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SEP 1 3 1970

Clerk, Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

MARJORIE LEE BAKER,
Plaintiff-Respondent,

vs.

ALVIN D. BAKER,
Defendant-Appellant.

Case No. 12098

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE KIND OF CASE

This case is before the court to review certain findings and orders of the Trial Court regarding child custody, support payments and the award of attorney fees in a divorce action.

DISPOSITION IN TRIAL COURT

On April 13, 1970, the Trial Court entered its Findings of Fact, Conclusions of Law and Decree of Divorce, wherein the defendant was granted the divorce and ordered to pay certain monthly obligations of the family totaling $253.00 per month and including a mortgage payment, and the plaintiff was granted the permanent custody of the children of the parties, plus additional support payments of $50.00 per month per child and attorney's fee of $550.00 for the

use and benefit of her attorney. This appeal relates to the award of the children's custody to the plaintiff, the child support payments and the award of the attorney's fee.

RELIEF SOUGHT ON APPEAL

Inasmuch as this is an equitable matter upon appeal, the defendant seeks to have the findings of the Trial Court modified by this Court, and to enter findings as follows:

1. That the permanent custody of the children should be awarded to the defendant instead of to the plaintiff.

2. That the defendant pay no additional support payments, other than monthly installments on family indebtedness, and that the plaintiff repay all payments made to her by the defendant to date.

3. That each party bear their own expenses and attorney fees in maintaining this action, and that any attorney's fees paid by the defendant to the plaintiff be returned to the defendant.

STATEMENT OF FACTS

The parties were married at Salt Lake City, Utah, on June 29, 1956. As a result of said marriage there were born to the parties three children, namely: Alvin Biff Baker, born July 22, 1957; Jerry Dean Baker, born April 13, 1959; and Bambi Lee Baker, born December 27, 1961.

On October 1, 1968 the wife, Marjorie Lee Baker, filed a Divorce Complaint in the District Court of Salt Lake County, which was answered by the husband, Alvin D.

Baker, on October 1, 1968, at which time the husband also filed a Counterclaim for divorce and asking for custody of the children.

On the 13th day of November, 1968, the Trial Court ordered the parties to "attend the Family Counseling Service" and that the minor children of the parties be interviewed and evaluated by a staff member in order to determine which parent should be awarded the permanent custody of the minor children of the parties. Said evaluation was read to counsel for both parties by the Trial Judge on May 14, 1969, and filed with the Clerk of the Court on May 19, 1969, (T. 20).

At the commencement of the trial on June 12, 1969, the Court first interviewed two of the minor children of the parties, and because of what appeared to possibly be undue influence by both parties on their children, the Court continued the trial until August 1, 1969. At the conclusion of the trial, the Trial Judge requested counsel to submit memoranda to the Court to assist the Court in reaching its decision (T. 21-26).

On October 3, 1969, (T. 27-28) the Court did enter a memorandum order, at which time, among other things, the husband was awarded the divorce, the wife was awarded "probationary" custody of the children, the Court agreed to reconsider the question of permanent custody after January 1, 1970, each party was to pay his own costs and attorney's fees, the husband was ordered to obtain "extra employment consistent with his teaching obligations" in order to "put himself in a position to pay some support for

the children" and to reappear before the Court within 30 days to review the matter of child support.

On October 20, 1969, upon motion of the wife, the Court issued an Order requiring the husband to appear before the Court to show cause why he should not be held in contempt for his actions and why he should not be ordered to assist the plaintiff financially (T. 40). On November 3, 1969, the Court, by way of letter (T. 38) did inform counsel for the parties of the decision reached on the hearing held on October 28, 1969. In that decision, the Trial Court ordered, among other things, that the defendant pay the plaintiff an additional $50.00 per month per child as child support, and $550.00 for the use and benefit of her attorney. On December 16, 1969, based on written instructions by the Court, the defendant's attorney prepared and submitted to the Court for its signature, Findings of Fact and Conclusions of Law and a Decree of Divorce (T. 42-45 and T. 48-55). On December 18, 1969, the defendant moved the Court to amend its Findings of Fact and Conclusions of Law (T. 46-47). Said Motion was heard on February 9, 1970, (T. 56) and denied, although there is no written Order in the transcript which reflects the same.

