

1970

Carolyn J. Wiese v. Robert D. Wiese : Brief of Appellant

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TABLE OF CONTENTS

	Page
NATURE OF CASE	1
STATEMENT OF FACTS	1
DISPOSITION BELOW	4
RELIEF SOUGHT ON APPEAL	6
ARGUMENT	6
POINT I. THE COURT ERRED IN FINDING THAT IT IS IN THE BEST INTEREST OF THE MINOR BOYS TO REMAIN IN THE CUSTODY OF DE- FENDANT.	6
POINT II. THE COURT ERRED IN REFUSING TO ALLOW JANICE WIESE, MINOR DAUGHTER OF THE PARTIES, TO TESTIFY.	43
POINT III. THE COURT ERRED IN REFUSING TO ALLOW PLAINTIFF'S COUNSEL TO BE PRES- ENT AND SUGGEST QUESTIONS TO BE ASKED OF THE SUBJECT BOYS DURING THE COURT'S QUESTIONING OF THEM.	47
POINT IV. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO APPOINT AN EX- PERT AND TO REOPEN THE CASE.	49
CONCLUSION	51

STATUTES AND RULES CITED

Rule 43, U.R.C.P.	46
78-24-1, U.C.A. 1953	46
78-24-2, U.C.A. 1953	46

CASES CITED

Austad vs. Austad, 2 Utah 2d 49, 269 P2d 284 (1954)	47
---	----

TABLE OF CONTENTS—Continued

	Page
Boone vs. Boone, 150 Fed ² 153 (D.C., 1945)	51
Callicott vs. Callicott, 364 SW ² 455 (1963)	46
Graham vs. Ogden Union Ry. and Depot Co., 79 Ut. 1, 6 P ² 465 (1931)	49
Hepler vs. Hepler, 195 Va. 611, 79 SE ² 653 (1954)	47
Johnson vs. Johnson, 7 Utah 2d 263, 323 P2d 16 (1958)	47
Stone vs. Stone, 19 Utah 2d 378, 431 P2d 802 (1967)	7
Thurman vs. Thurman, 73 Idaho 122, 245 P ² 810 (1952)	33

ANNOTATIONS CITED

35 ALR ² 629	50
35 ALR ² 1005	34

IN THE SUPREME COURT
of the
STATE OF UTAH

CAROLYN J. WIESE,
Plaintiff-Appellant,

-VS-

ROBERT D. WIESE,
Defendant-Respondent.

Case No.
11823

BRIEF OF APPELLANT

NATURE OF CASE

This is a post divorce action for change of custody of two minor sons, ages 7 and 12, of the parties from the defendant father to the plaintiff mother.

STATEMENT OF FACTS

Plaintiff filed suit for divorce against defendant on December 2, 1966 (R-4). Issue was joined on January

9, 1967. The parties executed a Stipulation, dated March 6, 1967, concerning the matters at issue (R 9). Plaintiff did so with the understanding that defendant had agreed to allow her to have the boys if they ever wanted or needed to be with her (T 269). Defendant now disputes this understanding (T 269). Plaintiff is, or was, a naive and gullible person (T 212). She was under great emotional strain (T-81). Anyone can be subjected to pressures which would impair their judgment (T 223). In addition, plaintiff realized that the boys would have a more normal home environment with defendant at that time since he was already romantically involved with another woman he planned to marry and did (R 18, par. 8, T 249). Plaintiff was awarded a divorce from defendant and custody of the minor daughter, Janice, then age 8, and defendant was awarded custody of the two minor sons, Kurt, then age 9, and Michael, then age 5, pursuant to the aforesaid Stipulation, on March 6, 1967 (R 10). The defendant was ordered to pay \$100.00 per month to plaintiff for the support of Janice.

On December 27, 1967, plaintiff executed an affidavit alleging a change of circumstance and requesting modification of the divorce decree to award her the custody of Michael, then age 6, and alleging certain violations by defendant of the divorce decree provision relating to payment of support money and counsel fees. The Court, Judge John F. Wahlquist presiding, tried the case on February 5, 1968, and denied plaintiff's request for change of custody (R 18).

In July and August, 1968, the boys lived with plaintiff in California for two periods of two weeks each (T 7). During that time plaintiff learned that the older son, Kurt, had been troubled by questions regarding his mother's taking dope, trading him and his brother for a car, not loving him but only Michael, and her trying to prove he was mentally retarded (T 9). She had sensed that the boys needed emotional help (T 65) and arranged for the boys to be examined by Dr. Malcolm Liebroder, a clinical psychologist. Both boys were examined on July 12, 1969, and Kurt was also seen on August 19, 1968, and September 29, 1968 (T 165). Dr. Liebroder found that both boys were experiencing emotional difficulties (See T 168 as to Kurt and T 172 and 204 as to Michael). Both boys expressed to their mother (T 8 as to Michael and T 10 as to Kurt) and to Dr. Liebroder (See T 172 as to Michael and T 175 as to Kurt) a desire to live with their mother.

After the boys returned to Utah, Kurt told his father that he wanted to live with his mother for the coming school year (T 325). Defendant told him he could not do so (T 327).

In August and September plaintiff kept in close contact with the boys by phone until defendant had his phone number changed to an unlisted one and refused to give the number to plaintiff (T 257). On October 3, 1968, plaintiff commenced the instant proceedings by her affidavit for change of custody (R 24). During the pendency of the proceedings, defendant had the boys

examined by Dr. Richard S. Iverson, a psychiatrist who referred them to Dr. Clarence D. Swaner, a clinical psychologist. Dr. Iverson found that both boys should have psychiatric treatment at a later time (T 408). Dr. Swaner found that Kurt was emotionally disturbed (T 140) and that "for Michael he seems to need more over support in the life situation and value of placing him with his mother should be seriously considered" (T 156).

Two weeks prior to the trial in May, defendant's wife filed suit for divorce (T 250) and has now obtained her divorce. Dr. Swaner testified that Michael's problem would probably be intensified by not having a step-mother in the home (T 156). At present the boys are being cared for by defendant's elderly parents who have health problems (T 420).

Defendant did not pay for the support of Janice, as ordered by the divorce decree, either before (T 267) or after the trial although his wife was working and he had gross earnings of \$950.00 per month as a civil engineer (T 251) and an additional \$1,700 to \$1,800 gross earnings from Army reserve pay (T 317).

DISPOSITION BELOW

On October 26, 1968 the Honorable John F. Wahlquist issued an Order to Show Cause concerning the custody of said sons returnable November 12, 1968 (R 26). Plaintiff served a Notice of the taking of the Depo-

sition of defendant and the older son, Kurt, on November 4, 1968 (R 23). Debtor moved for an order forbidding the taking of the deposition (R 25). On October 28, 1968, Judge Wahlquist granted Defendant's motion and denied an intervening motion (as to latter see R 27) concerning temporary custody before the trial date and that defendant be required to furnish his phone number to plaintiff to enable plaintiff to call the boys at a reasonable time each day (R 32). On October 31, 1968, plaintiff filed an Affidavit of Bias or Prejudice (R 31). On November 15, 1968 (The trial having been rescheduled for hearing on February 11, 1969, before the Honorable Parley E. Norseth) plaintiff moved for periods of temporary custody in each month thereafter for short periods of time during vacation from school or on week ends and that the phone calls ordered by Judge Wahlquist (R 32) be fixed as to days and hours (R 33). These motions were argued on November 25, 1968. On December 20, 1968, Judge Norseth ordered that the minor sons of the parties be permitted to visit with plaintiff on December 26, 1968 (R 237).

