1970

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

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 RESPONDENT

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NATURE OF CASE

This is a post divorce motion brought by the Appellant (mother) petitioning for the change of custody of Michael Wiese, age 7, and Kurt Wiese, age 12, from the Respondent (father).

The Trial Court denied Appellant's motion for modification of the decree of divorce changing custody of Michael and Kurt to the mother; denied Appellant's motion to reopen the case for the purpose of introducing

evidence of an additional expert witness and denie Appellant's motion for further visitation. The Tri Court ordered that the daughter, Janice Wiese, remai in the custody of the Appellant mother and Kurt an Michael Wiese remain in the custody of the Responde father subject to reasonable rights of visitation of eac of the parties. Appellant was granted the further righ to have the custody of Michael and Kurt during Augus of each year and Respondent to have the custody o Janice each July. Each of the parties to have all thre children during the Christmas school vacation to an including December 28th on alternate years. Appellan and her present husband were restrained from harass ing and embarrassing the Respondent by telephone calls telegrams or other means of communication, from mak ing unnecessary telephone calls and travel arrangement to visit in California, and from interfering with the orde of the court affecting custody and control of the mino children.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the Modified De cree entered by the District Court.

STATEMENT OF FACTS

Respondent accepts the statement of facts of Ap pellant's with the following clarifications and additions

Each of the parties and their attorneys entered int a written stipulation March 6, 1967 (R 9) concernin custody of their three children providing for permanen custody of the children, "That plaintiff may be awarde

the permanent care, custody and control of the parties' minor child, JANICE WIESE, subject to defendant's right of reasonable visitation. That defendant may be awarded the permanent care, custody and control of the parties' minor children, KURT LAWRENCE WIESE and MICHAEL ROBERT WIESE, subject to plaintiff's right of reasonable visitation." There were no other written or oral agreements concerning custody at that time. Respondent has at all times been concerned for his children's best interest and welfare regarding custody (T 273).

Although the Appellant was awarded custody of Janice, she failed to take her until September 15, 1967, and all three children remained with Respondent until then.

Appellant filed a motion for custody of only Michael, this motion was heard on February 5, 1968 and denied April 22, 1968 (R 18). The Court found in the Findings of Fact that Appellant had shown a less than average interest in her own children as shown by her reaction to visitations and pickup (R 18). The Appellant was warm but her affections for the children were not real and her description was basically one that she wanted her children because the children were qualities not because the children are children (R 18). Respondent was not in default in support, alimony or attorney's fees as of April 1968 and Respondent had paid obligations after the divorce for Appellant for which he was given credit on alimony payments (R 18). Respondent, in addition to his own attorney's fees and costs was required to pay Appellant's attorney's fees of $300.00 and

costs in the original divorce action which Respondent was ordered to pay no later than two years from date (R 10). Appellant had an execution issued upon Respondent's salary prior to the two years causing a hardship upon Respondent which made it difficult to pay the support for his daughter, Janice, as ordered by the Court (R 16). O nApril 22, 1968, the Court awarded Appellant an additional attorney's fees of $75.00 and costs on Appellant's motion for custody of Michael only (R 18). The Court recognized the financial hardship upon Respondent and recommended that an agreement be entered into so that Respondent's wages would not be further executed upon (R 18). Appellant's repeated post divorce motions and out of court enticements for Michael and Kurt to move to California have caused Respondent great financial hardship (T 268) (T 315), resulting in separation and divorce of Respondent's second wife (T 274) (T 276). Respondent's take home pay as a civil engineer, after the legally required deductions is $700.00 per month (T 285) (T 317), plus gross annual pay as a captain in the army reserves of between $1700.00 and $1800.00 for reserve training (T 317).

Appellant failed to show an interest in the children again after her motion for change of custody of Michael was denied and left Utah again for California without even seeing Michael and Kurt (T 286) (T 287). However, at that time Appellant arranged to have Michael and Kurt in California for one month visitation in August 1968 because she contemplated another marriage (T 287). Appellant failed to write to her children or show an interest in them until June 1968 (T 290).

Appellant changed her mind and demanded her visit with Michael and Kurt in California upon 1 day's notice in June 1968 (T 288).

Respondent was leaving for Army Reserve Training at Camp Williams and could not meet her demand (T 288). Appellant manifested her emotional instability and disregard for Respondent, Michael and Kurt by sending daily telegrams marked emergency to Respondent at Camp Williams (T 288) (Defendant's exhibits 7 through 12) and to Respondent's wife at her place of employment (T 289). There was in fact no emergency and the telegrams required a runner to bring them to the artillery ranges in Dugway some 70 miles away, and Respondent to travel 20 miles cross country to reply to them (T 289). Appellant made telephone calls on June 7 and 8, 1968 (T 387) and sent telegrams dated June 10th, 11th, 12th and 20th from Thomas D. Harrison's home (T 390) (Defendant's exhibits 10, 11 and 12). Respondent agreed to let Appellant take Michael and Kurt to California the weekend after he returned from camp (T 290). Appellant declined this offer and then said she would wait for another week later (T 290). Appellant then requested two separate visitations of two weeks each in California (T 291).

Appellant sent Thomas D. Harrison, a man who had never met Michael and Kurt to pick them up in Utah (T 291) (T 351). At the time Mr. Harrison picked up Michael and Kurt, he explained that Appellant was too emotionally involved and distraught, that he was going to take over handling the matters (T 292).

Thomas D. Harrison contacted a Utah lawyer in May 1968 (T 377) to commence to get custody of Kurt and Michael from Respondent. Thomas D. Harrison took Michael and Kurt to a psychologist on July 12, 1968 (T 377) prior to the marriage to the Appellant, on July 20, 1968, and without the knowledge or consent of the Respondent who had their legal custody (T 294) (T 296).