By agreement between the parties, the further hearing by the Court regarding the permanent custody of the minor children was held on April 13, 1970. The plaintiff at that time again asked that the defendant be found in contempt of Court (T. 57-58) which Motion was denied. At said hearing the Court did grant the permanent custody of the minor children to the plaintiff and on April 17, 1970,

the Court entered new Findings of Fact and Conclusions of Law (T. 59-65) and a Decree of Divorce (T. 66-69).

ARGUMENT

POINT I.

BASED UPON THE EVIDENCE, THE TRIAL COURT ERRED IN AWARDING THE CUSTODY OF THE CHILDREN TO THE PLAINTIFF, AND THAT THE PERMANENT CUSTODY OF THE CHILDREN SHOULD BE AWARDED TO THE DEFENDANT.

Point I will show that the Trial Court erred in awarding the permanent custody of the children to the plaintiff. In so doing it will be demonstrated that the Trial Court's findings were not consistent with the facts, and that the Trial Court's order was contrary to the best interests of the children.

A. The awarding of the children by the Trial Court in a divorce action is an equitable matter, and both the findings and law are subject to review on appeal.

The Utah Statutes authorizes the Trial Judge to "make such orders in relation to the children * * * as may be equitable". (U. C. A. 1953, 30-3-5.) The leading cases in this jurisdiction have held that the decision of the Trial Court regarding the custody of the children will not be disturbed unless the evidence clearly preponderates against

the findings of the Trial Court.[1] These cases have also held that "no firm rule can be uniformly applied in all divorce cases, and that each must be determined upon the basis of the immediate fast situation." (*Wilson* v. *Wilson,* 5 Utah 2d 79, 296 P. 2d 977 (1956)), and that a "judgment should not be upset unless it works such an inequity or injustice or places one of the parties in such an impractical situation, that equity and good conscience demaond that it be revised". (*Watts* v. *Watts,* supra note 1.) In *Wiese* v. *Wiese,* note 1 supra, this Court held: "* * * We may be persuaded that a finding is against the preponderance of the evidence to such an extent that we would be justified in disapproving it or even making a finding of our own."

The defendant urges that the evidence does preponderate against the findings of the trial court. The evidence in this matter is such, that the finding of the Trial Court is so inequitable and unjust that both equity and good conscience demand that the finding of the Trial Court should be modified and a new finding made by this Court, granting custody of the minor children of the parties to the defendant.

The Trial Court awarded the permanent custody of the children to the plaintiff (T. 61) but found that "neither of the parents is unfit as a parent, but that each of them has been negligent in some respects so far as the best inter-

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[1]See *McBroom* v. *McBroom*, 14 Utah 2d 393, 384 P. 2d 961 (1963); *DeRose* v. *DeRose* 19 Utah 2d 77, 426 P. 2d 221 (1967); *Watts* v. *Watts*, 21 Utah 2d 137, 442 P. 2d 30 (1968); *Wiese* v. *Wiese* ...... Utah 2d ......, 469 P. 2d 504 (1970).

est of the children are concerned" (T. 61). In determining this fact, the Trial Court "took in consideration both the advantages each parent has to offer the children" (T. 61). The Trial Court then specified the advantages that it considered the plaintiff had over the defendant as follows: "The Court feels that the plaintiff mother is the more stable emotionally" and "because of her special training and background in working with emotionally disturbed children" (T. 62, lines 1-3). The defendant alleges that said findings by the Trial Court are not consistent with the record.

B. The Trial Court erred in finding that the plaintiff was "more stable emotionally" than the defendant.

The plaintiff as a parent is not more stable emotionally than the defendant as a parent. In order for the Court to find that the plaintiff was "more stable emotionally" than the defendant, there should be some showing in the record of the lesser emotional stability on the part of the defendant. The only evidence the defendant can find, that was introduced to the Court, that might suggest that the defendant husband was not emotionally stable was testimony by the plaintiff and her witness George Delanor Jermayne (T. 120, 127) that the defendant husband followed the plaintiff on many occasions, because he wanted to know why his wife was getting home from her work at school so late, what her conduct was with certain other men, and that the defendant asked two of the children of the parties if they wanted to continue to live like they had been (T. 118). Such evidence is not sufficient to support

the Trial Court's conclusion that the defendant was not as emotionally stable as the plaintiff. Surely a husband has the right to inquire into the unexplained activities of his wife, and to inquire if his children wanted certain unfavorable conduct to continue.