The trial of plaintiff's custody motion was held on Feb. 11, on May 27, and May 28, 1969. On June 5, 1969, plaintiff moved the Court to appoint an expert witness and to reopen the case to receive the testimony of said expert and also certain evidence from plaintiff as to her being willing to be examined by Dr. Richard Iverson, defendant's expert witness, on condition that defendant be examined by plaintiff's expert witnesses, a condition

allegedly rejected by defendant (R 54). Defendant filed an affidavit of Dr. Richard Iverson in opposition to plaintiff's motion to appoint an expert witness and to reopen the case (R. 49). On June 26, 1969, Judge Norseth denied both the custody motion of plaintiff and her motion of June 5, 1969, in a memorandum decision (R 53). Findings of Fact, Conclusions of Law and a Modified Decree were signed and filed in this cause on August 4, 1969 (R 58, 59). This appeal is from that Modified Decree denying plaintiff's Motion to Amend the Divorce Decree concerning the custody of the two minor sons, now ages seven and twelve.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the Modified Decree entered in this cause set aside and an order entered modifying the divorce decree in this cause to grant plaintiff custody of the two minor sons of the parties or, in the event a change of custody is not ordered by this court, a new trial concerning the custody of these boys in which Janice, their sister, is permitted to testify, an independent psychiatrist is appointed by the court, and counsel are present when the boys are interviewed by the court.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT IT IS IN THE BEST INTEREST OF THE MINOR BOYS TO REMAIN IN THE CUSTODY OF DEFENDANT.

Plaintiff well recognizes that this Court must survey the evidence in the most favorable light to the defendant since he prevailed in the court below (*Stone vs. Stone*, 19 Utah² 393, 384 P² 961). In light of these guiding principles, plaintiff proposes to survey the evidence which defendant has produced to establish the critical fact which plaintiff contends was decided contrary to the evidence.

The subsidiary facts in support of this major finding, as distilled from the Findings of Fact and paragraphs of corresponding number (R 58), are the following:

1. A previous motion for change of custody concerning Michael only was denied after a trial, February 5, 1968.

2. Plaintiff's husband told defendant in June, 1968, that plaintiff was "too emotionally unstable to handle her affairs."

3. Plaintiff and her husband harassed defendant prior to June 20, 1968, in efforts to obtain temporary custody of the boys.

4. The sons in question were taken for psychological examinations by plaintiff's husband without defendant's knowledge or consent, and this caused them to question unnecessarily their sanity and emotional well being.

5. Kurt told the trial court he wanted to remain with the defendant.

6. Plaintiff and her husband attempted in California to undermine the boys' relationship to defendant and, by promises of gifts, sought the boys to request a change of custody.

7. Plaintiff's husband permitted Kurt to drive a car to influence him to stay with plaintiff.

8. Plaintiff placed the boys under great emotional pressure by daily phone calls.

9. Defendant has not unreasonably left the boys alone without proper supervision and is able to provide for their care, supervision, and control of them.

10. Plaintiff's remarriage alone is not sufficient to change custody.

Plaintiff respectfully makes the following comments concerning the above facts of corresponding number:

1. Prior Custody Hearing — The prior decision should not be decisive as to this one unless the situation is substantially the same in this case, which it is not since plaintiff was then working full time and single, whereas she is now remarried and a full time homemaker.

2. Plaintiff's Husband's Comment Concerning Her Emotional Instability — The evidence on this point (T

291, 292) is defendant's testimony that plaintiff's husband said "he felt that Carolyn was so emotionally involved and distraught over this that he was just going to take over the handling of all this stuff." Such a statement is not a declaration of the lack of capacity of the person referred to but an explanation as to why it's better for someone else to conduct business of an emotional nature. In any event, plaintiff's virtues must have greatly offset such a serious handicap, if instability can be read into it, as Thomas Harrison nevertheless married plaintiff thereafter on July 20, 1968 (T 351). Since actions speak louder than words and since the time of trial and not a time nearly a year before is the time in question with respect to plaintiff's ability to function appropriately, plaintiff submits that this fact can be given but slight weight, especially in view of the direct evidence of her ability at that time as testified to by Dr. William Brown (T 211) as follows:

"Yes. Mrs. Harrison is an intelligent person. She has not been a scholar, in the sense of someone who would regularly be pursuing knowledge for the strength or power intellectually it might give you. But it has been of the utmost importance to her to know social conventions and expectations. She has been able, and is now able, to assess real life situations very soundly and to behave properly and appropriately. I think she's a capable, adequate person."

3. Harrassment of Defendant by Plaintiff Prior to June 20, 1968 — This was vigorously denied, but accept-

ting it as an established fact, as we must, it is of practically no legal significance in view of the fact that such conduct, regrettable and censorable as it is, would not directly harm the children. The children's well being and not that of the parties is the crucial concern.

4. Psychological Examinations without Defendant's Consent — Plaintiff asserts she has every legal and moral right to ascertain the children's mental and emotional condition as well as their physical condition. Certainly she would have no obligation to get defendant's approval for a physical examination if she had believed there was a physical ailment. Plaintiff believed her sons had emotional problems, and the examinations complained of bore out that suspicion or intuition. In fact, every one of the three experts who examined these boys, two of whom were engaged by defendant, so testified. Dr. Liebroder, plaintiff's expert, testified concerning Kurt as follows (T 168):

"I felt that Kurt was a highly intelligent boy who was under great stress, and that the problems that he was having were really preventing him from making full use of his abilities. I mean more than simply in his accumulation of information. I felt in fact that the accumulation of information in Kurt's situation was almost out of place. It was disproportionately high and I felt that he was trying to rely so heavily on facts and that he was having great difficulty expressing feelings.

"So that, in a well-rounded person, we would expect them to be capable of showing feeling and emotion, of being able to recognize them in themselves, and also to use facts and information in order to make sound judgments.

"And I was concerned particularly with Kurt, because of his great need for structure. His need to rely on fact, to the exclusion again of emotion. So that, while on the intelligence scale he was shown to be in many instances quite a bright boy, on less structure tasks — which would be more comparable to how he would function, more on his own — he didn't show the imagination that we would expect to see. He didn't show the freedom. His performance was very, very sparse. Far less than we would expect from a more well-rounded, shall I say, child."

As to Michael, Dr. Liebroder testified (T 172):

"I felt that Michael's feelings were much closer to the surface than Kurt's were and that a number of his test responses were indicative of feelings of depression, emotional turmoil, conflict, anxiety, and what I refer to as unsatisfied nurturant needs."

"Q. What do you mean by 'unsatisfied nurturant needs'?"

A. These are the kinds of needs that are usually satisfied, by Mother generally, during the early years of life, where the child begins to get some basic feelings of security and belongingness.

Q. And did you have a recommendation as to what you thought would be the remedy in his situation?

A. I felt that Michael needed the stability and security of a family. And, at the time of his evaluation, he expressed some preference to be with his natural mother. It seemed to me at that point that, if this was available, that it would be in his best interests."

Dr. Clarence Doxey Swaner, one of defendant's expert witness, testified as follows (T 140, 141, 142):

"Q. Did you form any conclusions as to Kurt's emotional condition as a result of these two examinations or interviews you had with him?