On the second two week visit in August 1968, with Appellant Mr. Harrison permitted Kurt, then age 10 years, to drive Mr. Harrison's 1963 Chrysler New Yorker four door sedan (T 388) (T 379).

Janice visited in Utah with the Respondent, Michael and Kurt during the last two weeks of August and first week of September, 1968 (T 293). During this period Janice was called three to four times a day by the Harrisons (T 293) and they called Mrs. Stewart, Mr. Wiese's mother-in-law (T 293) together with a deluge of mail to the Wiese children (T 294) (T 307). Janice's visit was cut short on Mr. Harrison's request in the letter of August 28, 1968 (Defendant's exhibit 3) (T 300). Mr. Harrison requested Kurt and Michael spend the school year 1968-69 in California (Defendant's exhibit 4) (T 303).

Pre-addressed letters from the Harrison's marked Secret and a secret code name of "Casual Cat" was given the children to prevent telephone conversations from being overheard (T 310) (T 311). Although Mr. Harrison denies any knowledge of the code (T 355) and admits he provided about 50 Secret labels (T 356).

Appellants husband offered to pay the expense for Michael and Kurt to be flown to California one weekend a month (T 374) (Defendant's exhibit 5) (T 312).

During the weekend visit of September 20, 1968, on Appellant's birthday, Appellant took Kurt to a psychologist in Salt Lake City (T 378).

Michael and Kurt were observed to then become withdrawn and acted as if they had a sense of guilt in their daily actions, were not responsive to their stepmother or the Respondent and they appeared to be deeply concerned about problems which they had not manifest before (T 307).

At this time Respondent changed his telephone to an unlisted number and Appellant demanded that Kurt call her each afternoon collect (Respondent's exhibit 7) (T 309). Appellant made a motion to have Respondent's telephone number and b epermitted to talk to the boys daily. This motion was denied (R 32).

The Court entered an order restraining the parties from attempting to influence Michael and Kurt regarding custody during the pendency of the custody hearing (R 32).

Appellant and her husband contacted Michael at his school on each of the two days, February 19, 1969 and May 26, 1969, immediately prior to the custody hearing, without the knowledge or consent of the Court or Respondent.

Kurt had never told his father that he wanted to

live with his mother on a permanent basis, he had been placed under great influence by the Harrisons through telephone calls, airplane trips, driving an automobile, visits to a psychologist and promises by the Harrisons. He believed he could go for a short jaunt or run back any time he wanted to. Based upon this he considered going to California to live with his mother (T 256). Except for a short period of time when Kurt thought he would like to go to California for a school year or at least a summer this was the only time he expressed a desire for any lengthy visit, Michael was waivered back and forth (T 270).

All of this was part of a plan by Thomas Harrison to gain permanent custody of Michael and Kurt and had been since he contacted counsel in this case in May 1968 (T 377).

ARGUMENT POINT I

The Trial Court's Findings that it is in the interest of Michael and Kurt to remain in the custody of the Respondent should not be reversed and are supported by more than a preponderance of the evidence.

The well recognized principle that this court must survey the evidence in the most favorable light to the prevailing party in the court below (*Stone vs. Stone*, 19 U. 2d 393, 384 P.2d 961) should be further examined under the principle set down in earlier equity cases. That is where the case was regularly tried and the trial court found on all material issues its findings will not be disturbed by the Supreme Court unless they are so mani-

festly erroneous as to demonstrate oversight or mistake which materially affect substantial rights of Appellant. (*McKay vs. Farr*, 15 U. 261, 49 P. 649; *Klopenstine vs. Hays*, 20 U. 45, 57 P. 712; *Elliot vs. Whitmore*, 23 U. 342, 65 P. 70.)

The Supreme Court, although it has power to review facts in an equity case, will not disturb findings made therein by the trial court unless evidence is clearly insufficient to sustain such finding. (*Sidny Stevens Implement Co. vs. South Ogden Land Building and Improvement Co.*, 20 U. 267, 58 P. 843).

The Supreme Court in an equity case cannot interfere with the Trial Court's findings of fact where the evidence on the controlling questions is not only in sharp conflict, but justifies the findings. (*Beesley vs. Boardman*, 50 U. 149, 166 P. 991).

These general principles should be applied to the divorce case at issue under the rule of *Lawlor vs. Lawlor*, 121 U. 201, 240 P.2d 271), that the Supreme Court should be reluctant to modify a decree of divorce because the evidence is contradictory and the Trial Court, having seen and heard the witnesses, is in a better position to determine their credibility.

The Trial Court's findings of facts are amply supported by a preponderance of evidence.

1. The Appellant had the court review the matter of custody of Michael less than a year before bringing a second motion to modify the decree respecting custody of Michael and Kurt; the court denied any change April 22, 1968 (R 58). On Appellant's motion and affi-

davit for change of custody of Michatel April 22, 1968 the Trial Court in its findings and order found facts in part as follows: (R 18)

> "3. The Court finds that the natural mother is more capable than the average person, is further more easily upset than the average person and has less emotional strentgh than the average.
>
> 4. That the plaintiff has less than average interest in her own children, as demonstrated by her reaction to visitation and pickup.
>
> 5. That the plaintiff is not absent these qualities but less than average inthem and markedly so.
>
> 6. The Court finds the plaintiff is warm, but that her affections for her children are not real and her description is basically one that she wants the children because the children are qualities rather than because the children are children.
>
> 7. With respect to the father, the defendant, the Court finds the father is brighter than normal and much more capable than normal."