Defendant cannot see why a husband should be considered emotionally less stable than his wife simply because he wants to know the whys and wherefores of her unexplained and questionable conduct. The plaintiff gave the defendant sufficient grounds to be suspicious of the conduct and activities of the plaintiff, as is hereafter set forth. Mr. Jermayne (Germain) testified that the plaintiff consistently left school by at least 4:00 to 4:30 p.m. (T. 127, line 20) and yet the children testified that their mother was always late getting home from school (T. 87, line 11; 101, line 27; 196, line 19; 365, line 9); that their mother did not like their father to ask why she was late (T. 104, line 5); and that their mother would laugh at their father when he would inquire as to her reasons for always getting home late (T. 103, line 24). If such conduct would not cause the average man to become emotionally distraught, then perhaps the sight of seeing his wife rub another man's feet in the presence of his children (T. 96, line 14; 100, line 25; 250, line 104), or finding her parked with the same man in secluded places when she was supposed to be to a teachers' meeting, on more than one occasion (T. 27, 229); or having her report she was going out to the theatre on numerous occasions, yet never attending the same, yet still putting at least 21 extra miles on the car (T. 231); or having

her cease to be accommodating to him as his wife (T. 233) are surely adequate grounds for the defendant to become emotionally upset at his wife's conduct. In fact the defendant became so upset with the conduct of his wife, that he had to be taken home from work in an ambulance because of his nerves (T. 228, line 3), which he at first thought was a heart attack. To the discomfort and enxiety of the defendant, the nervous problem with his heart persisted thereafter (T. 228). The plaintiff does not deny the same and her reply to the defendant's request for her to stop was that she could see no wrong in her conduct, and that she would keep on doing it (T. 228, line 16). The undisputed testimony by the defendant was that this conduct by the plaintiff had been going on for about four years (T. 224), and that prior to that time, he had had a good marriage with her (T. 233). The plaintiff's witness Jermayne (Germain) testified that the defendant had told him a year before this proceeding that defendant's marriage had been a happy one (T. 134), but that because of the conduct of his wife, he now wanted a divorce from her (T. 134). The plaintiff construed the defendant's suspicions as being unfounded and a conspiracy against her (T. 189) and that as a result the defendant had attempted to alienate the children from her (T. 176, 189). The defendant would urge that if he was in fact not as emotionally as stable as the plaintiff's wife, that the plaintiff's conduct was the cause of his lack of emotional stability. However, the defendant believes that the record fairly indicates that the plaintiff, because of her conduct, is not as emotionally stable as the defendant. The evidence further indicative of the plaintiff's ap-

parent lack of emotional stability is set forth hereafter.

1. Plaintiff cannot control her urge to steal. Both of the older children testified that this was one of the reasons that they did not want to live with their mother. All of the children have seen her steal. The children saw their mother steal pink beads (T. 91), silver goblets (T. 91), a fly-tying book (T. 91), Shasta pop (T. 92, 355, 365), 4 paintings (T. 92), records (T. 108), towel rack (T. 110), a can of white spray paint (T. 160), cosmetics (T. 354), and a display rack (T. 354).

