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Carol Joan Stone v. Val Franklin Stone : Appellant's Brief

IN THE SUPR

OF

STATE

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IN THE SUPREME COURT
of the
STATE OF UTAH

CAROL JOAN STONE,
Plaintiff-Respondent,

vs.

VAL FRANKLIN STONE,
Defendant-Appellant.

Case No. 10698

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an action to modify the terms of a divorce decree and to award the custody of the four minor children to the father on the grounds that the mother is mentally incompetent and is otherwise unfit to care for them; and on the further grounds that the two oldest children, both over ten years of age, expressed a desire to live with their father. These proceedings also involve a motion pursuant to Rule 35 of the Utah Rules of Civil Procedure to

have the mother of the minor children submit to a mental examination before a disinterested psychiatrist. (Tr. 13)

DISPOSITION IN THE LOWER COURT

The Honorable Stewart M. Hanson found against the appellant on all issues.

RELIEF SOUGHT ON APPEAL

For the Supreme Court to reverse the decision of the trial judge on all issues, and to award the custody of all four children to their father.

STATEMENT OF FACTS

This case is one of first impression in the State of Utah and involves substantial rights of parents and minor children. It also brings before the court the issue of whether *Anderson v. Anderson,* 110 Utah 300, 172 P. 2d 132 (1946), has been modified by *Smith v. Smith,* 15 Utah 2d 36, P. 2d 900 (1963); and if it has not, then this instant case seeks clarification of the *Anderson* case as it pertains to children over ten years of age.

The parties herein were divorced in a decree signed on July 21, 1964, by the Honorable Stewart M. Hanson, the same judge who presided at the

trial in the lower court in the instant case. (Tr. 5-6) At that time, the trial court awarded the care, custody, and control of the four minor children to the mother, the respondent herein. (Tr. 5) The children are all boys, and their names and ages at the time of the hearing in June of 1966 were as follows: Randall, born October 24, 1953, age 12; Richard, born March 13, 1955, age 11; Bret and Bart, born January 11, 1959, age 7. (Tr. 7). The father was ordered to pay $240.00 per month as alimony and child support (Tr. 8); and the record discloses that these payments were promptly made each and every month. (Tr. 108). In addition to these payments, the father spent time at the former residence assisting in taking care of the children when needed, and helping around the house and yard. (Tr. 108, 175).

In April, 1965, the father remarried. His new wife Lynell had three children from a previous marriage, two girls and one boy. The ages for the two girls were 13 and 7 and the boy was 9 at the time of the proceedings in the instant case. (Tr. 87-88). Their ages were about the same as the four minor children involved in this action, whose ages were 12, 11, and 7.

The record shows that the respondent had a nervous breakdown during 1958-1960 and had not been able to take care of the children. (Tr. 118, Line 21 — Tr. 124; Tr. 131, Lines 9 et seq.). She had moved from her old neighborhood because she

felt that the neighbors were spying on her. (Tr. 119, Lines 8-18). After moving into the new home, her condition worsened and she claimed that she had a tape recorder embedded into the back of her head which was recording what she was thinking, that her telephone had been tapped and people were spying on her; and that people were parked in cars watching her. (Tr. 120) In 1960 she went into the hospital for shock treatments (Tr. 120-121). The first of these did not help but after a little time she improved and by the time of the divorce in 1964 was sufficiently better so the father decided not to contest the custody of the children. (Tr. 121).

Matters remained in this state until after the remarriage of the father in the summer of 1965 when the old symptoms reappeared (Tr. 121, Lines 12-15). The mother began complaining of headaches again and said she felt that people were spying on her. (Tr. 121, Lines 14-25). She thought the neighbors again were against her and she became very depressed. She told her husband that she thought she had a tape recorder in her head about the first part of 1966 which was some five or six months after the first symptoms appeared (Tr. 122, Lines 1-2). During this time she was unable to recognize her children. Her statements to her husband about this are as follows:

"Q Did she ever tell you Mr. Stone that she did not recognize her children?

A Yes sir. She has told me occasionally on

several occasions that she just no longer could recognize the children all the time.

Q And when would these be, and what would be the circumstances?

A Well, one time in particular was a Saturday morning. I went out to pick up the children, and she just said, 'Well, you can take these children, but I don't think these little ones are mine.' She said the other day, 'I am sure they sent home the wrong children from school and I was just about to send them back and one of my neighbors convinced me that they were my children so I let them stay here.' " (Tr. 122, Lines 3-16.)

One of the mother's neighbors who lived just across the street, and who had been in the mother's home several times testified that the mother told her that she didn't believe the younger twins were hers. This situation occurred in January of 1966, and as stated by the witness was as follows:

"Q Has Mrs. Stone ever told you that she didn't believe that the two youngest children, the twins, were hers?

A Yes, she did.

Q And can you tell us about that situation, please?

A Well, at the time she said she was very upset. I don't know what caused the situation to come about.

Q When was this Mrs. Close?

A This was about the 5th of January.

Q Of this year?

A Of this year.

Q All right, what happened then?

A I had been over visiting with Carol and I was just helping and visiting with her, and I left about 1:30 that afternoon, the children, I don't know if they were home from school, or what the deal was, but I had to go home, and she had gone over to visit with another neighbor, and she was quite upset and the neighbor had called me over because I had been with Carol that day.

Q Who was the neighbor, Mrs. Close?

A Mrs. Lavon Marler. And the children were in primary and I really don't remember everything that happened except that she was worried about the twins.

Q Who was worried about the twins?

A Carol was worried about the twins. They were in primary, and she wanted to make sure they were there, and she was upset, and I said 'I will take you over', so I took her over to primary and got the twins and brought them out to my car, and she just didn't think they were her children.

Q What did she say to you?

A She asked me if I thought the twins were hers, and I said, 'Of course they are yours,' and I tried to reassure her that they were hers, and I told her the twins knew me, and that if they didn't know

me I was quite sure that they would not get into my car or come with me when I got them out.

Q Did she say this in the presence of the two twins?

A Yes, she did. (Tr. 153-155)

This witness went on to testify that the mother told her that she felt that some of the people in the neighborhood were against her and that she thought there was a tape recorder set up in her house or a microphone and that the things she did and said were being recorded. (Tr. 156). None of this testimony of either the father or the neighbors was denied or controverted by the mother who did not take the stand nor offer any witnesses.