A. I felt that Kurt is showing some signs of emotional disturbance.

Q. And can you give us some idea as to the degree of emotional disturbance that you found indicated?

A. Oh, he was a very anxious boy. Extremely compulsive. Perfectionist. He was very concerned with a lot of details in his life. Reflecting his insecurity, I think. I made a recommendation that I thought he should be seeing somebody, and —

THE COURT: What do you mean by seeing somebody?

A. Seeing somebody for counseling.

Q. And what type of professional person did you recommend that he see?

A. I recommended that he see a psychiatrist. Because that is what's available in this community.

Q. Did you find his degree of emotional disturbance well above the average. I suppose all children have some degree of insecurity, do they not?

A. Well, I felt he needed some help.

THE COURT: Well, the question was all children have some insecurity. Now what is your answer to that, Doctor?

A. I would hesitate to compare him with other children. I feel Kurt is an individual and as an individual I thought he had some problems and could stand some help.

THE COURT: Does that satisfy you? Does the answer satisfy you?

MR. HANSEN: Just about, Your Honor.

THE COURT: All right.

MR. HANSEN: I'll say this, to clarify —

THE COURT: Don't say anything to me. Go ahead with the witness.

MR. HANSEN: Q. Doctor, do you recommend psychiatric treatment for all of those that you give psychological examinations to? That is in his age group?

A. Well, the children that I see — because of my professional position — are usually in difficulty, and frequently a recommendation is for some type of counseling.

Q. I see. Now did you determine, in the course of your examination of Kurt, any of the factors that you felt might account for the problems he was having?

A. The basic insecurity in his life, and the position he's been put in between his parents — through their divorce — and his insecurity in his life.

Q. Now what, in specifics, did you conclude — if you did — was the cause of the insecurity?

A. Well, the marital discord, and the insecurity. The lack of a stable home situation.

Q. Well, was there anything in his activities, the daily routine, that you thought was out out the ordinary?

THE COURT: Now, Doctor, if you can answer that question, you may. If you can't answer it, say so.

THE WITNESS: It's too general for me.

THE COURT: I thought it would be. Go ahead, and rephrase your question.

MR. HANSEN: Q. Well, did you find any indication that he was left alone too much?

A. I felt he was left alone too much.

Q. Did you find out why he was being left alone so much?

A. Both parents worked.

Q. Did you find out just how early the father and stepmother left home for their employment?

A. It was early. I think around 7:00. I'm not sure. He usually fixed his own breakfast."

Dr. Richard S. Iverson, defendant's other expert witness, testified as follows (T 408):

"Q. Now as a result of these examinations, did you find that any psychiatric treatment for either of these boys was indicated?

A. I was concerned about both of them. I thought with the trauma that they have been through, when this custody is finished, that they would both benefit from some type of treatment. But that is not a certainty. No treatment was recommended at that time because I felt the boys should be given a chance to see how they'll stabilize after the custody is determined. I did not consider it an emergency at that time. Because I considered it appropriate for these boys to be upset. If they hadn't been upset, then I would have been definitely concerned.

Q. Did you find any indication that either of the boys, and Kurt particularly, were emotionally disturbed by the amount of time they

have to be alone in this home? In their father's home?

A. Not particularly that I'm aware of. I can't remember it.

Q. Do you recall whether or not Dr. Swaner indicated any concern in this regard?

A. Dr. Swaner was concerned, I think about both of the boys, with the time they were free alone. But, more so he was concerned about Michael."

5. Kurt's Preference to Remain with Defendant — Kurt's response was to this following leading question: "But you still would like to live with your father, wouldn't you? (T 127)

Kurt had previously, however, expressed a desire to his father that he would like to live with his mother for the school year (T 325), as well as to his mother (T 9) and to Dr. Liebroder (T 175). Michael had expressed his desire to live with his mother to his mother (T 8), to his father (T 270), to Dr. Liebroder (T 172), to Dr. Swaner (T 153), and most importantly, to the trial court (T 116). In the latter case, he expressed this desire as follows:

"Q. Do you want to live any place else but with your father?

A. With my mother.

Q. You mean you want to live with your mother?

A. (Nodding head in the affirmative)

Q. Why?

A. Because I love her.

Q. Dont you love your father?

A. I love him, too, but I love my mother the most."

6. Promises of Gifts -- Plaintiff submits that this finding has no support in the evidence and is contrary to the testimony of the boys (See T 118 as to Michael and T 126 as to Kurt).

7. Kurt Driving Stepfather's Car -- The circumstances were as follows (T 388):

"I let Kurt drive the Chrysler New Yorker for a distance of about 200 feet, at a speed never exceeding five miles an hour, on a dead-end cul-de-sac, going towards the dead-end of a cul-de-sac, in an area of vacant land in Palos Verdes, California."

8. Phone Calls to Boys -- Defendant testified that plaintiff and her husband were calling four and five times a day (T 274). Plaintiff's husband denied that (T 358, 359). Plaintiff's phone bills (Exhibit "L") corroborate the latter's testimony; hence plaintiff contends this finding is contrary to the clear weight of the evidence. The sister of the boys was prepared to testify concerning the favorable reaction of the boys to plaintiff's calls but the court refused to accept such testimony (T 392).

9. Boys Being Left Alone -- There is no dispute in the evidence that the boys were necessarily left alone much of the time because ~~the~~ both defendant and his wife

working (T 251) and leaving home about 6:30 a.m. Although the court found this was not unreasonable, it certainly is not desirable, and the emotional well being of the boys would require it to be otherwise if this is possible. It is significant that defendant's elderly parents did not testify at trial as to their willingness to assume an active role in caring for these young boys despite their age and health.

10. Plaintiff's Remarriage — Plaintiff does not dispute this conclusion but submits that the issue is not whether the fact of remarriage alone justifies change of custody (plaintiff concedes it does not) but whether there is in the record other facts which do justify and require in the best interest of these boys such a change of custody.

Limiting this inquiry and itemization to such *undisputed* facts as appear of record, plaintiff submits that the following are such facts:

(1) Boys' emotional needs

(2) Desire of Michael to live with his mother as expressed to trial court and prior to commencement of this action

(3) Desire of Kurt to live with his mother as expressed to his father and others after visits with his mother in the summer of 1968.

(4) Plaintiff is now a full time mother

(5) There is a wholesome environment in plaintiff's present home

(6) Character or capacity of defendant with respect to complying with the law

(7) Severance of boys from plaintiff if left in defendant's custody

Some comments as to foregoing by corresponding number:

(1) Boys' Emotional Needs — As detailed on pages 10-16 supra, all three expert witnesses who testified in this case declared that both boys had emotional difficulties that must be resolved if they are to develop properly. Perhaps those difficulties are not solely defendant's responsibility but certainly they existed while in his custody. Would it not be wise as to Michael to follow the recommendation of defendant's own psychologist that "For Michael he seems to need more overt support in the life situation and value of placing him with his mother should be seriously considered" (T 156), and to give Kurt the opportunity to personally resolve "these questions" (T 175)?

(2) Michael's Desire to Live With His Mother — This fact is probably the most telling of all, particularly in light of the prior litigation concerning this boy's custody and defendant's realization that plaintiff was again going to seek his custody in court (T 297). It should be noted he gave solid reasons for his preference to the court as set forth on Page 17 above. He also gave a good reason, according to the testimony of Dr. Swäner (T 153):

“Q. Did Michael make a very positive statement as to preferring to live with his mother in California?