2. Plaintiff finds it difficult to tell the truth. Under cross-examination the plaintiff admitted that she had had a Mr. Fleisher, who was a married man, in the bedroom of her home at night; that his wife had come and got him; but that said conduct was proper since it was about 9:00 p.m.; that at least one of her children was in the room with her; and that her bedroom door was unlocked (T. 201). However, that same child, which she claimed was in her room, told a different story. He testified that about 11:00 p.m. he was awakened by a banging at the family home; that he went upstairs to investigate and found that someone was at the front door; that he had then gone to his mother's bedroom where he found that her bedroom door was locked; and that he then went back to answer the door where he found a lady who wanted to know if a Mr. Fleisher was there (T. 118). This

incident was a further reason why this twelve year old child did not want to live with his mother. This incident is demonstrative of the fact that the plaintiff had no qualms about lying under oath. In addition, the plaintiff testified that she used $200.00 she received from her mother to open a banking account (T. 302). When the records of the checking account were examined, the plaintiff could not identify the deposit of her mother's "loan" (T. (T. 305) and finally testified that in fact the account was opened with $75.00 from her household expense account (T. 303, 304). While these inconsistencies are minor on first appearance, they are indicative of the plaintiff's inability to tell the truth. She was trying to cover up how she had been able to purchase $500.00 worth of stock (T. 301) and then got caught in her own lie.

3. Plaintiff is unable to personally implement her verbalization as to a mother's responsibilty. The plaintiff verbalized well as to what she felt were her responsibilities as a mother (T. 186). However, the plaintiff was apparently unable to put her verbalization into action. The children testified that she was late getting home to them (T. 87); that she fixed meals late (T. 106); that the meals were good *when* they had company, but otherwise not so good; that she didn't mend their clothing (T. 351); that their father had to do her "work" in the house (T. 87); and that she would leave them without letting them know where she

was going (T. 160); that she let a married man put his arm around her (T. 352); that she had another married man in her locked bedroom late at night when his wife came to get him (T. 118). The plaintiff's problem is accentuated by the fact that she teaches Home Economics (T. 170).

In addition, the conduct by the plaintiff which lead to the defendant's nervous reaction is also an indication of the plaintiff's lack of emotional stability.

4. The defendant as a parent is an emotionally stable person. By comparison to their mother; the children testified that the defendant always came right home after school (T. 88); that he prepared them good meals (T. 87); that he took good care of them (T. 87) and that there was nothing about their father that they disliked (T. 163), and that every one of them preferred to live with their father (T. 105, 116, 168, 352, 365, 372).

   In view of the foregoing, the defendant urges that the Trial Court's finding that the plaintiff was "more stable emotionally" than the defendant is in error.

C. The Trial Court erred in finding that the plaintiff works with emotionally disturbed children.

The second reason the Trial Court found that the plaintiff was better equipped to have the custody of the minor children was "because of her special training and back-

ground in working with emotionally disturbed children" (T. 62). Inasmuch as it is not merely a matter of semantics, and since the Trial Court has used this as a basis for granting custody to the mother, it should be pointed out that this finding is in no way supported by the evidence. In addition, the defendant questions the relevancy of the Trial Court considering the same since there was no showing that the children of the parties are emotionally disturbed. Nevertheless, plaintiff testified that she taught "special education for the retarded and . . . Social Studies, language arts, physical education, home arts" (T. 170). Special education for the retarded which the plaintiff is engaged in, is not the same program, as working with emotionally disturbed children. The transcript reflects that in fact it was the defendant who was trained and worked with emotionally disturbed children (T. 243). If working with emotionally disturbed children is to be the criteria for awarding the custody of the children, then the custody should have been granted to the defendant.

D. The Trial Court's award of the permanent custody of the children to the plaintiff was contrary to the best interests of the children.

In March, 1969, the counselor appointed by the Trial Court to interview the parties and their minor children, although making no recommendations as to custody, found that the children related better to their father than to their mother and that the children preferred to live with their father (T. 20).

On June 12, 1969, in the Chambers of the Trial Court,

only the two older children were interviewed; however, both of them indicated that they wanted to live with their father (T. 90, 105). (Because the Trial Court was then concerned about what the Court felt was undue influence on the children on the part of both parties (T. 139, 145), the Trial Court continued the trial of the matter until August 1, 1969.)