The record discloses that the mother would just sit and stare and would become very depressed and moody. (Tr. 156-157) The mother stated to the father and to several neighbors that the two oldest boys were too much for her to handle; that she couldn't discipline them and that she felt that they should be living with their father (Tr. 126, 152-153; 181-182) The neighbors became so concerned about the mother's depression and neglect in the home that they went to the mother's bishop and asked him to go to talk to her. (Tr. 157, 164, 180). Her illness persisted from the summer of 1965 to later than April, 1966. (Tr. 121, Lines 14-15; Tr. 183, 184)

During this time, the mother was under the care of Jack L. Tedrow, M.D., with offices at 975

East First South, Salt Lake City, Utah. Dr. Tedrow was a physician and surgeon specializing in psychiatry, (Tr. 187). He stated that he had seen the mother continuously since her nervous breakdown in 1960 averaging several visits a year and that the last time he had seen her was on January 14, 1966. (Tr. 199). Dr. Tedrow stated that he felt the mother was suffering from a mental illness known as schizophrenia (Tr. 191-192), and recommended she be hospitalized in the LDS hospital psychiatric ward for further examination. (Tr. 125-126) The mother called the father and asked him if he would take the children while she went into the hospital to which he readily agreed. (Tr. 125-126)

The appellant testified that the mother's symptoms were the same from the summer of 1965 through April of 1966, as those exhibited in 1960 during her first nervous breakdown. He stated that he did not think that she was capable of taking care of the children or her house during these times. (Tr. 131) The father stated that just a few weeks prior to the time of the trial in June 1966, when he returned the children to their mother that her eyes were glassy and had kind of a fixed stare expression. He noticed that her hair had not been combed and that her body was shaking. She appeared to be extremely nervous (Tr. 130-131). He further stated that during the time shortly before and after these proceedings were commenced that the children were

neglected in the house, that the house was a mess, that food was spilled in the rooms, that the children were never clean, that he and his present wife had to bathe the children when they took them on Saturdays for visitation, and that they had to wash their clothes and feed them breakfast even though they were not picked up until about 9:30 in the morning. (Tr. 118, 139).

For some reason, the mother decided against going into the hospital. It was this decision that precipitated the present lawsuit which was commenced March 31, 1966. (Tr. 12-15) At the first hearing held on Friday, April 8, 1966, the mother's attorney stated that he was not ready to hear this matter and asked for a continuance. This was objected to by the father's counsel on the grounds that a hazard existed in the mother's home and that it would be detrimental to the children to allow them to remain in the home any longer while the mother was in her present mental state. The trial judge, JOSEPH G. JEPPSON, overruled this objection, continued the matter in all aspects and sent the case to pretrial.

Judge Leonard W. Elton held the pretrial on May 5, 1966, and based upon the representation of the mother's counsel, that he could not be ready for trial before a certain date, the case was set for a two day trial before the Honorable Stewart M. Hanson beginning June 14, 1966. (Tr. 35).

The pre-trial judge formulated the issues as follows:

"(1) Whether the plaintiff is mentally incompetent to take care of the four minor children.

(2) Whether the plaintiff is otherwise unfit to take care of the four minor children.

(3) Whether pursuant to Rule 35 of the Utah Rules of Civil Procedure, there is sufficient cause for the plaintiff to submit to psychiatric, physical examination.

(4) Should the court decide the plaintiff should be examined by a disinterested impartial physician the examining physician will be entitled to all medical records pertaining to the person being examined. Counsel for the plaintiff objects to the furnishing of all medical records, which objection was overruled.

(5) Whether the plaintiff is in contempt of the divorce decree heretofore entered in this matter for her failure to grant the defendant reasonable visitation rights with respect to the four children.

(6) After the issue of custody is decided then the trial court should decide the issue of what are reasonable visitation rights. (Tr. 36)

* * *

(7) Whether the four minor children or any of them will select the defendant as the parent with whom they wish to reside permanently.

(8) If any child does so select the defendant, whether that decision is binding on the

trial court as to which parent should have custody of that child (Tr. 38-39).

The court then added five more issues for the plaintiff as follows:

(1) Whether the defendant is mentally incompetent to take care of the four minor children.

(2) Whether the defendant is otherwise unfit to take care of the four minor children.

(3) Whether pursuant to Rule 35 of the Utah Rules of Civil Procedure, there is sufficient cause for the defendant to submit to psychiatric and physical examination.

(4) Whether or not the defendant has established a suitable home with his new wife and whether his present wife is a suitable person to have these children.

(5) Whether the plaintiff's counsel is entitled to attorneys fees and the amount thereof in defense of this action. (Tr. 37).

The first four issues raised by the mother were decided against her by her own stipulation in court. This stipulation was to the effect that the father and his present wife were capable in all respects to care for the minor children. This stipulation was made in open court and was recorded in the trial record as follows:

"THE RECORD MAY SHOW THAT HE

(plaintiff's counsel) HAS STIPULATED THAT BOTH HE (the defendant) AND HIS WIFE ARE FIT AND PROPER AND MORAL PERSONS AND PROPER PERSONS TO RAISE THE CHILDREN." (Tr. 202, Lines 20-22)

This stipulation made it unnecessary to call character witnesses who were present in court and ready to testify. (Tr. 202).

At the trial, the defendant called the father, his present wife, four neighbors of the plaintiff, and the plaintiff's psychiatrist as a hostile witness. Character witnesses were present but were not needed because of the stipulation cited above. The father then rested.

The mother did not take the stand, nor did she offer any witnesses in her behalf, nor did she offer any evidence to rebut the statements made by the father's witnesses as set forth above in this statement of facts.

The trial judge then ordered the children to be present the next day. That night the mother's attorney called the mother and the two oldest children into his office for a "brainwashing" session. What occurred at that meeting is described by the oldest boy Randall to the trial judge as follows:

"Q You have never talked to your mother's attorney?

A Yes.

Q When did you talk to him?

A Yesterday night.

Q What did you tell him?

A Well, he talked to me about school and that.

Q Did he tell you what to say down here?

A Today? unh unh.

Q Just tell me what you remember him telling you?

A I remember him telling me that my mommy needs me and knowing that I should stay where I live. I guess that is what he said. And he said, 'I think that you will stay where you are.'" (Tr. 214-215)

In spite of this attempt, the two oldest boys told the trial judge they would rather live with their father than with their mother and gave their reasons for so deciding. (Tr. 210, Lines 14-20; Tr. 212, Lines 12-14; Tr. 217, lines 1-13).

The court then issued its memorandum decision finding against the father on all issues. (Tr. 46-47, 51) Counsel for the mother then submitted his proposed "Finding of Fact," Conclusions of Law, and a Decree (Tr. 54-59) to which written objections were filed on several grounds. (Tr. 60-63). The father also made an offer of proof that if the mother's psychiatrist had been permitted to testify about the mother's mental condition, (The Doctor-patient privilege had been invoked by the mother and sustained by the trial judge) he would have said the mother

was mentally incompetent to take care of the four minor children and that in his opinion the mother should be required to submit to further psychiatric examination and should be hospitalized for further treatment because of her condition. He would further testify that her condition was not good for the welfare of the minor children and that it would have an adverse effect upon their said welfare (Tr. 62-63). A hearing was had on the said objections and motion after which the trial judge signed the Findings, Conclusions, and Decree and refused to allow the offer of proof.

I.