The Appellant personally failed to show any changed interest in her children as manifest at the conclusion of the hearing for change of custody of Michael. She failed to even say goodbye to Michael and Kurt before leaving for California (T 286) (T 287), failed to write or contact them until after her contemplated marriage to Mr. Thomas D. Harrison had finalized (T 290). However, it was not Appellant who manifest new or changed inter-

est in Michael and Kurt but Mr. Harrison. It was Mr. Harrison who:

A. Contacted Mr. Hansen in Salt Lake City to act as attorney in May 1968 (T 377).

B. Personally picked up Michael and Kurt for their first two week visitation in California (T 291).

C. Took Michael and Kurt to a psychologist in Salt Lake City to build evidence for the change of custody hearing he was contemplating (T 377).

D. Encouraged the sending of telegrams during June 1968, part of which were sent from his home listing his residence telephone number (T 390) demanding the children be placed on a plane for an immediate visit in California in June 1968 (Defendant's exhibits 7 through 12) (T 390).

E. Financed the telephone and telegram harassment of Respondent and Michael and Kurt.

F. Offered monthly airplane trips to California (T 374) (T 312) (Defendant's exhibit 5).

G. Wrote the letters setting out dates of visitation (Defendant's exhibits 3 and 4).

H. Permitted Kurt, then age 10, to drive his Chrysler New Yorker car (T 388) (T 379).

I. Had this telephone wired to record telephone conversation (Plaintiff's exhibit D).

J. Provided the stamped pre-addressed envelopes and codes for secret communication with the children (T 310) (T 311) (T 355) (T 356).

Although Appellant has remarried and is not working there is no substantial evidence that Appellant has changed regarding her children as found by Judge Wahlquist at the February 1968 hearing (R 18).

2. The fact that Thomas D. Harrison believed Appellant was too emotionally involved and distraught to handle her affairs regarding visitation with Kurt and Michael (T 291) (T 292) and thereafter married Appellant on July 20, 1968 (T 351) should not compel the Court to a conclusion that the Trial Court errored in its findings nor can it be concluded that Appellant became stable and gained capacity by the mere fact of marriage to Thomas D. Harrison. Mr. Harrison had lost custody of his children to his former wife. He could not bring himself to the reality that his former wife, who subjected him to indignities and failed to fulfil his needs to be loved and caused a fear of rejection in him (T 219), was better off than his present wife, the Appellant, in that she was awarded the children by her prior marriage to Mr. Harrison.

Appellant cites as evidence of her new found emotional stability and change from being an impulsive person the testimony of William H. Brown. It should be noted that this witness only spent two hours with Appellant (T 221). This brief interview with William H. Brown was arranged for by Mr. Harrison prior to the marriage for the purpose of obtaining helpful testimony from him as an expert witness. The two statements made by William H. Brown (T 211) one of which is quoted in Appellant's brief attempting to show a great change in Appellant were observed to be selfserving statements

made by Appellant which the court questioned at (T 211).

> "A. I had made comment in the report that I think earlier in life Mrs. Harrison had been quite a naive person. On sentence-completion tests she wrote: 'When I was a child, I was cheerful and well-behaved.' And I think being cheerful and well-behaved has sort of been a pattern in her life, earlier in her life, until she learned that ofttimes simply being a cheerful, pleasant, well-behaved person did not bring its rewards.
>
> The Court: Wouldn't you call that a self-serving declaration, Doctor?"

The expert witness, William H. Brown, failed to take any history of the Appellant (T 214) as to whether her natural mother gave up custody of Appellant (T 214), as to whether Appellant's mother advised her not to retain custody of Kurt and Michael in the divorce (T 215) or even the fact that Appellant through stipulation gave Respondent permanent custody of Kurt and Michael in the original divorce proceeding (T 215).

3. The Trial Court's findings regarding Appellant's harassment of Respondent were as follows:

> "3. That prior tothe marriage of the plaintiff and Thomas D. Harrison, the plaintiff and her future husband, unreasonably harassed the defendant while he was on active duty at Camp Williams, Utah, with purported emergency telephone calls and telegrams requiring the defendant, Robert D. Wiese, to be called from the field

when in fact it was not an immediate emergency regarding visitation and custody of the minor boys."

These facts manifest a complete disregard by the Appellant for the best interest and welfare of Kurt and Michael, as late as June 1968 and indicate that Appellant's demands were promoted by immature short sighted, selfish and impulsive thinking on the part of Appellant in contrast to the Appellant's expert witness William H. Brown's testimony of Appellant's present character and personality.

Respondent testified that the summer visitation was originally to have been in August 1968, because Appellant had planned to get married then (T 287). In June 1968 Appellant demanded the children be sent to her on one days' notice. Mr. Wiese testified regarding this.

"Q. And why did she tell you that she wanted the boys in August.

A. Because she was planning to get married.

Q. All right. And at that time did you both agree, and make your plans, based on her request to have the boys in California in August?

A. Yes.

Q. All right. And when was the first time that she advised you that she wanted the boys in June?

A. The night before she wanted them.

Q. And what were you doing at the time that

she called and told you she didn't want them in August, but she wanted them in June?

A. Packing to go to summer camp with the Reserves.

Q. All right. And did you in fact comply with this demand that she have them not in August, but in June?

A. No. There was no way I could. We even tried to start washing the kids' clothes, and getting them ready to go. But it was just — Well, I could just see that we couldn't do both things.

Q. What did she tell you, when you told her that you just couldn't get the boys respectably ready, or whatever words you used, to send them down?