A. Yes, he did.

Q. Did he state a reason why he would rather live with her?

A. He did. I don't remember where it is.

Q. Do you recall his statement on Page 6 of your report: ‘Mom wouldn't have to work. She would have time to be with me.’? Do you remember him making that statement to you?

A. Yes.

Q. And at the top of the next paragraph: ‘His concern about time being spent with him seems to be associated with a situation in the Wiese home, in which both parents work’?

A. Yes.

Q. And I note there you say: ‘Apparently both parents leave the home around 6:30 a.m.’ Did you get that from Michael, or was that from the parents?

A. That was from Michael, no, that was from Kurt.”

(3) Desire of Kurt to Live With His Mother — Kurt had expressed his desire to live with defendant at the time of the divorce (see 'T 81) and this was a prime influence on plaintiff agreeing to defendant's having his custody at the time of the divorce. The fact that he continued to express this preference accounted for the fact that plaintiff did not seek his custody when she

moved the lower court for custody of Michael only on December 27, 1967 (R 14). Plaintiff has been unjustifiably injured by defendant's accusation that her action in this regard was a lack of affection for Kurt. Whether there was an agreement between the parties as to whether defendant agreed to allow the boys to live with plaintiff if they ever desired to do so, as plaintiff contends, or whether defendant had to agree that it would be in their best interests to do so if they did want to live with her, as defendant contends, the court is not bound by the selection made after the divorce has been entered as Finding of Fact No. 5 as drawn seems to infer. In any event, Kurt's preference made prior to these court proceedings to someone other than the parties would seem to be a more reliable guide as to his real feelings. Such a preference was expressed to Dr. Liebroder who testified as follows (T 175):

"Kurt during this time said — I asked: 'If you could have three wishes, what would you wish for?', and he said: 'That I go try it out with Mom, that Mike could live with Mom, and that all these questions get cleared up with proper answers.'

"I questioned Kurt about what questions he was so concerned about, and it was revealed that he had been plagued by questions concerning his mother's mental status and moral conduct. And, with regard to the latter, he indicated that he had been told that his mother had been maintaining an illicit relationship with a man in California. Questioned more about his mother, Kurt said to me: 'I found out that she isn't having the big

problems like I thought at first. I thought she had been taking drugs. I have been told lies. This is what has been separating me from my mother.'

"He continued to express love for his father and disappointment that there was not the kind of family life that he wanted so badly."

(4) Full-time Natural Mother — self-explanatory and self-evident.

(5) Wholesome Family Life — Plaintiff's testimony and that of her husband are necessarily self-serving in a large measure. However, their testimony as to this fact has been corroborated in the best and possibly the only means possible — by in-depth psychological evaluations by Dr. William Brown, one well-qualified to render an opinion on this subject. He testified (T 212) as follows:

"In regard to your question about her present marriage, I think it became clear in the tests that Mrs. Harrison is not an impulsive person, in the sense that she would unthinkingly, without weighing her thinking, jump into any situation. I think more than ever now, with some of the experience that she has had, she does carefully weigh all aspects of a situation before arriving at a decision. And the test findings do support her statement that her decision to marry Mr. Harrison was arrived at through much exploration of the many factors that are involved in a remarriage. There was nothing, I repeat, there was nothing impulsive about this decision. It would be my prediction too that the marriage —

"Mr. Newey: I'll object to a prediction. He

can testify on his opinion of what her personality is.

"The Court: Well, you can predict, Doctor, for what it's worth. Go ahead and predict.

"Dr. Brown: Well, the chances of a dissolution of this marriage would be very minimal. Because of the way the Harrisons are working at gaining an understanding in their relationship. I think even the religious difference that is present is being nicely resolved by the fact that — at least Mr. Harrison reports — he has been attending, and plans to join, the church of Mrs. Harrison."

This is also corroborated by Mr. Merrill Bickmore, their neighbor, who testified (Exhibit "M") that both plaintiff and her husband enjoyed a good reputation in their community. The very fact that such a successful and busy man would voluntarily take the time to come here to give his deposition of itself carries considerable inherent proof as to his own conviction. The fact that his transportation was paid for by plaintiff is neither sinister, as defendant seems to infer, nor unusual. In fact, one would seriously question the integrity of plaintiff's husband if he did not insist on bearing Mr. Bickmore's out-of-pocket expenses incurred in furnishing to the court the information he gave it.

Defendant himself acknowledged this on May 16, 1969, when plaintiff asked him the following question and he responded accordingly (T 269, Exhibit "F"):

"MRS. HARRISON: Do you really think that now I'm not working and able to take care of these

boys, they wouldn't have a wonderful home with me?

MR. WIESE: I think they would have a good home with you always, Carolyn. You know that."

The granting of plaintiff's motion would have the obvious advantage of reuniting all the children. Janice has been close to and enjoyed the association of both of her brothers. Even the "Secret" stickers which defendant presented as sinister (T 311) and later acknowledged were harmless and even wholesome (T 318) indicate a desire to be close, at least on the part of Janice.

(6) Defendant's Character or Capacity — Defendant testified he had paid only three months' support during the past 14 months (T 267); that he could not afford to pay the support as ordered (T 268). Indeed! His admitted gross income from his regular job as a civil engineer was \$950.00 per month during the time in question (T 251). In addition, he had an annual gross income of \$1,700-\$1,800 as a reserve officer (R 317), and his wife had a take home pay of \$260.00 per month (T 250). Certainly this Court should seriously question the ability of one to raise honest, law-abiding sons who so mismanages income of this amount so that he is in serious default, if not contempt, of a court order regarding ones' highest legal and moral obligation — to support his own child.

Defendant admits that he told plaintiff he had witnesses on the line during their phone conference of De-

cember 25, 1968 (T 277). At trial he swore there was no such witness (T 277).

Defendant testified that his marital difficulties with his second wife were primarily the result of plaintiff's actions in this case (T 274). Either that is a lie, as plaintiff contends it is, or defendant's perception is so faulted he ought not to assume the awesome responsibility of raising children.

(7) Alienation of Mother — Defendant denies that he sought to deprive plaintiff of her proper relationship to their sons. However he admitted disparaging plaintiff (T 258, 259), told plaintiff that the boys did not want to visit her in June of 1968 (T 254), and changed his phone number to an unlisted number on September 12, 1968 (T 309) to curtail phone conversations between plaintiff and their sons (T 257). He continues to believe all the disparaging things he has expressed to the boys, and without doubt would express his beliefs in the future. His regard for plaintiff is perhaps best indicated by calling her a bitch 12 times and a witch 2 times during the phone call of December 25, 1968 (Exhibit "D") (R 3). The following excerpts from that call are also enlightening, although one must listen to the tone of voice on the tape itself (Exhibit "D") to get the full impact:

"MR. WIESE: Hi.

MRS. HARRISON: Hi.

MR. WIESE: They'll be on the flight tomorrow.

MRS. HARRISON: O.K. Fine.

MR. WIESE: They will be back here on Flight 196 tomorrow night.

MRS. HARRISON: Well, I don't agree with that. We'll have to talk to our attorney about that.

KURT: Dad, please Dad, can't I stay till Friday?

KURT: Dad?

MR. WIESE: We'll hang up.

MRS. HARRISON: Bob, you'd better have those children on the plane tomorrow or you're going to be in trouble.