THE TRIAL JUDGE ERRED IN NOT GRANTING CUSTODY OF THE TWO OLDEST BOYS TO THEIR FATHER, BECAUSE THESE BOYS WERE OVER THE AGE OF TEN YEARS AND BECAUSE THESE BOYS HAD STATED TO THEIR FATHER AND TO THE TRIAL JUDGE THAT THEY WANTED TO LIVE WITH THEIR FATHER.

The trial judge stated in his memorandum decision as follows:

> "(4) The court is of the opinion that even though the two oldest children expressed a desire to be with their father, that expression is not binding upon this court. This court is of the opinion that the case of *Smith vs. Smith* in 15 Utah 2d does not apply to this case, and that the court is governed by the case of *Anderson v. Anderson* found in 110 Utah." (Tr. 46)

The oldest boy, Randall, age 12, made the following statement to the trial judge about who he wanted to live with and why:

"Q Has your daddy ever asked you to come and live with him?

A Yes.

Q And what did you tell him?

A I told him I wanted to.

Q You told him that you wanted to go and live with him?

A Yes.

Q Did he promise you anything when he asked you to come and live with him?

A No.

Q He didn't promise you a bike, or a pony or fishing trips or anything?

A No." (Tr. 210)

* * *

"Q And what has your father ever said about your mother?

A I haven't heard him say anything.

Q He has never said anything about her.

A I've never heard him.

Q But you say that you would rather live with your father than your mother?

A Yes.

Q Tell me why.

A Well, because I haven't seen my father

for so long and I want to see him." (Tr. 212)

This minor child, Randall, then went on to state that he knew his father's present wife's three children and wanted to have them as his brothers and sisters (Tr. 213)

The trial judge's questions to the minor child Ricky, age 11, were as follows:

"Q Do you want to spend more time with your father?

A Yes.

Q How much more time? You tell me. Would you like to go and live with your father?

A Yes.

Q Rather than your mother? And why? You've got to help me Ricky, you've got to tell me. Has your father ever told you that he would like to have you come and live with him?

A Yes.

Q Have you told him that you would like to go live with him?

A Yes." (Tr. 217)

This child also said that he would like to have the defendant's present wife's three children as his brothers and sisters. (Tr. 219)

The record further discloses that these two oldest boys had also told their father shortly after

the proceedings had commenced that they wanted to come and live with him. The father's testimony in this regard and which is not disputed by the mother is as follows:

"Q Have your children or any of them ever told you that they wanted to come and live with you and Lynell in the house.

A Yes sir, my two oldest sons have expressed that desire.

Q Who are they?

A Randall Stone and Richard Stone.

Q Can you tell us when it was that they expressed this desire and where it was and what was said?

A I was made aware of this whole situation the first part of this year when we had two visits with the bishop, with Carol's bishop in our home.

Q Let me ask you what the children said to you.

A The children?

Q Yes.

A They said they would rather come up and live with me than where they are now living.

Q When was this Mr. Stone?

A It has been in the last two months.

Q In the last two months?

A Yes.

Q Did they say that to you prior to the time that the proceedings were started?

A No sir, they didn't tell me before we started proceedings.

Q Did you ever talk to the children and tell them how they should testify before the judge?

A No sir, I haven't." (Tr. 116)

On cross-examination the father clarified this conversation with his two oldest children.

"Q (By Mr. Schaerrer) Now in regard to these children telling you that they wanted to come and live with you.

A Yes sir.

Q Your testimony was that they never told you that until you started these proceedings, is that correct?

A Yes sir, that is correct.

Q Didn't you go to them and tell them that they should make up their minds if they wanted to come and live with you.

A No sir, not until after the proceedings were started.

Q But then you told them that?

A I asked the two older boys who they would like to live with.

Q And did they tell you that?

A Did they tell me what?

Q Did they tell me who they wanted to live with?

A Yes sir, they have.

Q How much longer, how many. When you told them to make up their minds, how long did it take them to answer that question?

A Randall, it took him from one week.

Q And you were having several talks with him during this period of time?

A No, sir; just from Saturday to Saturday is all. I told him not to make up his mind immediately because I knew it was a serious decision and that I would like him to make it, and if he possibly could to make a decision.

Q And you told him you would like him to come and live with you?

A I reminded him how much I did love him, and yes, I wanted him to come and live with me." (Tr. 143)

These two oldest boys obviously felt the same way at the time of the trial some two months later. They both told the trial judge they wanted to spend more time with their father and wanted to come and live with him rather than their mother. The reason for this was that they did not get the opportunity to see their father enough. They both stated that they loved their father's present wife and would like to have her children as their brothers and sisters. Their testimony to the trial judge was that there were no lures held out to help them make this decision and it is obvious from the quotation above that this

decision represents their considered judgment. (Tr. 210, 212, 213, 217)

In this regard, the defendant would like to point out that after the first day of the trial, the attorney for the mother called the two oldest boys into his office where together with their mother the two oldest boys were subjected to a brain washing session. (Tr. 214-215) This was shortly after the mother's attorney told the trial judge that he objected to the children being examined because he

> "didn't then think there was evidence enough to justify the traumatic experience this is going to be for the children to come into the courtroom here and elect one or the other parent." (Tr. 207)

Apparently he felt the session in his office was to be a therapeutic balm for the boys' emotional well being. Whatever virtuous motive might have precipitated this session, the appellant submits that it was improper and extremely unfair, and probably generated more anxiety in the boys than anything else could have done.

Notwithstanding this eleventh hour session, the boys still told the trial judge the next day they wanted to live with their father rather than their mother and gave some very mature reasons for doing so.

The trial judge apparently ignored these requests of the children and seems to had already made

up his mind that the mother was to have custody. This might have been because it was the same judge who had heard the earlier divorce decree in which he had granted the custody of the children to the mother. (Tr. 109, Lines 1-5) In addition to that fact, the father submits there are at least two other portions of the record that support his conclusion that the trial judge had erroneously made up his mind about the case before it ever got started.

The first instance occurred during the court's opening remarks to counsel, as found on page 71 of the transcript, as follows:

> "MR. McINTOSH: May I make an opening statement?
>
> THE COURT: No, let's get going. I have read all this.
>
> MR. McINTOSH: I would like to cite one case.
>
> THE COURT: *Smith vs. Smith*, 15 Utah (2d).
>
> MR. McINTOSH: In addition there is the case of *Holder vs. Holder* in 1959 Utah (This is a reporter's error, the case should be *Bowler v. Bowler*, 96 N.W. 2d 129 (1959).) This, we think is on all 4's with this proceedings.
>
> THE COURT: You'd better read *Anderson v. Anderson* which has not been revised by the *Smith* case."