A. To just send them down with the shirts on their back."

4. The Court's findings regarding psychologist examination without consent were as follows: (R 58)

"4. That Thomas D. Harrison took the two minor boys of the parties to a clinical psychologist when said minors were then and there in the custody of the said Robert D. Wiese, without the knowledge or consent of the natural father of said minor boys and that said minor boys were unnecessarily caused to question their mental sanity and emotional well being."

These examinations as previously noted were ar-

ranged for by Thomas D. Harrison and his attorney to obtain expert testimony not to obtain any treatment for Kurt and Michael. Respondent testified concerning the effect of this examination as follows:

> "Q. What effect, if any, did this have as to your peace and tranquility in your home?
>
> A. Well, it was rather upsetting. We were also by this time receiving a deluge of mail. And somewhere in this period is when I found out that Mr. Harrison had taken the boys to see Dr. Liebroder, without any permission or even consulting me on it. So I was a little upset about the whole thing, and it naturally upset the household.
>
> Q. Prior to this period of time, had either Mr. or Mrs. Harrison written to you, requesting that you take the boys in for a psychological evaluation, or to see a psychiatrist?
>
> A. No."

and as testified by Respondent: (T 295) (T 296)

> "Q. Now did you learn, first of all, that your boys were going to be taken to be psychoanalyzed in advance, before they were taken?
>
> A. No.
>
> Q. Were you consulted by anyone — either Mr. Harrison, your former wife or counsel for Mrs. Harrison — with regard to your desires on psychoanalysis of Kurt and Michael?

A. No.

Q. All right. Then after they were psychoanalyzed how did you first learn of this?

A. Well, the children appeared somewhat disturbed, and were rather aloof. And, in just talking to them, Kurt had mentioned the fact that he had something to tell me. We were just discussing this, and he mentioned that he had been taken to a psychiatrist or a psychologist. He didn't know at this time. And I was quite upset about it.

Q. All right. Now then, how did Kurt react to this?

A. Well, he was worried about it. Because he had been aware of this idea that his grandmother — Carolyn's mother — had from the time he was a little child, had felt that he should have help in some silly way, although she had never seen him or visited him. She had said that he needed help, and he had been aware of the fact that there had been talk of sending him for help, or to a military school, and he had often asked me if I really thought he was crazy. He was worried about this, and I said: "No, you are not crazy, and that they have no reason to take you there, unless at least we know what it's for." And he was very worried about it.

Q. All right.

A. About this.

Q. Now were Kurt and Michael instructed regarding whether or not you were to know that they had been taken?

A. Yes, they were instructed. And they were instructed that I was not to be told, by Mr. Harrison."

Upon learning of the examinations of Kurt and Michael by Malcolm Liebroder, Respondent contacted Dr. Richard S. Iverson who has specialty training in medicine, surgery, obstetrics and gynecology followed by 3 years training in psychiatry and neurology, and has passed the American boards examination and is a Certified Psychiatrist, is a fellow in the American Psychiatrist Association, Instroctor of Psychiatry, University of Utah Medical School, Chief of Psychiatry at St. Benedict's Hospital and the Thomas D. Hospital in Ogden, Utah (T 394) (T 395).

Dr. Iverson testified regarding the difference between a psychologist and psychiatrist as follows: (T 396)

"A. Well, first of all a clinical psychologist is not a doctor of medicine. The next thing is the training is different. A clinical psychologist would have an average of six to eight years training. They're not trained primarily in the area of what we call diagnosis and treatment. Their training is in so many different fields. A clinical psychologist primarily relates to what we call personality testing. They do some counseling, and some of them have excellent training and excellent experience in doing treatment of emotional dis-

orders. I think it varies from clinical psychologists to other clinical psychologists, where the psychiatrists' training primarily is in the area of diagnosis and treatment."

Regarding tests made upon Kurt by the two clinical psychologists, the results were as follows:

Malcolm N. Liebroder, July 1968: (T 196)

Verbal IQ Score 125

Performance IQ Score 94

Clarence D. Swaner, January 1969: (T 146)

Verbal IQ Score 148

Performance IQ Score 125

Dr. Iverson testified regarding the difference in the results of the tests (T. 400).

"Q. All right. Now, Doctor, if the testing by Mr. Swaner in January was substantially higher, as has been pointed out, do you have any explanation that they're both valid?

A. I would approach this from two things. One, the first impression would be as the boy was more relaxed. He was functioning better, and felt under less pressure at the time that he saw Dr. Swaner. But again I want to point out that this is not really too much of a difference.

Q. Under either test, could you describe Kurt's intellect?

A. Well, he is a very bright little guy. But

the performance information on this shows that he's under a lot of pressure right now. Because anxiety tension, fears, interferes with ability to perform, but do not interfere as much with ability to talk.

Q. Okay. So the performance of 94 on July 12th, and the performance of 115 in January by Dr. Swaner, what would that indicate to you, if anything?

A. Well, it indicates he was either feeling better, or the circumstances under which he was tested were better. Something had improved."

Dr. Iverson's opinion was that Kurt and Michael should be left with their father (T 402) (T 403).

"A. All right. Now the fact, as I see it – and I'm admitting this is an interview with the father, so this is all I have to judge by — that I saw the boy having a good relationship with his father. He was functioning well, and getting by in school. He seemed happy. Was interested. Was active. And it would be my considered opinion, from the information I have, that it would be a significant loss to this boy to be separated from his father.

Q. Okay. Now in connection with Michael at that time. Michael, the younger of the two. Based upon your examination of both the father and Michael, based upon your professional training, do you have an opinion regarding Michael's relationship with his father and with his brother

Kurt?