MR. WIESE: I think according to the plane . . . ah . . . to the thing on the telephone that I must ask you to turn this recorder off or, if they will be back by 12 midnight, if you will pick them up at my home tomorrow, no, just turn off the recorder or they won't be there."

* * *

"KURT: Mom?

MRS. HARRISON: What darling?

KURT: Please turn off the recorder.

MRS. HARRISON: Kurt, I don't know, what are you on the extension for honey? (Kurt: Huh?) This is a conversation between your Father and I.

MR. WIESE: Kurt is part of this family.

KURT: O.K., I'll hang up. (Kurt hangs up.)"

* * *

"MR. WIESE: Turn off the recorder.

MRS. HARRISON: Why? Are you going to say something thats going to be wrong?

MR. WIESE: No, I'm not going to say anything.

MRS. HARRISON: Well then, you shouldn't mind this being recorded so that both of us won't misunderstand what has been said."

"MRS. HARRISON: Do you think the Court really intended for you to have us go to all that expense for a day or do you think they intended them to have a reasonable visit?"

MR. WIESE: Look, I'm not going to argue with you, and I'm not going to bring these children down, and I'll defy the Court if you're not going to be reasonable enough. . ."

* * *

"MRS. HARRISON: Why do you put the children through this, Bob? You know those kids want to come here for a visit. Why can't they come here for a pleasant, fun visit?"

MR. WIESE: I know they want to and that is exactly what I called you up for and that's exactly what I'm paying my money for, for right now.

MRS. HARRISON: Well, that's what we're paying \$200 and something dollars for tickets for. . .

MR. WIESE: O.K. Now you turn that damn recorder off, or these kids will not be on that plane. Now do you want to hear that?

MRS. HARRISON: No, I don't want to hear that."

* * *

"MRS. HARRISON: Reasonable. You think that's reasonable?"

MR. WIESE: You bring this recording in, you little Bitch.

MRS. HARRISON: You think that's reasonable.

MR. WIESE: I want to hear you, cause I'll call you this in Court. Now, I'm trying to be decent to you."

“MR. WIESE: O.K., O.K. Will they be back at — O.K. You’ve made a lot of demands. Now, here, this is how simple it is. They will be on Flight 81 tomorrow morning. They will be back on Flight 196 tomorrow night. Now is that right or is that not?”

MRS. HARRISON: Well, uh, I’ve got to check with my attorney. I’ve told you this Bob.

MR. WIESE: Carolyn, you are the worst bitch that has ever been created, next to your Mother, and she’s the only one worse than you, and I want this recorded and I’ll say this in Court.”

* * *

“MRS. HARRISON: I’m really just a little heart-sick. Bob, that you would have the kids listening to this and on Christmas Day.

MR. WIESE: O.K., O.K., are these children going to be back? If they are going down there for their day, are they going to be back?”

* * *

“MR. WIESE: My attorney happens to have been sick and been in the hospital, so I’m sorry, they will not be there. Now do you want to make this agreement, or do you not?”

MRS. HARRISON: I would make it . . .

MR. WIESE: (Interrupting) On your recording, on your recording Bitch.

MRS. HARRISON: Bob, I would make this agreement, if my attorney advises us to . . .

MR. WIESE: Do you want to make this agreement, or do you not?

MRS. HARRISON: Only if my attorney advises us to.

MR. WIESE: O.K. I'll have to make it with my attorney, now damn it to Hell. . .

MRS. HARRISON: You know you could have let me know a couple of days ago so I'd have had time to check with him.

MR. WIESE: O.K., you never let me know a thing. I never saw . . .

MRS. HARRISON: (Interrupting) You've had four days. . .

MR. WIESE: I never saw this either. Now you know damn well . . .

MRS. HARRISON: Well, you got the telegram several days ago.

MR. WIESE: What?

MRS. HARRISON: You got our telegram. . .

MR. WIESE: Three days ago?

MRS. HARRISON: Yes.

MR. WIESE: Yeah, Oh Boy, Bitch. I hope that's recording too.

MRS. HARRISON: Well I'm sure it is."

* * *

"MR. WIESE: O.K. Do you want to make this agreement or not? Do you? Do you? Do you?

MRS. HARRISON: You know you want me to agree and I can't.

MR. WIESE: Do you want your day or not?

MRS. HARRISON: I most certainly want my day.

MR. WIESE: O.K. They'll be on Flight 81. They'll be back on Flight 196 and you'd better damn well guarantee it because in an hour I'll be down there to get them. Now, is that right?"

"MRS. HARRISON: I just have no choice, Bob. I'm trying to be reasonable . . .

MR. WIESE: You don't have a damn bit of choice. I happen to have custody of these kids and you think you can tear their guts out, and you bitch, you can't cause I'd like to tear yours out."

"MR. WIESE: And I don't happen to like you and for God's sake, I don't your husband and I don't like your attorney and I'll . . .

MRS. HARRISON: Bob, I don't really, that's not the point here of who likes who. The children's interests are . . .

MR. WIESE: (Interrupting) O.K. Flight 196 tomorrow night.

MRS. HARRISON: 196 at 9:55 p.m.

MR. WIESE: Tomorrow night.

MRS. HARRISON: All right, now, we'll have to check on it.

MR. WIESE: That is the time it arrives here. That is your day."

* * *

"MR. WIESE: Turn the recorder on now you bitch. O.K. Now, we'll tear the guts out of these kids some more, and you'll watch them.

MRS. HARRISON: I'm sorrier for those kids all the time in that environment there, Bob."

* * *

"MR. WIESE: Do you want to make the agreement or not? Do you want to make the agreement?

MRS. HARRISON: I must talk to my attorney, I don't know.

MR. WIESE: Well, O.K.

MRS. HARRISON: But my attorney says if you don't send the children you're going to be in trouble, Bob.

MR. WIESE: Don't stall me you bitch. I'm going to call you a bitch anytime I think about you because you are.

MRS. HARRISON: That's your prerogative. You use what kind of language you prefer to.

MR. WIESE: That's exactly what you are and that's a female dog.

MRS. HARRISON: Thank you for the interpretation.

MR. WIESE: Yeah, I know. Your husband doesn't know what shit means either.

MRS. HARRISON: That's right, we don't use it around here.

MR. WIESE: Yeah, I know. Well, it's a good Western term."

* * *

"MR. WIESE: O.K. Ten minutes, you'd better decide. Now you've got your day and put this in Court.

MRS. HARRISON: Fine."

* * *

"MRS. HARRISON: I'm heartsick for those kids that they'd have to hear this on Christmas Day, I really am.

MR. WIESE: Yeah, you're heartsick for you, you bitch.

MRS. HARRISON: I don't know why you can't just be civilized and talk decently. . .

MR. WIESE: And I just think you're a bitch

and I'll call you this in Court too. I'm sorry bitch. Now ten minutes.

* * *

MRS. HARRISON: You're under Court Order to have them on that plane. . .

MR. WIESE: O.K. They will be back — no, they will not. You will pick them up. Reasonable visitation rights that you can see them. You'd better come and get them, you bitch.

MRS. HARRISON: You know these boys have been planning on this trip now for the last few days.

MR. WIESE: Huh?

MRS. HARRISON: And you'd actually have them disappointed like this?

MR. WIESE: I will have them down there. You can pick them up in three hours and one minute. You bring them back here in twenty-seven hours and one minue. Now how's that!

MRS. HARRISON: I've heard that.

MR. WIESE. I know. So's your little beep and so has little Tweetie Pie.