Again at the end of the trial and when the court ordered the four minor children to be present for examination the next day, the attorney for the mother objected to this on the ground that it would be a traumatic experience for the children. The Court said, "I am going to permit them to come in, *I have got my own idea of what the law is* and then we can argue the law after." (Tr. 207) The appellant submits that it is obvious from the statements of the trial judge that he felt the mother should get these children and that the consent of the children or their wishes and desires had no weight whatsoever. The trial judge obviously had his own idea of what the law should be and he wasn't going to let the children persuade him otherwise. It's obvious that the only reason he gave the father the courtesy of talking to the children was because the father submitted thirty-four written questions for the trial judge to ask the children (Tr. 42-45) After hearing these comments by the trial judge, it was no surprise to the father when the court stated in its memorandum decision that he believed the wishes and desires of the minor children were not controlling and that he felt that the *Anderson v. Anderson* case was binding. The defendant submits that the trial judge erred in his interpretation of the *Anderson* holding and that paragraph 4 of his memorandum decision is contrary to law and to the decisions of this Honorable Supreme Court.

Even assuming for the purpose of this argu-

ment that the *Anderson* case has not been modified by later decisions, the appellant submits that the trial judge has not properly interpreted the court's holding in *Anderson* insofar as the decisions and wishes of minor children over the age of ten years is concerned. The appellant further submits the *Anderson* case is authority for *his* request for a change of custody. *Anderson* was a proceeding exactly like the instant case — that is, it was a request by the father to modify an earlier divorce decree and to award custody of a son to the father on the grounds that the son had reached ten years of age and had expressed a desire to be with the father. The court granted the father's motion for a change of custody, and although it held that the decision of the child was not absolutely binding upon the court, it went on to state:

> "In so holding, however, we do not mean that the choice of the child who has reached such an age and evidenced such intelligence as to appreciate the importance of his decision, should not be given due weight by the court in considering the question of change of custody. On the contrary, such choice, and the reasons, if any, advanced therefore, should be given careful consideration. If it be evident that the choice is not made because of some temporary dissatisfaction or a passing whim and is not dictated by some present lure, but is a considered judgment of the child, it may well be controlling in the determination of what is for the best interest of the child."

(*Anderson v. Anderson*, 110 Utah 300, 305, 172 P 2d 132 (1946)).

It is not suggested by the trial judge anywhere in his Memorandum Decision, Findings of Fact, Conclusions of Law, or Decree that the choice of these two oldest boys was a mere whim or a passing fancy. As a matter of fact, the writer of this brief will represent to this court that the trial judge told him personally that their decision was not a mere whim or passing fancy. Moreover, the boys themselves told the trial judge that there was no "present lure" offered them in their decision; and the record discloses that the decision was their "considered judgment" and not anything else. The record overwhelmingly shows that the decision of these boys was made after mature deliberation and remained unchanged for two months notwithstanding a "brain washing" session in the office of the respondent's attorney just before coming to court. Consequently, the appellant submits that it was prejudicial and reversible error for the trial judge to close his eyes to the request of these minor children under the circumstances of this case. The defendant further submits that the rationale of the *Anderson* case dictates that the custody of the two older children should be awarded to the father

Since *Anderson* was decided, the Supreme Court has had occasion to decide *Smith v. Smith*, 15 Utah 2d 36, 386 P 2d 900 (1963). In *Smith* the court held that a child who has reached the age of ten

years or more may select the parent to which he will attach himself and the court must grant custody of that child to that parent unless it is shown that the parent is unfit to have custody.

It was stipulated by counsel for the mother; and the trial court expressly found that the father and his present wife were "*fit, proper and moral persons and proper persons to raise the children.*" (Tr. 202) Consequently, the only issue before this court is whether the decision of the two oldest children is binding upon the court as held in *Smith v. Smith* and as suggested in *Anderson v. Anderson* or whether it can be completely ignored as it was in the instant case.

The appellant admits that the *Smith* holding dealt with an original divorce action; whereas the *Anderson* case involved a subsequent modification proceeding much like the instant case. However, the appellant respectfully submits that *Anderson* also held the decision of the child was to be controlling if it was a considered judgment rather than a mere whim or passing fancy. If the Court disagrees with this interpretation, then the father respectfully requests the Court to interpret its holding in *Anderson* and hold that the desire of a child over the age of ten years is binding on the court in a modification proceedings just as it is in an original divorce action or as a minimum alternative that it is binding under the circumstances in this case.

Section 30-3-5 Utah Code Annotated — 1953 reads as follows:

> "*Disposition of property and children*: When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the children and parties as may be equitable; provided that if any of the children obtain the age of 10 years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

The father submits that there is nothing in the language cited above to show a legislative intent to allow a ten year old child the privilege to select his own parents in a divorce proceeding but deny him that right in a subsequent proceeding commenced to modify the earlier decree. The father submits there is no rationale to justify such a result and that it is unworkable in domestic relations cases. If a boy younger than ten needs a mother because of the tender, loving care and attention she can give; he needs it as much in the modification proceedings as in the original divorce. Similarily, if a boy older than ten needs a father becouse of the added discipline problems and because of the need to prepare for education and business, doesn't it follow that he needs this same parent in the modification proceed-

ings as much as he does in the original divorce action? Why should he be given the right to select the parent in the one case but not the other? The father submits that the legislature emphasized the age separation as being controlling and not the forum in which the action happens to be brought. The father submits that the age is controlling regardless of when the action is commenced and that a more uniform result in this area can be achieved by holding that the desire of the youngster over ten years of age is controlling on the court in both the original divorce as held in *Smith v. Smith* as well as in a subsequent modification proceeding.

The father submits the court should interpret *Anderson v. Anderson* to mean that a child over the age of ten has the absolute right to select the parent to which he will attach himself to and that this decision is binding upon the trial court in modification hearings the same as it has been held to be binding upon the trial court in divorce proceedings. As a minimum alternative, the defendant requests the court to hold that *Anderson v. Anderson* should be interpreted to award custody of the two oldest boys to their father under the circumstances of this case because their decision is obviously the result of mature deliberation and reflects their considered judgment and is not a passing fancy. It seems astonishing that this considered, deliberate judgment could be completely ignored by the trial judge. If their feeling was as strong as

it is expressed in the record herein, then it is very likely that these children are either going to run away from home to be with their father or else they are going to end up before the court in a future criminal proceedings. The request which the appellant is making to this court is made in all fairness to avoid these situations in the future.

In addition to the considered judgment of the oldest children, there is also the uncontroverted evidence by the father and by the mother's own neighbors that she was unable to take care of and adequately discipline the two oldest children. In this regard, the record shows that she told the witnesses that she was unable to take care of the two older boys and that she thought they would be better off with the appellant. (Tr. 126, 152, 153, 181, 182) The mother did not take the stand to rebut any of this testimony and the appellant submits that this evidence preponderates and dictates that the children are too much for the mother and they should be given to the father for that reason also.

II

THE TRIAL COURT ERRED IN DECIDING THERE WAS NOT GOOD CAUSE SHOWN TO REQUIRE THE RESPONDENT TO SUBMIT TO A MENTAL EXAMINATION PURSUANT TO RULE 35 OF THE UTAH RULES OF CIVIL PROCEDURE.