A. I think it would be a significant loss for him to lose his father and his brother, and I think it would be tragic to separate the boys from their dad.

Q. Do you have an opinion as to whether this may create some mental problems, with either or both of these boys, if they're separated?

A. Yes, I do.

Q. Of what nature?

A. I think that the deprivation that would occur at this particular time could lead to what I would consider depression later on in the teen years or in the early twenties. It might possibly manifest itself in antisocial behavior."

Dr. Iverson's final opinion was: (T 405)

"A. It's my impression, from the information that I have, that the boys would be better off staying where they are."

Clarence D. Swaner testified regarding the intelligence of Kurt based upon the IQ tests (T 149).

"A. Well, on this particular test — assuming that one portion of the test — only 1% of the children his age would get a score higher than him.

Q. Only 1% of the children his age would score higher on that particular testing?

A. That's right.

Q. All right. Now then, let's take him on the overall testing. Where did he score there, Doctor? The average of everything?

A. He had a full-scale IQ score of 136.

Q. How does that compare to other children his age?

A. The same. After you get so high, there is only a small percentage of people. So it's aroun dthe 99 percentile."

As to Kurt's association with his natural father (T 150) (T 151).

"Q. Okay. Now then, Doctor, this young man associated himself very closely with his father, did he not?

A. He has a close identification.

Q. Did he discuss with you what his goals in life were?

A. I think he wanted to be a chemist.

Q. Was there any discussion about being a Captain in the Army also?

A. Yes. He talked of going in the service, and being a Captain.

Q. Did he mention the fact that his father was a Captain in the Army?

A. Yes.

Q. Did you draw any conclusion from that association, or identification?

A. I feel that he identifies with his father.

Q. All right. Did he discuss with you such items as interest in hunting and fishing?

A. Yes.

Q. And did you have any conversation with him as to whether his father hunted and fished with him?

A. He does. Or did.

Q. And did you draw any opinion why this is important in the young man's life?

A. It's a closeness he shares with his father."

"MR. NEWEY: Q. Did you also report back to Dr. Iverson, the psychiatrist, that: 'He does not wish to change this close identification with his father.'?

A. Yes.

Q. And did you report back that: 'There seems to be nothing in the relationship that suggests that he should change it. Leaving Kurt in the custody of the father would seem to be appropriate.'? Is that what you reported back?

A. Yes."

In response to paragraphs 5 through 9 the Trial Court Judge, Parley E. Norseth, presiding, found as follows:

"5. That upon the motion of the plaintiff the

Court interviewed Kurt Lawrence Wiese, age 11 and Michael Robert Wiese, age 7, in chambers out of the presence of the parties or their respective counsel; that Kurt Lawrence Wiese being over the age of 10 years elected to remain in custody of his father, the defendant.

6. That the plaintiff and her present husband, Thomas D. Harrison, during periods of visitation with said minor boys in the state of California attempted to undermine the relationship of said minor boys with their natural father, the defendant. That the plaintiff, and her present husband have, through promises of gifts sought said minor boys to request a change of custody before the Court which has not been in the best interest and welfare of said minors.

7. That on one occasion, Thomas D. Harrison, husband of the plaintiff, permitted Kurt, age 11, to drive his Chrysler automobile in an attempt to secure said minor's request to remain with the said Thomas D. Harrison and the plaintiff.

8. That the constant attempts by the plaintiff and her present husband to secure the election of said minor boys to be in the plaintiff's custody has not been in the best interest and welfare of the said minor boys and it is to the best interest of said minors that they remain in the custody of the defendant. That the defendant has not in fact sought to prevent a close association

between the parties' minor boys and the plaintiff and in fact cooperated and made said minors available to the plaintiff, until through plaintiff's unreasonable conduct in connection with visitation, it became apparent that it was in the best interest of said minors that defendant not comply with the every whim of the plaintiff made by daily telephone calls from the state of California to said minors. That the plaintiff, through these telephone calls to the minor boys has caused said minors to be placed under great emotional pressure.

9. That the defendant has properly supervised said minors and that said minors have not been unreasonably left alone without proper supervision and that the defendant is in a position to continue to provide the proper care, supervision, maintenance and control of said minor boys whether the defendant reconciles his present marriage or continues to reside alone with said minor boys."

Respondent respectfully submits that there is more than a preponderance of the evidence to support the Trial Court's Findings as cited supra, Respondent's Brief, pages 2 through 23 and that the Supreme Court should not disturb the Trial Court's Findings.

In response to the Appellant's claim that Respondent alienated Kurt and Michael from her; any alienation which may have occurred, unfortunately occurred because of conversations between these parties during their

marriage and conduct of Appellant during the marriage (T 258) (T 259).

"Q. Now isn't it a fact, Mr. Wiese, that you told Kurt that his mother had engeged in immoral sex acts in California, and went there to live with men?

A. No, I didn't say that. I had no way of knowing that she engaged in immoral sex acts. I did tell Kurt that she had gone down there to, or was planning to stay with Mr. Finkel. When postcards started coming, and things of this sort, it was very obvious that she was. And she said - In fact Kurt was aawre of this before the divorce ever occurred. Because Carolyn and I argued about it, i nthe living room on the couch, and Kurt overheard the whole thing. In fact he had queried me about this, and asked about it. He was very worried about it. And I didn't see that there was any reason to dispell, to just white wash the thing, when he was quite worried about it.

Q. And you also told him, did you not, that his mother had traded his custody and his brother's custody for a car you had at that time?