MRS. HARRISON: O.K. Are you through now?"

* * *

"MR. WIESE: O.K. Now do you want to make this agreement? No, we don't have any agreement at all. I don't have any agreement with you and I don't like you and I don't love you and I don't happen to want to make any deal with you except . . ."

* * *

At the time it was played in court, this tape appeared

to make such an impact on the trial judge that he then remarked (T 93, 94) :

"I repeat again that the greatest fallacy of this whole thing is evidenced by this recording which this Court has heard. I tried to impress upon these people — the mother and the father — not to destroy their kids, and if this isn't the finest example of an intent, or deliberate downright atrocious performance, I have never heard one."

Special attention should also be called to defendant's response concerning advantages defendant felt he could give the boys (T 336) :

"These boys are mine. They were given to me, in the sole intent that they would not be harassed and not be bothered."

Such an attitude clearly indicated an intent to exclude their mother and a feeling of justification based on contract principles.

Surely anything which one parent says to a child in disparagement of the other must adversely affect that child who naturally and properly relates to both parents. Can it be in the best interest of such a child to remain in such a situation?

The case of *Thurman vs. Thurman*, 73 Idaho 122, 245 P² 810 (1952), in a similar context found it would not be. There the court said:

"[2-4] To justify a substantial modification in a divorce decree there must be a change of circumstances or the discovery of material facts existing but unknown to the court at the time the

original decree was rendered. Whenever it has reference to the custody of children their welfare is of controlling importance and in determining such welfare a number of factors may be considered. 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. 27 C.J.S., Divorce, p. 1190, § 317.

"The best welfare of minor children is promoted by having such children respect and love both parents. This is natural and every effort should be directed to the end that such respect and affection will not be destroyed and alienated; any other course is not in the interest of and for the best welfare of such minor children.

"[5] 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. *Johnson v. Johnson*, 102 Or. 407, 202 P. 722; *Delle v. Delle*, 112 Wash. 512, 192 P. 966, 193 P. 569; *Ritch v. Ritch*, Tex. Civ. App., 195 S.W.2d 205; *Rone v. Rone*, Mo. App., 20 S.W.2d 545; *McLeod v. McLeod*, Tex. Civ. App., 9 S.W.2d 141; *Kaplun v. Kaplun*, Mo. App., 277 S.W. 894; *Meffert v. Meffert*, 118 Ark. 582, 177 S.W. 1; *Albertus v. Albertus*, 178 Iowa 1124, 160 N.W. 830."

The case quoted from above is annotated in 35 ALR 1005. That annotation states as a general rule (Sec. 2)

"By the great weight of authority conduct toward a child which tends to poison the child's mind against, and alienate his affection from, his mother or father, is so inimical to the child's welfare as to be grounds for a denial or custody to or a change of custody from the party guilty of such conduct." Twenty-six cases from thirteen jurisdictions are cited in support of that rule. Two cases from Arkansas are cited to the contrary. No Utah cases are cited.

It is worth noting that there was only one truly independent witness in this case of the ten witnesses who testified, and that was Susan Anthony, Michael's 26-year-old school teacher. She testified both as to the good effect Michael's mother had on him and to some facts which indicate that his best interest would not be served by remaining in defendant's custody. Because of the importance of her testimony (T 225-241), most of it is reproduced in the following excerpts:

"Q. Do you have as a student one Michael Wiese?

A. Yes, sir, I do.

Q. How long has he been in your class?

A. Since the 29th of August, of '68.

THE COURT: August of '68?

THE WITNESS: Yes.

THE COURT: Thank you.

MR. VINCENTI: Q. This school year?

A. Yes.

Q. Directing your attention to February of this year, do you recall a visit from Mr. and Mrs. Harrison to your school?

A. Yes, I do.

Q. At the time of that visit, how was Michael doing?

A. He was not working up to the First Grade level. He was definitely behind in his school work.

Q. Did you experience any or see any emotional difficulties?

A. Yes. Michael was very hard to get through to. And, as far as my relationship to him as a teacher, when I would be lecturing or giving a lesson, Michael was never with us. He was always doodling, or dropping something on the floor, and — I had a very difficult time keeping Michael's attention.

MR. VINCENTI: Q. With whom did you consult, concerning these difficulties in school?

A. I'm sorry. Do you mean — Well, first of all I talked to my supervisor, Thelma Loren. Because I was concerned about Michael's progress, and the problems that he was having in the classroom situation. And I had her come and observe him in this situation; and then I talked to the stepmother, Mrs. Wiese.

Q. Now when did you talk to the stepmother, Mrs. Wiese?

A. It was the Parent-Teacher Conference, and I believe it was the end of January. I'm not sure.

Q. What sort of a reaction did you get from Mrs. Wiese?

THE COURT: What? I didn't get that question.

MR. VINCENTI: Q. What kind of an answer did you get from Mrs. Wiese, as to Michael's troubles in school?

MR. NEWBY: Was this the stepmother, Mrs. Wiese?

THE WITNESS: Yes.

MR. VINCENTI: Q. Go ahead.

A. This is a little bit difficult to answer. She was my last conference that night and I tried to explain —

THE COURT: Was this a Parent-Teacher Conference?

THE WITNESS: Yes. Correct.

(Discussion off the record.)

THE COURT: Go ahead.

A. And I started to explain the trouble that Michael was having, but it was sidetracked completely.

MR. VINCENTI: Q. How was it sidetracked?

A. Well, she just — Well, she just kept wanting to bring up the problems with his real mother. And every time I would bring it back to this, — about what Michael was doing, or what we could do to help him — she would keep going back to the problems that he was having, and the difficulties that she was having. And then I did talk to her mother, and —”
(T 228)

* * *

“Q. Were you with Michael, when Mr. and Mrs. Harrison first came to see you in February?

A. Yes, I was.

Q. Did you observe his reaction?

A. Yes, I did.

Q. Would you describe that to the Court, please?

A. Well, Michael had a big grin on his face, and did show a very happy reaction. He is rather a quiet child, as far as expressing relationships with the other children in the class, and it was actually the first time that I had seen Michael really express any kind of emotion in my class.

THE COURT: Do you think it was unusual to express emotion to see his mother?

THE WITNESS: Yes.

THE COURT: You did, huh?

THE WITNESS: No, I'm sorry. Unusual to express any kind of emotion. If I was reprimanding him, or if I was giving him well after anything, I have never seen him really show any kind of real emotion, like he did when his mother came.

THE COURT: Is your mother living?

THE WITNESS: Pardon?

THE COURT: Is your mother living?

THE WITNESS: Yes, she is.

THE COURT: Do you express emotion when you see her sometimes?

THE WITNESS: Yes. But I also express emotion at other times. And this was the only thing I was bringing up. That I hadn't seen Michael —

THE COURT: All right.

THE WITNESS: — really expressing any, you know, happiness, or even sadness or anything.

(T 231)

* * *

Q. Are there any other students in your class who live in North Ogden, that you know of?

A. No.

Q. During this first visit when Mr. and Mrs. Harrison came to see Michael, while they were in your presence and Michael's, did you hear — on the part of either Mr. or Mrs. Harrison — any pleading for Michael's allegiance, or did you hear either of these people make any promises if he gave them his allegiance?