The pretrial judge listed one of the issues as follows:

"3. Whether pursuant to Rule 35 of the Utah

Rules of Civil Procedure, there is sufficient cause for the plaintiff to submit to a psychiatric examination." (Tr. 36)

The trial judge in his Memorandum Decision stated:

"2. That there is not sufficient cause at this time to order the plaintiff to submit to a psychiatric and physical examination. However, the plaintiff should be closely observed, and if it appears at some future time that a psychiatric and physical examination is necessary, application to the court shall be immediately made." (Tr. 46)

The appellant submits the trial judge misconceived the burden required under Rule 35 and the apprehension he expressed about the mother's mental condition in his memorandum decision was sufficient cause standing by itself to order the mother to submit to a mental examination to clear up any doubts about this issue and to determine just how serious the mother's mental illness really was.

Rule 35 (a) states in part as follows:

"(a) In an action in which the mental condition of a party is in controversy he court in which the action is pending may order (her) to submit to a . . . mental examination by a disinterested and imparial physician. The order may be made only upon motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, matter, conditions, and scope of the examination and the person or persons by whom it is to be made."

The record shows that the mental competency of the mother was the key issue in this proceedings. (Tr. 13, 14, 36) The record also discloses that a motion was made for a mental examination pursuant to Rule 35 (Tr. 14) and that notice was given to the adverse party. (Tr. 15) The father agreed to pay all cost involved. He submits that he showed "good cause" for such an examination and that it was prejudicial error for the trial court to deny this examination.

The requirement of "good cause" does not mean that the appellant must prove his case beyond a reasonable doubt or even by a preponderance of the evidence. The mother in the instant case did not object to the pre-trial order. She did not take the stand nor did she offer any witnesses to show why she might be prejudiced by such an order.

In 4 Moore's *Federal Practice* 2559, the author states:

> "An order for physical or mental examination (pursuant to rule 35 of the Federal Rules of Civil Procedure which is similar to Rule 35 of the Utah Rules of Civil Procedure) may be made only for 'good cause shown.' However, it will usually be easy enough to make such a showing where the physical or mental condition of the party is actually in controversy."

In defining "good cause" in Rule 34 of the Federal Rules of Civil Procedure which is for the production of documents, Professor Moore states:

"The party seeking inspection is required to

> show 'good cause thereof'. Considerations of practical convenience should play the leading role in determining what constitutes good cause. What is good cause depends upon the particular facts of each case. As Judge Mize said in one decision, 'It is difficult to lay down a definition of good cause and apply it to every particular case. There is a wide latitude.' Generally speaking, however, there should be a showing that the documents about to be inspected will in some way, aid the moving party in the preparation of his case; the the documents are relevant to the issue; that the moving party must establish his claim or defense by documents, most of which are in the adverse party's possession; or the denial of production would unduly prejudice the preparation of the party's case or would cause him hardship or injustice. That production at the trial would be cumbersome and time consuming is a reason for ordering production and inspection under Rule 34." 4 Moore's *Federal Practice*, 2449 Section 34.08, "Showing of Good Cause."

The appellant submits that all of the tests specified above for Rule 34 were met in the instant case. There was certainly a showing that the mother's mental condition was in controversy. In fact that was the key isue in this case. Her past history of mental illness, together with a reoccurence of old symptoms which reappeared in the summer of 1965 and continued until this action was commenced about the first of April, 1966, all emphasize the fears which the father had for his children. Just how serious the mother's mental condi-

tion was could not be known by the father nor the neighbors he subpoenaed to court, nor by the trial judge. It was a matter for the experts — for someone who was qualified to probe the mind and nervous systems and their relationship to the actions of the mother.

The nature of this case precluded any direct evidency by a qualified independent psychiatrist of the mother's mental condition because the mother claimed the doctor-patient privilege. (Tr. 199) However, many lay witnesses including the father and the mother's neighbors did testify to unusual symptoms which the mother displayed as set forth above. The father submits that there is no way other than by an order pursuant to Rule 35 that the mother could be compelled to submit to a mental examination to see just how serious these symptoms were.

The appellant subpoenaed the mother's psychiatrist as a hostile witness and did solicit an opinion suggesting that the respondent was suffering from a mental illness diagnosed as schizophrenia of a recurring nature. (Tr. 191-192) This opinion was based on a hypothetical question which in turn was based on facts in evidence by the lay witnesses. However when the doctor was asked questions about his specific treatment of the mother, the doctor-patient privilege was invoked and no questions were allowed. (Tr. 199) The appellant submits that the mother's fear of not allowing the Doctor to testify; together with the fear that the mother displayed at pretrial

when her counsel objected to records of her past mental condition being made available to the appellant, (Tr. 36 paragraph #4) is ample evidence of the respondent's mental sickness. If she was not apprehensive and if she thought that she was normal and was able to take care of the children she should gladly have submitted to such an examination. The appellant testified the mother had told him she had been advised by Doctor Tedrow her psychiatrist to enter the LDS Hospital Psychiatric Ward for observation and treatment just before the present action was commenced. (Tr. 125. See also Tr. 28. These answers to the mother's interrogatories were made a part of the record as stated on Tr. 75, Lines 28—et. seq. and again at Tr. 128, Lines 17-18) None of this evidence was denied by the mother, or any of the witnesses that were called by the father.

The testimony of the lay witnesses put the mental illness and incompetency of the mother directly into issue. The appellant testified about the respondent's previous nervous breakdown and the reappearance of the symptoms again in the summer of 1965 and that these symptoms continued until just a few weeks before the trial in June of 1966. (Tr. 121)

The respondent's neighbors living directly next door and across the street testified that the respondent was mentally upset and depressed for a period of time from about September of 1965 through April

of 1966; although they did admit at the trial held on June 14, that at that time the mother was acting a little better. However they were unanimous in saying that during the intervening months she was emotionally upset, distressed, very depressed, that she could not recognize her children, that she stated that the oldest children were too hard for her to handle and that they should be with their father. They also stated that she told them that she thought that a tape recorder had been put in her house; that the neighbors were spying on her, that they did not like her, and that her telephone was being tapped. The neighbors became so concerned about this problem that they went to the mother's bishop and asked him to talk to her to see what could be done to straighten out the situation in the home.

> (Tr. 152, 153, 156, 157, 158, 163, 164, 167, 168, 169. See also Tr. 170 where the attorney for the mother more or less admits that the illness persisted from September of 1965 through April of 1966. His questions always went to having the witnesses admit that she was a fairly good mother prior to the summer of 1965 and after the action was started in 1966; and the appellant submits this clearly shows the mother's own attorney admitted her mental sickness during these intervening months. Other references to the neighbor's testimony are Tr. 178, 179, 180, 181, 182. See also 183 and 184 where the neighbor states that even when the mother began taking pills this year for what she believed was a low-blood sugar condition that there did not seem to be much improvement at first, but that

during the last two months, which would have been May and June of 1966, there was a little improvement. In this regard, the testimony of the mother's psychiatrist on Transcript 187-189 shows conclusively that the mother was suffering from mental illness and not a low-blood sugar condition. Again on page 198 he states that the mother had all the symptoms of mental illness and the only symptom which would indicate low-blood sugar was the fatigue.)

