetency of the custodian, and other misconduct or unfitness of the custodian may be considered." Ibid.

The many authorities to the same effect are collected at the above cited annotation, 32 A.L.R. 2d 1005. In light of these authorities, plaintiff's conduct constitutes so fla-

grant a disregard for defendant's rights and so concerted an effort to alienate the affections of his children that the court's refusal to grant the requested change of custody is an abuse of judicial discretion and should be reversed.

POINT V

THE COURT ERRED IN GRANTING ATTORNEY'S FEES TO PLAINTIFF.

Adding insult to injury, plaintiff, after compelling defendant to resort to litigation to enforce his rights under the decree, had the temerity to ask for attorney's fees. Unaccountably, this request was granted by the trial court.

No evidence whatsoever was offered by plaintiff other than an oral request for $750.00 in attorney's fees made by counsel at the close of his argument, which request was granted in the amount of $600.00. (R. 191). It is a principle of law firmly established in this state that, in the absence of a stipulation, attorneys fees may not be awarded except upon competent evidence. F.M.A. Financial Corp. v. Build, 17 Utah 2d 80, 404 P.2d 670 (1965). As this Court recently stated:

> "There is merit in the defendant's challenge of the award of $775.00 attorneys fees to the plaintifff without any evidence or stipulation in the record with respect thereto. The plaintiff argues that this award is justified because of an 'advisory schedule of fees and charges' published by the Salt Lake County Bar Association. It is fundamental that the judgment must be based upon findings of fact, which in turn must be based upon the evidence. This rule has been followed by this court and other jurisdictions in regard to awarding

attorneys fees." 404 P.2d 673, citing numerous authorities.

It is in fact doubtful that plaintiff is entitled to attorneys fees even if she produces evidence as to amount. Although defendant is unable to find any authority directly in point on the question of whether a wife is entitled to attorney's fees in a contempt action against her to enforce the terms of a divorce decree, on a related question it is said:

> "It is recognized in most of the states that the court may deny temporary alimony to a wife who is guilty of matromonial misconduct such as would authorize the husband to sue for a divorce or separation; and the court may also deny suit money under the same circumstances." Annotation "Wife's Misconduct or Fault as Affecting Her Right to Temporary Alimony or Suit Money," 2 A.L.R. 2d 307, 309 (1948).

The above annotation adds:

> "Where the case has been tried on the merits, the husband is in a much better position to oppose the wife's application for temporary alimony and suit money than he would be if the application were heard before the evidence was fully presented to the court. And another factor enters the picture: After the case has been fully tried, the wife obviously does not need support money for the purpose of enabling her to live pending the trial, and so there is the factor of lack of need as well as the established guilt of the wife." Ibid.

Although the cases cited in the above annotation are not in point on our specific question, they do reveal a general

policy on the part of the courts to deny attorney's fees to a wife in divorce litigation where the action is brought as a result of the wife's misconduct.

The award of attorney's fees to the wife in divorce litigation is intended to remedy the economic disadvantage at which she often finds herself. No such policy consideration is present here. Indeed, by her obstructive tactics the plaintiff has put defendant to considerable unnecessary expense including the cost of repeated travel to Provo and substantial attorney's fees. Under these circumstances it was error to award attorney's fees to plaintiff.

CONCLUSION

It is clear that defendant is entitled to the relief requested in his petition. In view of the error of the trial court, defendant respectfully requests that this Honorable Court direct the court below either (1) to enter its order amending the decree to change custody of the minor children to defendant or, in the alternative, (2) to find the plaintiff in contempt of the court's decree and to apply such sanctions as will secure defendant's rights thereunder.

Respectfully submitted,

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Mailed a copy of the foregoing, postage prepaid, to Harley W. Gustin, Gustin and Richards, Walker Bank Building, Salt Lake City, Utah, this_____day of July, 1969.