A. No, I didn't.

Q. Anything that counsel has described as cheerful pleading, or pony-promises?

A. No.

Q. Did you either Mr. or Mrs. Harrison, at this meeting, attempt to apply any pressure of any kind on Michael?

A. No.

Q. Now since February how has Michael progressed?

A. He has shown an improvement, but I would specifically say during the last two weeks he's showed a real improvement.

Q. But only in the last two weeks?

A. Well, he has shown a general improvement up to that time, but specifically the last two weeks.

Q. I see. Have you noticed any change in his emotional attitude, that you have described?

A. Yes. He's more outgoing in class. He does answer questions for me now. He participates in class discussions.

Q. Now when did the Harrisons next come to the school to visit Michael?

A. Yesterday.

Q. Were you present during part of that consultation?

A. Yes, I was.

Q. How much of it?
any time did you have a conference with his father?

A. Yes, I did.

Q. When was that?

- A. I was just taking my children outside, and they just took Michael. Very little.
- Q. Did you observe at this time any pleadings or promises?
- A. No, I didn't.
- Q. Any pressures of any sort?
- A. No.
- Q. What was Michael's reaction on this occasion?
- A. Again he was very happy to see his mother.
- Q. One more question. During the time that Michael was having difficulties at school, at
- A. This was our second Parent-Teacher Conference, and it was probably in March. I'm not sure on the date.
- Q. March of this year?
- A. Uh-huh.
- Q. Was it after our last hearing?
- A. Yes.
- Q. In Court?
- A. Yes, it was.
- Q. And, at that conference, what sort of constructive help did Mr. Wiese offer?
- A. Well, again I had the problem of — Well, he was apologizing for the things that had been happening, and he made arrangements to call me concerning Michael later on, because each Parent-Teacher Conference lasts 15 minutes and the time was spent. However, he did make arrangements to call me concerning Michael.
- Q. And did he call you?
- A. No.
- Q. And during the 15 minutes that he spent with you, did you say he spent a lot of that time apologizing?
- A. Yes.

Q. At any time did he offer any constructive help to Michael's wellbeing?

A. Well, he realized the problem. He said that he did realize there was a problem, but he would call me and we would make arrangements for this. Then I did send several notes home with Michael, for him to call me. They had an unlisted phone number, that I didn't have, but — Then Mrs. Wiese did call me later."

(T 241)

"MR. VINCENTI: Q. Was Mr. Wiese displeased at the conference?

A. No. He was extremely apologetic. He was also —

THE COURT: That was her answer before, Mr. Vincenti.

MR. VINCENTI: Q. Was there anything else that affected his conversation?

A. Yes.

Q. What?

A. When he walked in, I could smell liquor on his breath very heavily. When he sat down, which was about as far away as the Judge is from me, I could smell it from there."

The above testimony was challenged only in minor aspects by the defendant who testified as follows (T 284, 285):

"Q. Now you have heard the testimony of this young school teacher. Are you interested in how Michael is doing in school?

A. Yes, I am.

Q. Tell the Court what the result was, when you personally attended Michael's Parent-Teacher Conference.

A. Well, actually Miss Anthony very briefly

showed me his file, and said that he was somewhat behind the rest of the class and I attempted — rather than apologized, and my wife also, when she talked to her, we tried to explain or appraise the teachers of the fact that these children did have outside problems that they should note, in case there were any special problems. And Miss Anthony asked if we would contact her back, and I did at that time give her my home phone number. We tried to contact her a couple of times, but she was out. Then finally, well, apparently she had sent some notes home with Michael which he had lost. He brought one home, and she said she had sent others. So we contacted her and made an appointment to meet with her, and she called stating that there was, oh, something doing that she couldn't make it. And, in the intervening time of course, I had been preparing for this and different things. However, my mother has been out and talked to her, and has picked up extra work. And Mrs. Stewart was a school teacher, and she did obtain quantities, fairly large quantities, of extra material. He has improved in his reading tremendously in the last month. I do know that.

- Q. What are your intentions, with regard to Michael's reading, during the summer?
- A. Well, I had really intended to have some form of a remedial reading class, have him engaged in some form of a remedial reading class to help him with this. I feel that it is important."

The trial court was bothered by a "sinister influence" then unidentified that was thwarting his effort

to arrange a negotiated settlement. It seems evident from his Memorandum Decision (R 53) that he later concluded that Thomas Harrison, plaintiff's husband was that villian and ordered certain sanctions against him even though he was not a party to these proceedings. Plaintiff submits that there is no evidence to support such feeling, that Mr. Harrison is in fact a beneficial factor in the total situation, and in any event the decision in this case should turn on what is in the best interest of these boys and not who is the "good guy" and who is the "bad guy" vis-a-vis Mr. Wiese, the father, and Mr. Harrison, the stepfather. Certainly the latter knows his proper role (T 351) and nothing in the evidence indicates any likelihood that he will exceed it. That possibility certainly ought not to deprive the boys of the best possible home otherwise available to them.

POINT II

THE COURT ERRED IN REFUSING TO ALLOW JANICE WIESE, MINOR DAUGHTER OF THE PARTIES, TO TESTIFY.

Janice, the then 10-year-old daughter of the parties, was probably the most qualified person of anyone to evaluate the relative advantages and disadvantages of being in her mother's home as compared with her father's home. Her age and intelligence would clearly qualify her as a competent witness and her proposed testimony would certainly have been relevant. The offer of proof indicated to the court she would be expected to testify as to the following facts (T 244, T 391):

Mr. Hansen: "We believe that she would testify that Michael told her, during the first visit

that the boys had made to their mother in July, that he wanted to live with his mother, and that he had told her this on several occasions during this time that he was living with his mother. And then, during the second time—of the summer visit—there was recalled, Your Honor, a visit during August that the boys had with their mother and that again he expressed his desire — to Janice, privately — this isn't in the presence of others — that he wanted to live with his mother.

“Also that she and Michael enjoy a very close relationship and enjoy very much being in the association with each other.

“We believe that she would also testify that Michael has expressed appreciation and respect for his mother's husband, Mr. Harrison; and, with respect to Kurt, that she would testify that Kurt told her — and her alone — that he would like to live with his mother for one year to see if he would like it. And that, during the summer visit that Kurt had with the mother that he was affectionate and close to Janice and that this seemed to have not been the attitude of recent times since they had an opportunity to be together considerably during the summer.

“Also that she would testify that she heard Mr. Wiese — her father — and Kurt discussing the invitation of her mother for Kurt to spend the school year that is now concluding with the mother in September last year and that Kurt had told his father each day, for a period of several days, that he wanted to come and try it for a year and that Mr. Wiese told him that he couldn't and that he at times hollered at him. He told him that if he went, he could never return and that he had to make up his mind immediately, and later that Kurt broke out in hives.

"Also that she observed that he was very lonely and had little activities, interests, or associations with other children or adults.

"Also - - before Janice went back to be with her mother, after school had started — that Kurt had the flu and that he had to stay home alone in the house on the three days. That Janice wasn't allowed to stay home with Kurt during that week but had to go to Mrs. Stewart's, that was the step-grandmother; and that, during her visit with her father, that he insisted that she spend a night with a daughter of one of his friends, although she had begged him not to force her to do that, and that she cried in the car on the way over to the friend's house.

Mr. Hansen: "We believe the daughter Janice Wiese would testify, if called as a witness, that she was present during both of the visits her mother had with Michael period to these Court hearings; and that there were no promises, intimidation, requests of coercion of any type prohibited by this court in trying to influence the boys as to what position they should take.