The appellant submits that if this testimony is not sufficient to carry the burden required by Rule 35 then it is impossible to ever use this rule for mental examinations. The appellant wonders what more could possibly be required. He was willing to pay all costs of the examination and any other expenses which might be involved.

The trial judge apparently felt the respondent should be closely watched and so stated in his memorandum decision. This clearly shows that a doubt was raised in his mind as to the respondent's mental condition and the appellant submits that the court should have ordered the examination to clear up this doubt. The appellant does not believe the approach suggested by the trial judge would help. If the appellant did closely watch the respondent and found her condition got worse again and made application to the court for relief, why should he expect any better treatment in the future than he received in the instant case which would mean that he would have to wait two to three months for dis-

covery, trial schedules, etc. before the hearing. By that time the mother would be able to cover up her symptoms, could talk to her neighbors, and the father would be back where he is now.

The trial judge refused to make any specific findings as to the testimony of the psychiatrist or the witnesses or the neighbors as to the mother's mental condition. His Memorandum Decision and "Findings of Fact" are mere conclusions of law. The appellant objected to them and made an offer of proof as to what the psychiatrist would say if he were permitted to testify as to his treatment of the mother. (Tr. 62) These objections and this offer were ignored. The appellant submits the trial court had ample evidence to determine that the mother was mentally ill and that she should be examined further. This would have brought forth a fresh, independent and impartial psychiatrist. Only by so doing could the trial judge be sure that the mother's mental condition was not going to be injurious to these minor children. The appellant stated in his testimony that when the mother had her nervous breakdown in 1960 she was not able to take care of the house or the minor children and that he was fearful that she could not do any better this time. (Tr. 178-124, 131, Lines 9 et. seq.)

The appellant admits the testimony of some of the mother's neighbors who said on cross-examination that before the summer of 1965 and after April of 1966 the mother appeared to do better. But is this

sufficient? Is a lucid interval for a few months out of a year enough or is the job of raising four children a 24 hour a day task which requires rationality seven days a week as a minimum. Is a mother that can't even recognize her own children a good mother? Can one who sits and stares and is so depressed that she can't take care of her house or properly feed and clothe her children competent to have their custody? Suppose that a further mental examination disclosed a more serious mental illness than even Dr. Tedrow was able to diagnose from the hypothetical question. Wouldn't it be better to alleviate these doubts and to clear the air once and for all by a mental examination now.

Other courts have faced this same problem and have even gone so far as to deny the mother not only custody of the children but visitation rights as well. In *Bowler v. Bowler,* 355 Michigan 686, 96 N.W. 2d 129 (1959) the court had before it the father's motion to modify the original divorce decree and to grant the custody of the children to him on the grounds that the mother had become afflicted with a serious mental illness. The testimony of three psychiatrists at the hearing was in favor of the father's position and based thereon the court upheld the change of custody and also denied the mother reasonable visitation rights notwithstanding she had her friends and neighbors there to testify as to her good motherly qualities. In this connection the court said:

"The second ground, as we followed it, is that the court erred in granting custody to the father where there was disputed medical testimony. To thus badly state the question is to answer it. We are aware of no rule of law nor are we cited one, that ties the hands of a chancellor because of disputed medical testimony. If we did know of any such rule, we would promptly write to overrule it. Opposed testimony of friends and former neighbors apparently also depended upon by appellant, (as to their past observations as to the kindliness and maternal attributes and good character of Mrs. Bowler) however important in the usual case, were of but passing moment in the particular circumstances of this case. These attributes were not disputed nor in issue and, if anything, only tend to make this case more pitiable. *The raising of young children is a 24 hour proposition, 7 days a week, year in and year out, and in these situations passing observations of lay witnesses made during the subjects's lucid intervals (apparently one of the strange phenomenon of this grave mental sickness) may not challenge the clear, careful, and detached testimony of three reputable psychiatrists.* The chancellor below himself made it plain that if it were not for the mother's mental state, he would gladly and without hesitation have restored her to actual as well as legal custody of the children." (Page 132 of Court's Opinion. Emphasis added)

In the *Bowler* case the psychiatrists stated that Mrs. Bowler was suffering "from a grave mental illness which they more or less uniformly diagnosed as schizophrenia, paranoid type, chronic active." At least

two of them felt that she should be in a mental institution. One of the doctors told the court of the devastating effect that exposure of growing children to such an afflicted parent could have on the children not only in the present, but in the unpredictable future. Another testified that *'it is never in the best interests of anyone to be in the custody of somebody who is mentally ill;'* and one medical witness who appears to have seen the mother most recently flatly recommended against granting the mother visitation for her sake as well as the childrens. (Page 131 of the opinion)

The appellant submits that the *Bowler* case is on all 4's with the instant case. In the instant case the psychiatrist testified that the mother was suffering from a mental illness diagnosed as schizophrenia, and said that it was of a recurring or active nature. He stated that there were many different things that could happen around the house to trigger a schizophrenic episode such as emotional problems, responsibility of raising four children without the help of the father, etc. (Tr. 196) The testimony is undisputed that this doctor recommended that the mother be hospitalized in the psychiatric ward of the LDS hospital for further examination. (Tr. 125) The defendant submits that in addition to the schizophrenic tendancies mentioned by Dr. Tedrow that the mother's anxiety about being persecuted by her neighbors so much and that she felt a tape recorder was implanted in the back

of her head and in the house and that she had moved from a former residence and had also had her telephone disconnected and the number changed because she thought that the neighbors were spying on her suggests a paranoid illness also. Under these circumstances, it might well be the opinion of a disinterested psychiatrist that not only should the custody of the children be taken from their mother and be given to their father but also that the mother should be deprived of ever exposing her mental illness to the children again; and forbidden from any future visitation rights in accordance with the opinion set forth in the *Bowler v. Bowler* case.

The appellant submits that this evidence amply discloses that "good cause" has been shown to require the respondent to submit to a mental examination. The appellant also suggests to the court that sufficient evidence has been shown upon which this court could make an outright change in the custody of the minor children based on the mental incompetency of the mother without remanding this matter for a further examination or a new trial.

III.

THE TRIAL COURT'S FINDING THAT THE RESPONDENT IS NOT MENTALLY INCOMPETENT TO TAKE CARE OF THE FOUR MINOR CHILDREN AND THAT THE RESPONDENT IS NOT OTHERWISE UNFIT TO TAKE CARE OF THEM IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The trial judge stated in his memorandum decision as follows:

> "1. That the plaintiff is not mentally incompetent to take care of the minor children, nor is the plaintiff otherwise unfit to take care of them." (Tr. 46)

The defendant submits there was ample uncontroverted evidence to sustain the finding that the mother was mentally incompetent and refers this court to the evidence cited above under the next preceding argument point. The appellant submits that the evidence he produced was not only sufficient to carry the burden of good cause pursuant to Rule 35 for a further mental examination, but that it was also sufficient for the trial judge to make an outright award of the custody of the four minor children to the defendant.