A. She offered to.

Q. Well, you told —

A. Yes. She offered this, and in a sense she did. She said if I didn't give her the car — and this was discussed before the divorce — she said

that if I did not give her the car and the things she asked, that she wouldn't let me have the boys.

Q. And didn't you also tell Kurt that his mother had been taking drugs?

A. I talked about it. Kurt was aware of this also. Because, when I found these drugs in the closet upstairs, Carolyn had gone off to Park City and I had taken care of the kids, and I discovered these. And when she came home we had a very serious argument, and at that time I told her that I would not tolerate those being in the house, with the kids around, where they could get them. And Kurt was very well aware of this at the time, because he heard that too.

The telephone conversation of December 25, 1968 (Plaintiff's exhibit D (R 3), only part of which is quoted in Appellant's Brief omitted many portions of the communication in which Appellant taunted Respondent with the fact that the conversation was being recorded over the objection of Respondent. Appellant is able to taunt and hurt Respondent with the recording device until he admittedly becomes angry and loses control. There are at least 12 times during this conversation in which Appellant taunts him with the fact of recording when he questions her.

Respondent had initiated the telephone calls from Ogden with the intent to voluntarily arrange for a longer visit (T 261). Respondent testified: (T 261)

"A. I was — if I may clarify this — I called Mrs. Harrison on Christmas night, with the intent

of allowing a longer visit. However, she would not agree to anything but the full period which she had asked, which extended well into the time that the children would be back in school even

MR. HANSEN: Q. Now —

A. So I became very angry. They were baiting me obviously, and I did become angry. I blew my stack. But I wasn't being baited, and there was no alternative. Either I just allowed the children to go as they demanded, or there was nothing. And so I told them that —

Respondent had made two prior calls on December 25, 1968 which were obviously made without anger and for the purpose of wishing his daughter a Merry Christmas and letting Kurt and Michael talk to their mother and sister on Christmas (Plaintiff's exhibit D).

The recording of the telephone conversation between the parties on December 25, 1968 (Plaintiff's Exhibit D) was played in open court and commented upon by the Corut. The written transcript of this tape recording was never received in evidence (Plaintiff's exhibit D). However, the Trial Court had the benefit of listening to this recording before entering its Findings of Fact. If the Appellant Court is going to consider this evidence which was never admitted, the full transcript of all three telephone conversations made on December 25, 1968 should be considered by the Appellant Court.

"TRANSCRIPT OF FIRST CALL FROM MR. ROBERT WIESE TO MRS. CAROLYN HARRISON ON DECEMBER 25, 1968.

Telephone rang at 8:00 P.M. California time. Carolyn answered it. The recorder and beep tone were turned on.

Mrs. Harrison: Hello?

Mr. Wiese: Hi.

Mrs. Harrison: Hi.

Mr. Wiese: How are you?

Mrs. Harrison: Fine.

Mr. Wiese: Just trying to call you all evening and all day.

Mrs. Harrison: (Interrupting) Well . . .

Mr. Wiese: (Interrupting) The phones were all tied up, and we just got through directly.

Mrs. Harrison: Uh-huh.

Mr. Wiese: Yeah, the kids will be down there tomorrow.

Mrs. Harrison: Fine.

Mr. Wiese: And, ah, you need getting the envelope. Are
Mrs. Harrison: Yes, u-huh, we are recording this.

Mr. Wiese: I'll hang up.

TRANSCRIPT OF SECOND CALL FROM MR. ROBERT WIESE TO MRS. CAROLYN HARRISON ON DECEMBER 25, 1968.

Telephone rang at approximately 805 P.M. California time. Carolyn answered it. The recorder was turned on but the beep tone was turned off.

Mrs. Harrison: Hello?

Mr. Wiese: Hello, again.

Mrs. Harrison: Yes?

Mr. Wiese: Are you recording?

Mrs. Harrison: Yes.

Mr. Wiese: You are? O.K. I wanted the boys to b able to talk to you.

Mrs. Harrison: Well the boys may talk to me, I'm no recording their calls.

Mr. Wiese: Well, I'm sorry; I just didn't mean to mak any big scene about this.

Mrs. Harrison: Well, whose making a scene? I'm no making a scene about it.

Mr. Wiese: You're just recording.

Mrs. Harrison: I'm not recording at the moment. I we're going to get into anything lengthy I shall.

Mr. Wiese: I didn't want you to get upset either.

Mrs. Harrison: I'm not upset.

Mr. Wiese: Well why don't you shut up for a minute. I wanted to wish you a Merry Christmas and I wanted to talk to my daughter too, if I might.

Mrs. Harrison: Yes, she's perfectly welcome to talk to you, just a moment. (Mrs. Harrison calls Janice.)

Janice: Hello?

Mr. Wiese: Hi, Jan.

Janice: Hi.

Mr. Wiese: Did you get all of your boxes?

Janice: Yeah.

Mr. Wiese: O.K. I want to wish you a Merry Christmas.

Janice: You too. Thanks for the things.

Mr. Wiese: Oh honey, I think, just a second, let me hollar for the boys. May I?

Janice: O.K.

Mr. Wiese: (Calls Kurt and Michael.) I think they're down watching T.V.

Janice: O.K.

Mr. Wiese: (can be heard saying: 'Kurt and Mike, you go down and get on the other line.') We just did want to wish you a Merry Christmas.

Janice: You too.

Mr. Wiese: The boys will be down. Kurt, you on?

Kurt: Uh huh.

Janice: Hi Kurt.

Kurt: Hi Jan.

Janice: How are you?

Kurt: Fine.

Janice: Thank you for the presents.

Kurt: That's O.K.

Janice: I'm excited about seeing you guys tomorrow.