"Secondly, that she would be able to testify that during the time she was living with her father here in Utah when there were calls being placed by the mother to the boys, that they looked forward to that, and that Kurt himself had placed some of those calls."

Plaintiff submits that the items of proposed evidence set forth above would not be derogatory as to defendant's character and would not tend to impair the parent-child relationship. Plaintiff further submits that the testimony of a child as to such observations would be far less detrimental to a family relationship as a whole than to have the court deprived of evidence on which

a decision much to the advantage of the other children could properly be reached.

Rule 43 of U.R.C.P. dealing with evidence states:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statute of this state or under the rules of evidence heretofore applied in the courts of this state. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competence of a witness to testify shall be determined in like manner."

Sec. 78-24-1 U.C.A. 1953, concerning witnesses states in part:

"All persons, without exception, other than as specified in this chapter, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding are excluded."

Sec. 78-24-2 (2) U.C.A. 1953, states that children who are under 10 years of age and appear incapable of receiving just impressions of the fact respecting which they are examined, or of relating them truly may not be witnesses.

Although the question is one of original impression in this jurisdiction, the Supreme Court of Texas in the case of *Callicott vs. Callicott*, 364 SW² 455 (1963) held "the discretion of the trial court in custody cases appli-

to the determination of the court as to the best place to place the child for his or her future welfare but does not apply to a determination of the court whether it would be in the best interest of the child to testify."

The Supreme Court of Virginia held substantially the same in *Helper vs. Helper*, 195 Va. 611, 79 SF² 652 in 1954.

POINT III

THE COURT ERRED IN REFUSING TO ALLOW PLAINTIFF'S COUNSEL TO BE PRESENT AND SUGGEST QUESTIONS TO BE ASKED OF THE SUBJECT BOYS DURING THE COURT'S QUESTIONING OF THEM.

This Court has held that counsel for the parties ought to be present when the court examines minor children in a custody contest unless counsel stipulates that such examination may take place in his absence. *Austad vs. Austad*, 2 Utah² 249, 269 P² 284 (1954), *Johnson vs. Johnson*, 7 Utah² 263, 323 P² 16 (1958). These cases were cited to the trial court (T 96) which nevertheless refused to permit counsel to be present. It is submitted that this ruling was prejudicial error. Plaintiff also contends it was prejudicial error not to propound the 22 following relevant questions to Kurt as requested by plaintiff's counsel (T 105) which the court reporter typed and which are in the record between R 2 and R 3:

1. Did you ever tell your mother that you wanted to live with her during the present school year?
2. Did you ever tell Dr. Liebroder that you wanted to try it out living with your mother in California for awhile?
3. Did you ever tell your father that you wanted to go to school in California this year?

4. Did your father ever tell you that your mother and her husband Tom, would never let you come back if you did go to school in California?
5. Did your father ever tell you that your mother had been taking dope?
6. Did your father ever tell you that your mother and her husband were trying to prove you were insane or mentally retarded?
7. Did your father ever tell you that your mother had traded you for a car?
8. Did your father ever tell you that the Court hearing was for *permanent* custody?
9. Do you feel it is your duty to live with your father because you owe so much to him or feel sorry for him?
10. Do you feel it would be best for Michael to live with his mother?
11. Has Michael ever told you that he wants to live with his mother?
12. Have you ever told Janice you would like to live with your mother?
13. How do you get along with your step-sister Sandy?
14. Does your father ever favor Sandy?
15. How do you get along with Jean? (Step-mother)
16. Has she ever called you any names?
17. Have you ever overheard Jean say that she hated you?
18. Have you ever complained to anyone about being alone so much of the time because your father and step-mother Jean work all day?
19. During the time you had the flu, did your folks (father and step-mother) leave you home alone while you were sick?
20. What sort of activity do you and your father do together?
21. What activities do you wish you could do?

22. Would you like to live with your mother in California on a trial basis if you were sure you could come back if you wanted to?

Plaintiff's counsel does not contend that he has the right to propound the questions directly to the children but that his client has the right to have the substance of those questions asked by the court. Plaintiff also submits that this ruling precluded plaintiff from objecting to the form of the questions by the trial court to Kurt concerning the most vital question asked him (See Page 16 supra). Certainly leading questions are most objectionable when submitted to minor children who are most susceptible to responding in the manner which appears to be expected and desired by the form of the question and by the judge who personifies all civil authority.

POINT IV

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO APPOINT AN EXPERT AND TO REOPEN THE CASE.

Certainly the refusal of the court to permit a case to be reopened to receive additional testimony and the failure to appoint an independent expert witness would not ordinarily be error as these matters are within the sound discretion of the trial court. In fact, more often than not such motions are properly denied to avoid extending the litigation. Where, however, as here, there are special circumstances that clearly indicate that such motions should be granted in the interest of justice, then denial is prejudicial error. (*Graham vs. Ogden Union Ry. and Depot Co.*, 79 Utah 1, 6 Pac. 465 (1931). Here it is undis-

puted that defendant's expert witness called plaintiff counsel after the trial and before decision and expressed concern regarding the outcome of the case. Since his testimony was the main, if not sole, testimony to support the lower court's ruling, plaintiff submits that the interest of time and the conclusion of the matter is far less importance than reaching the proper result for the benefit of the boys in question. Both parties' expert witness requested an opportunity to examine the other party to this suit. Obviously, both felt it would be helpful to evaluate the situation since without it such witness would have no basis for making a relative judgment.

Plaintiff sought to have the case reopened to establish of record that she had agreed to submit to such an evaluation if defendant would, but he would not (R 54). Plaintiff does not contend that Dr. Richard Ivers repudiated his testimony. He didn't. It's inherent in his action, however, that he was uneasy as to the effect of it on the outcome and wished to have the court better informed as to the relative strengths and weaknesses of the parties, a concern in which the court should share. In light of these very special circumstances, plaintiff respectfully submits it was error for the court not to have reopened the case to have considered the additional evidence plaintiff proposed to produce. The court certainly had the power to reopen the case and to appoint a new expert. 35 ALR² 629 is an annotation on this subject.

"Consideration of investigation by welfare agency

or the like in making or modifying award as between parents of custody of children." Its scope includes psychiatrists (Sec. 1, footnote 19). Sec. 3 cites ten cases from six jurisdictions to this effect and none contra. The real question here, however, is whether the refusal to exercise such judicial power was an abuse of discretion.

The case of *Boone vs. Boone*, 150 Fed² 153 C.A., D.C. (1945) found it was error for the trial court in a custody action to decide it upon the adversary evidence there presented to him.

CONCLUSION

Accepting the credibility of all witnesses who testified in favor of defendant whenever there is a conflict in the evidence, the record on appeal clearly shows that the lower court was in error in finding that it was in the best interest of the minor sons of the parties to remain in defendant's custody.

Even if the evidence supports the above finding, the court did not consider all the competent evidence plaintiff sought to introduce because it excluded the testimony of Janice, the minor daughter, and refused to admit additional evidence including that of an independent expert witness requested to be admitted by reopening the case before it was decided.

Even if the finding above is acceptable and plaintiff was not entitled to have other evidence received than is in the record now, the court erred in its procedure regarding the interrogation of the subject sons.

It is submitted, therefore, that justice and equity require this case be reversed and that the custody of the two minor sons of the parties be awarded to plaintiff or, in the event such relief is not deemed proper, remanded for a new trial.

Respectfully submitted,

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