In addition to the respondent's mental incompetency, the appellant submits that there was also uncontroverted evidence of neglect of the physical well-being of the minor children; of a defeatist attitude toward disciplining the two oldest boys; of a favoritism towards the two youngest children; as well as derogatory statements about the appellant made by the respondent and/or third parties in the respondent's presence and also which were made in the presence of the minor children. These derogatory statements became very upsetting to the children as expressed by them in the record. All of these points were raised by the father in his motion for the change of custody of the children. (Tr. 13)

In the case of *Harris v. Harris*, 186 Cal. 2d 788, 9 Cal Reporter, 300 (1960) the California Supreme Court stated:

> "In modifying a child custody award it was proper for the court to consider, besides the obvious condition of the household maintained by the mother, the family relations, financial condition of the parents, and the ages of the children, the whole background of the children and of the parents and any other factors bearing on the welfare of the children, such as the mother's lack of interest in them and her lack of devotion and concern for their welfare, neglect of, insufficient facilities and the inability to care for the children, hostility of the mother towards the father and her refusal to allow him to express an interest in them, and her incapability of exercising necessary discipline, supervision and control over the children, and her deliberate estrangement of them from their father, the home atmosphere and the available superior care of one parent and the educational needs of the children."

The record discloses that the mother made derogatory statements about the father and that none of this testimony was objected to or controverted by the mother. The appellant testified that immediately before this proceeding was commenced he returned to the respondent's home with the minor children from a Saturday visitation session. At that time the mother exhibited hostility toward the father in the presence of the minor children and jerked

them out of the car and told the father that he couldn't see them anymore on Wednesday which had been a visitation day for the past two years. The mother further stated that he might not be able to see them again on Saturday. (Tr. 109).

That night, the mother asked her bishop's wife to her home where in the presence of the mother and the minor children, the bishop's wife made derogatory statements about the father and his present wife. The minor child Randall was so upset by this that he called his father the next day and stated to him what had occurred. The father's testimony in this regard is as follows:

"Q Did they say anything later to you about that?

A Yes sir, let me see, well the Saturday after this happened, my oldest son, Randall, he called me Sunday afternoon, and he said that after I brought them home the previous Saturday that his mother had called the bishop's wife and she came down and she was just telling them all kinds of bad things about myself and about Lynell.

Q Is Randy your oldest son?

A Yes.

Q What did he say had been said?

A He said that the bishop's wife had just called Lynell in so many — she said she was just a bad woman, and you see the

bishop's wife had never even met Lynell before previously.

Q Did he say anything else had been said at that time?

A He kind of inferred, she just said all kinds of bad things.

Q Did he seem upset?

A Yes, he was. He was extremely upset.

Q What did you tell him?

A I told him, 'Randall you are twelve years old, you are a big boy. You know some of these things that have been said.' I said, 'you know Lynell and you know what type of person she is.' I said, 'I can't be with you to explain to you too much about the situation, but you are going to have to just kind of make up your own mind as to what to believe and what you are not going to believe.' (Tr. 110)

When the trial judge asked Randall if his mother had ever said anything bad about his father, he replied in the affirmative stating:

"Q (By the court) What does your mother ever tell you about your father? Does she ever talk about him?

A (By Randall) She thinks he is a brat.

Q Is that what she said he was?

A She cusses at him.

Q What does she say bad about your father?

A When Tommy and Bret were riding down the street on a bicycle, my mommy couldn't find them, and she sat down and cried and started swearing at him.

Q Swearing at whom?

A My dad.

Q Was this before they were separated?

A After." (Tr. 211)

Obviously this kind of talk is something that the minor children should not be subjected to. The mother's mental illness was exposed when she sat down and cried and swore at the father over a relatively simple matter. This episode obviously stuck in the boy's mind. The appellant submits the mother's open hostility is very upsetting to these children and that it is going to poison their minds not only to their father, but perhaps will give them an improper prospective toward men in general and certainly toward the family as a unit. For these reasons the courts uniformly hold that the custody should be taken from the parent making the derogatory statements and be granted to the other. 32 ALR 1005 "Alienation of Child's Affections as Affecting Custody Award."

In addition to the derogatory statements, the record shows that the respondent was not able to handle the oldest children and had admitted to neighbors that they would probably be better off with their father and that they had also expressed a

desire to be with their father. (Tr. 126, 152, 181, 182) This evidence was not denied by the mother. Moreover the evidence shows the mother favored the two younger twin boys (Tr. 127, 168) and this is another reason why the custody of at least the two older boys should be granted to the father.

Finally the record shows that the mother neglected even giving the children the bare necessities of life. The father testified that when he would pick the children up at 9:30 on Saturdays for visitation they were frequently unfed and were almost always in dirty clothes. (Tr. 79-80, 111, 118) Not only were their clothes dirty, but their bodies also and sometimes this dirt produced an awful stench. (Tr. 103, 118, 204) A friend of the father's wife testified that she was present at the father's house on several of the Saturday visitations and that the children "were very very dirty. Their clothes were dirty, their faces and hands were dirty and they looked terrible." She stated that the father and his present wife had to take the children in and to wash them and clean them before they would be ready for breakfast. (Tr. 204)

None of this evidence was disputed by the mother. It is true that some of he neighbors stated on cross examination that at the time of the trial the mother was doing a better job of taking care of the children than she had done previously. However all of them admitted that while she had been "sick", "upset", and "depressed", (which was from the sum-

mer of 1965 through April 1966) she had not been able to do the job of taking care of the children as they thought she should. In fact the neighbors became so alarmed that at one time a group of them went to the bishop to ask him to talk to the mother to see if there wasn't something that could be done in taking care of the children and cleaning up the house. (Tr. 152, 153, 156, 157, 157, 163, 164, 167, 168, 169, 178-182)

The appellant submits that all of the factors set forth in the *Harris* case, supra, are present in this case and that each of them dictate against the trial judge awarding the custody of the minor children to their mother. It was clear that the father's financial situation and home and environment was much better for the children than was the mothers. The mother stipuated that both the father and his present wife were fit persons in all repsects to have the custody of the children. (Tr. 202, Lines 20-22) The father had remarried and his present wife had three children about the same ages as the four that were involved in the instant case. Both he and his present wife were working and were thus able to financially take care of the seven children. All seven children would have been in school so it was not necessary for anybody to be home during the day to take care of them. However, the father's mother lives just a few houses away and could have come down in any emergency. On the other hand, the record discloses that the mother was mentally ill, that

she was upset and depressed all the time and that the people in the neighborhood did not think that she was doing too good a job of taking care of the children. It is uncontroverted that the two oldest boys were becoming a discipline problem for her and that she stated that she thought they should be with their father.

IV.