Kurt: Yeah.

Janice: It's going to be fun.

Kurt: Yeah.

Mr. Wiese: (Still on the extension) Honey? (Janice answers 'Yeah?') I just wanted to make arrangements for Kurt and Mike to be down there tomorrow. Could I talk to your Mother one more time?

Janice: O.K. I love you.

Mr. Wiese: I love you, Jan. Have a nice time.

Janice: O.K.

Kurt: Good night, Jan.

Janice: Good night, Kurt. Tell Mike good night.

Mr. Wiese: Good night, sweetie.

Janice: O.K. Here's Mom.

Mrs. Harrison: Hello?

Mr. Wiese: Hi.

POINT II

To have permitted Janice, then age 10, to testify as a witness would have only added further to the tragic nature of the continued post divorce actions brought by the Appellant. All of the expert witnesses have testified to the traumatic emotional effect upon Kurt and Michael in connection with the contest over their custody. Courts have repeatedly frowned upon the practice of calling children of the parties as witnesses in a divorce action and held that it is bad from a social viewpoint though

not legally forbidden. (*Buck vs. Buck,* 320 Mich. 624, 31 NW 2d 829, 831 2 ALR 2d 1235).

> "The practice of calling children of the parties as witnesses in a divorce action has been repeatedly disapproved by this Court. Counsel, if possible, should refrain from doing so. It is bad from a social view point though not legally forbidden."

In *Kreutzer vs. Kreutzer,* 226 Or. 158, 359 P.2d 536 (1961) the court stated:

> "we share the view of the circuit judge that in a case of this kind, young children of the parties should not be forced to become witnesses * * *. This practice has been frowned upon by other courts."

The issue was raised by the Oregon Trial Court's refusal to permit defendant's son to testify as a witness at a post divorce hearing to modify the decree pertaining to custody. (*Gonyea vs. Gonyea* 375 P.2d 808, 811 (1962)).

The Court held that it was not at liberty to change the rules set forth by the legislature prescribing who may be a witness. Accordingly the minor son, age 10, was a competent witness. The Trial Court's refusal to hear his testimony was error. But the error did not of itself require reversal. The Court in *Gonyea vs. Gonyea, supra,* ruled on this issue as follows:

> "In the case before us there is no such dispute as to the fact. Douglas is a child of ten years. The decision of the circuit court to modify the custody decree was based on testimony as to the

effect upon him — emotionally or otherwise — c
the frequent visits with his father. That tes
mony was undisputed. There was no need, ther
fore, for corroborating testimony from the bo
on this issue. Credulity will be taxed if we assum
that under the circumstances the boy could hav
given an objective opinion as to the emotiona
impact these visits had upon him or his disciplin
We are unable to discern any way in which th
defendant was prejudiced by the refusal of th
trial court to permit the boy, Douglas, to testify
It follows that we must dismiss the second assig
ment of error as without merit."

The cases of *Hepler vs. Hepler,* 195 Va. 611, 79 SE 2d 652 (1954) and *Callicott vs. Callicott,* 304 SW 2d 45 (1963) cited by Appellant, are not controlling becaus the child was offered as a witness to testify concernin his own happiness and welfare. Whereas, Janice wa offered as a witness concerning primarily matters o the welfare, happiness and association of Kurt an Michael.

The Trial Court offered to talk to Janice in chamb ers, in lieu of having her take the witness stand in ope court (T 244).

Assuming that it was error for the court to den Appellant's request to have Janice testify in open cour it was not prejudicial error that substantially affected te rights of the parties.

1. That Michael told Janice he wanted to liv with his mother is not prejudicial. Michael ad

vised the court in chambers of his desires (T 116). Appellant testified as to Michael's desires (T 8). There was testimony from even the Respondent that Michael waivered in that he wanted to live with his mother (T 270). Appellant's witnesses, Malcolm N. Liebroder and Clarence D. Swaner also testified Michael had stated at the time they talked to him he wanted to live with Appellant.

2. Janice's proferred testimony that there was very little attention or affection given Michael by his father should be excluded on the objection that it calls for a conclusion.

3. Appellant had already testified regarding Janice's close relationship to Michael (T 115) and Janice's close relationship to Kurt (T 112).

4. Exclusion of Janice's proffered testimony that Kurt told her he would like to live with his mother for one year was not prejudicial to Appellant because there was other testimony received by the Trial Court concerning this subject.

5. Janice's proffered testimony that she observed that Kurt was very lonely would be objectionable as calling for a conclusion. However, Appellant testified that Kurt told her that he had been lonely (T 10).

6. If it was a fact that Kurt had the flu and had to remain home for three days and that Janice was not allowed to stay at home during the period that Kurt had the flu and that Janice cried for this reason; or whether meals were served at 6

o'clock or 8:30 p.m.; or that Janice didn't hav breakfast and had only a chicken pie at about 1 o'clock a.m. on the way to the airport is immateria and irrelevant to the issue of custody and woul not prejudice Appellant's case by the exclusio thereof.

7. Janice's proffered testimony that ther was no family spirit in Respondent's home call for a conclusion and certainly a 10 year old chil is not competent as an expert to so testify.

8. Janice's proffered testimony regardin visitations with Michael on the days immediatel prior to the custody hearings when Michael wa taken out of school by the Appellant has bee testified to by Appellant, her husband, Mr. Har rison and Susan Anthony, the school teacher.

9. Janice's proffered testimony that the boy looked forward to their mother's telephone call should be excluded as it calls for a conclusion.