THE TRIAL COURT ERRED IN AWARDING THE FATHER SUCH LIMITED VISITATION RIGHTS AND IT ALSO ERRED IN NOT FINDING THE MOTHER TO BE IN CONTEMPT FOR REFUSING TO AWARD THE FATHER REASONABLE VISITATION RIGHTS.

In his memorandum decision the trial judge stated:

> "3. That the plaintiff is not in contempt of the decree of divorce heretofore entered for her failure to allow the defendant visitation rights which he had prior to the filing of the petition:" (Tr. 46)

The trial court then amended his memorandum decision and added the following visitation rights:

> "It is ordered that the defendant is allowed to have the children Friday after school until Saturday night every other weekend, and shall have the right to visit with them in addition thereto at times convenient to the children and the parties. Further the defendant may have the children with him for a period of at least two weeks during the summer when the defendant has his vacation, and if the vacation is more than two weeks, he may have them with him during that period, during which

time the defendant will be relieved proportionately of the amount of support he is ordered to pay. However, this relief on the support only extends to summer vacation." (Tr. 51)

From the time of the divorce decree in July, 1964, the parties had agreed that the father would take the children to his house every Wednesday night and also on Saturdays from about 9:30 a.m. to 7:30 p.m. (Tr. 107) This constituted reasonable visitation rights for the parties. Even then, the children stated to the trial judge that they would like to see their father more often in the future than they had in the past. (Tr. 210, 217). However, the trial judge actually cut these visitation rights in half. There were no findings stated in the court's memorandum decision or "Findings of Fact" to support this action and the appellant submits that it is prejudicial error.

The appellant had always paid his $240.00 per month alimony and child support right on time each and every month. (Tr. 108, Lines 1-11) He had also assisted his exwife in taking the children at times when she was unable to handle them and had helped out around the house and yard. (Tr. 108, 175) Yet, in spite of all this assistance and showing of good faith on the part of the father, the trial court actually penalized him and has taken the children away from him, notwithstanding their express desires to be with their father more and the two oldest children having stated that they wanted to come and live with

him. And this was done notwithstanding the stipulation that the appellant and his present wife were fit and proper persons in all respects to have the custody of the children awarded to them. (Tr. 202)

The appellant submits that the mother's action in refusing to let him see his children on Wednesdays was merely a punishment for commencing this lawsuit and did not promote the welfare of the minor children in any way. It is undisputed that the parties agreed to visitation every Wednesday night for two years and that the father had always taken the children on these occasions. Certainly this had become reasonable visitation rights pursuant to the terms of the divorce decree. The record discloses that the mother was angry because the father was about to commence this action and that this anger prompted her actions denying the father Wednesday visitation rights. (Tr. 109) The mother did not offer any other reason for her action and the appellant submits that the trial judge should have found her in contempt of court for her failure to award the father reasonable visitation rights as ordered in the divorce decree, and as agreed upon by the parties for two years.

V.

THE TRIAL JUDGE ERRED IN REFUSING TO MAKE SPECIFIC FINDINGS OF FACT IN THIS MATTER.

Rule 41 (b) of the Utah Rules of Civil Procedure reads in part as follows:

> "If the court renders judgment on the merits against the plaintiff the court shall make findings as provided in Rule 52 (a)."

Rule 52 (a) of the Utah Rules of Civil Procedure states in part as follows:

> "In all actions tried upon the facts without a jury, . . . the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereof and direct the entry of the appropriate judgment; . . . "

There was no waiver of any kind of the Findings of Fact in this matter, and the trial judge refused to make any specific findings after the father requested them. After the proposed findings had been submitted by the mother's attorney, the father objected specifically to the findings and asked the court to make new findings concerning the welfare of the minor children pursuant to the evidence which had been produced. (Tr. 60-63) This the trial judge refused to do.

This court has held that in a divorce case where the case is tried to the court, there should be specific and direct findings of all of the facts. *Doe v. Doe,* 48 Utah 200, 158 Pacific 781 (1916). All of the cases following Rule 52 in the Utah Code Annotated show that Conclusions of Law alone are not sufficient and that it is a reversible error for the court to enter judgment which is not based upon adequate findings of fact as to each and every material matter which is in issue.

The trial judge entered his memorandum decision on June 16, 1966. (Tr. 46-47) Based thereon, counsel for the mother prepared some proposed "Findings of Fact", "Conclusions of Law", and a "Decree" (Tr. 54-59). These were objected to by the appellant on several grounds but the court dismissed these objections and signed the findings on July 13, 1966.

The appellant requests this honorable court to read these "findings." The appellant submits that they are merely a restatement of the conclusions of law which were stated by the court in its memorandum decision and that the conclusions of law and decree are also simply a restatement of these same points.

The appellant submits that the only proper finding is contained in the first part of paragraph 4 which states the children expressed a desire to be with their father (Tr. 55); but even then the court went on to overrule its own "findings" and award custody to the mother.

If this court will read the "findings" it will find that there is not one specific fact found anywhere other than that the children have expressed a desire to be with their father. No testimony of any witnesses is referred to nor are any other parts of the evidence cited. There is nowhere any finding as to what is best for the welfare of the minor children. The appellant submits these "findings"

which are really conclusions are not supported by the evidence for the reasons set forth above in this brief, and that these "conclusions" are contrary to the law and to the evidence for the reasons set forth above.

SUMMARY

In summary the appellant submits the record in this case to this honorable court for study. The record shows that the appellant has been an excellent father to the four minor children herein; that he has consistently each month paid the $240.00 alimony and child support ordered by the court; that he has helped out on other circumstances and occasions with the minor children and around the house; that he has remarried and that his present wife has three children of her own and their ages are about the same as the four children involved in the instant action; that both he and his present wife are fit and proper persons to have the custody of the minor children; that they are financially and are in all respects better able to take care of the four children than is the respondent; that the two oldest children have expressed a desire to live with their father rather than remain with their mother; that this decision is their considered judgment; that the mother has said that these two oldest children were too much for her to handle and that they should be with their father and that they have expressed their desire to be with the father — this she has

told to her neighbors as well as to other people; that the mother is suffering from a severe mental illness called schizophrenia of an active reoccurring nature and possibly a more serious illness; that for longer than six months she exhibited several symptoms of this mental illness; that she makes derogatory statements about the father and the father's present wife to the said minor children; that she neglects to provide the said minor children with the necessities of life and that she has denied the father the right to see his children in the future as he has been seeing them in the past. Under these circumstances the appellant respectfully submits the trial judge erred and did not listen to the evidence and weigh it, but rather had his mind made up about the case to the prejudice of the father's rights, and certainly to the detriment of the minor children.

The father submits that he is entitled to the custody of the four children as a matter of law from the record herein and further submits that the case should be remanded for the trial judge to make new findings and accurate conclusions of law granting custody of all four children to the appellant for the reasons set forth above.

Respectfully submitted,

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Attorney for Appellant

I acknowledge receipt of two copies of the Appellant's Brief this ..... day of November, 1966.