Therefore, if it was error for the Trial Court t refuse Janice's testimony as a witness, there has bee no prejudicial error committed in that all admissabl matters were testified to by several other witnesses an the Court further offered to permit Janice to be inter viewed in the Trial Court's chambers. Furthermore, th proffer of testimony made by Appellant's counsel app ears to be far too sophisticated for a 10 year old gir and it is doubtful that Janice would have testified t the facts in the proffer of proof.

POINT III

This Court has held that in a proceeding for modification of custody provisions of a decree, it was error to permit a child under 10 to express her preference as to the parent with whom she wanted to live, and if counsel desired to be present during this private conference, this privilege should be accorded unless some compelling reason to the contrary exists. *Austad vs. Austad,* 2 U.2d 249, 269 P.2d 284 (1954); *Johnson vs. Johnson,* 7 U.2d 263, 233 P. 216 (1958). It appears that from what the trial judge said (T 96) (T 97) he believed he had a compelling reason not to allow the children to be interrogated in the presence of counsel (T 104) (T 105).

> "MR. HANSEN: My purpose for wanting to be here is simply that — as we find, as counsel, in the course of a hearing — we couldn't hope to submit to the Court, in advance of the trial, all the questions that would be helpful in ascertaining the truth. And while we — Mr. Vincenti and I — have both submitted tothe Court questions that we anticipate, I'm sure — in being there, and seeing the reaction of the boys, which is something that probably carries as much communication as the words they say — that there would be other questions that would be very pertinent, and I think helpful, in the interest of justice. Not for counsel to propound to the Court, but merely to suggest to the Court, as additional inquiries, that in the interest of justice should be put to the boys.

THE COURT: Well, the last statement tha you made completely negates and abolishes, i the Court's thinking, your right to be present.

So the right of counsel is denied to both par ties.

However, I will say this, and I want to allud to just one or two things Mr. Hansen has sai about being present to propound other question which they think the Court should ask these juve niles, to pass upon, while they are present, whil the Court is having a confidential discussion wit the two minors.

It's ridiculous, and it would absolutely – i my opinion — destroy the concept and the inten tion of the Court, and the purpose for which th law permits a Court to interrogate children i Chambers."

The trial judge regarded the expressions of th children as merely one of the factors to be considered in determining what course would be best served fo the child's welfare:

A. Kurt, age 11, said he still wanted to liv with his father (T 127), that he loved both hi mother and father.

B. Michael, age 6, said he loved his mothe and wanted to live with her. That he loved hi father but loved his mother the most (T 116) (T 117).

These boys were not used as witnesses; they were

the subject matter of the action, and the trial judge had the discretion not to ask all questions propounded by plaintiff's counsel; the trial judge did state (T 105) that he would not ask the questions submitted verbatum but would cover much of the subject matter suggested by the questions, and in questioning the children, the trial judge did cover some of the items referred to in the questions proposed by counsel for plaintiff.

The children have had a traumatic experience with respect to the controversy of their custody without being interrogated with questions requested by Appellant's counsel.

The trial judge, in his questions to the children, endeavored to obtain an honest, freely given opinion of the feelings of each of the children. In questioning each child alone, the court, in its discretion, was doing that which was best serving the welfare and interests of the children. It is most difficult for a young child to state which parent he desires to live with, but to require him to answer any of the questions propounded by plaintiff's counsel could cause irreparable damage to the child.

The trial judge believed that the children would be least adversely influenced if he questioned them in his chambers without counsel being present and by utilizing his own judgment with respect to the questions to be asked to visualize and determine their feelings and desires with respect to each parent. This Court has held that it should be kept in mind that a contest of the custody of a child is something more than an adversarial proceeding between the parties. More important than

their rights is the welfare of the child which is alway the paramount consideration, and which the Court, repr senting the interest of the public, has a duty to safeguar *Motzkus vs. Motzkus,* 17 U.2d 154, 406 P.2d 31.

POINT IV

The Trial Court was clearly within its discretion t deny Appellant the right to reopen the case to receiv additional expert witnesses. The Court had alread heard the testimony of three expert witnesses on behal of Appellant, and Respondent's expert witness, Dr Richard Iverson.

The mere fact that an inquiry was made by Dr Iverson, after the conclusion of the hearing regarding the outcome of the case, merely manifest his sincer interest in the children. This should not be compelling upon the Court to disregard his testimony and to reope the case to receive further expert testimony. Dr. Iver son, in his Counter Affidavit to Plaintiff's Motion fo Appointment of Expert Witnesses and to Reopen th Case, stated that his telephone call was not with inten to rescind, revoke and disclaim his prior testimony. Sai Counter Affidavit further denied that Dr. Iverson ha expressed any regret over the disparagement of Appel lant's expert witnesses, Dr. William H. Brown and Dr Malcolm N. Liebroder (T 55)?

CONCLUSIONS

The record on appeal clearly shows that the Trial Court has granted Appellant fair hearings on each o her post divorce motions brought within a relatively short period of time.

The evidence supports the Findings of Fact made by the Trial Court that all evidence presented by the Appellant has been carefully weighed by the Trial Court. The Trial Court has attempted to carefully scrutinize the affects of these hearings upon each of the children; and if error was committed in excluding Janice's testimony, any error thus committed was not prejudicial error because each of the facts proffered as proof had been brought before the Court through other witnesses.

To require the minor children involved as well as Respondent herein, to go through the trauma of another trial would be unconscionable and create a further financial burden upon your Respondent, indirectly taking material benefits which the children would otherwise enjoy from their father.

It is respectfully submitted that the Trial Court's findings and amended decree be affirmed concerning custody and visitation of the minor children of the parties.

Respectfully submitted,

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