On August 1, 1969, the Court interviewed all of the children in chambers. The Court asked "where do you feel it would be best for you to live?" (T. 152). The oldest son testified that he didn't know where it would be best for him to live (T. 152, line 24). Upon further inquiry by the Trial Court as to whether the proceedings had him upset, the oldest child then testified that the Judge "sort of made him nervous" (T. 153). It is also important to note that the plaintiff had had the children out fishing or on other activities almost constantly from the time of the trial on June 12, 1969, to the trial on August 1, 1969, (T. 153-154), and that afterwards the plaintiff or her parents would say "See your father would never take you doing that" (T. 154, 155). It would appear to even the most casual of observers that such conduct by the plaintiff or her parents would undoubtedly have caused undue influence upon this child. However, the Trial Court made no finding of the same.

At the trial on August 1, 1969, both of the other children stated their preference to live with their father (T. 150, 168). Although the Trial Court did grant the defendant the divorce after the trial on August 1, 1969, the custody of the children was temporarily continued in the plaintiff on a probationary basis until after January 1, 1970.

On April 13, 1970, the Trial Court again interviewed the minor children in chambers. At least one of the children testified that he had had no discussions with his father about his mother since the last hearing (T. 367, 369) and there was no indication by the other children that they had recently had any undue influence exerted upon them by either parent. Nevertheless, each of the children expressed that they felt that it would be "best" for them to live with their father rather than their mother and that they preferred to live with their father rather than their mother (T. 352, 365, 372). Each of the children also stated specific reasons why they did not prefer to live with their mother, i.e. she goes out with a married man (T. 352); she doesn't wash and iron clothes (T. 351, 105); and the meals were still being prepared late (T. 365).

The children were unanimous in their selection of their father as the parent they preferred to live with because he did do these things for them. Notwithstanding their preference, and notwithstanding all of the reasons and facts already discussed, the Trial Court awarded the permanent custody of the children to the plaintiff. Such a decision seems to be contrary to the best interests of the children, the preponderance of the evidence, and to be manifestly unfair and unjust under the facts of this case.

The children knew that it was one thing for their mother to be out with an unmarried man and quite another for her to be out with a married man who puts his arm around her while alone in the front seat of a truck (T. 358). They knew it was improper for their mother to steal and

that she was getting home much later than reasonable or necessary under the circumstances. If she were leaving school at 4:00 p.m. as she testified, but not arriving home until 5:30 to 6:00 p.m. what was the plaintiff doing during that 1½ to 2 hours each day? The plaintiff stated she was preparing her lessons better than the defendant (T. 189) but since she wasn't at school or at home, where was she? The distance from Horace Mann Junior High to 729 Bryan Avenue is less than four miles, so that time was not spent in just driving home. It was this type of conduct that caused the children to choose to live with their father.

The Trial Court may have been favorably impressed with the plaintiff's ability to verbalize what she felt was her responsibilities as a mother (T. 186), but the record shows a pronounced credibility gap between her verbalization and her performance.

E. The permanent custody of the children should be awarded to the defendant.

Inasmuch as there is no evidence of improper conduct on the part of the defendant and there is evidence that the defendant is attentive to the needs of the children (T. 103), sets a good example for the children (T. 365), is able to provide the children with moral and religious training, as well as fulfill the functions of a father and a substitute mother (T. 87, 365), and is better able to relate to the children (T. 20), having less emotional or psychological problems to cope with than does the plaintiff, the defendant urges that the Trial Court's award of the permanent custody of the children to the plaintiff was not equitable and

was in error, and that the permanent custody should be granted to the defendant.

POINT II.

THAT THE TRIAL COURT SHOULD NOT HAVE ORDERED THE DEFENDANT TO PAY THE PLAINTIFF AN ADDITIONAL $50.00 PER MONTH PER CHILD AS CHILD SUPPORT.

At the Trial of the matter on August 1, 1969, the defendant testified that he had a net salary of $409.00 per month (T. 239). He further testified on October 28, 1969, that he was not sure what his net would be for the year 1969-70, since he had complied with plaintiff's request (T. 197) to allow her to claim all three of the children as her exemptions for income tax purposes (T. 337).

On August 1, 1969, the defendant was ordered to continue making monthly payments on pre-existing family indebtedness including mortgage payments on the family home in the aggregate sum of $253.00 (T. 233-236). This left the defendant with $156.00 per month to live on. The Trial Court found that the defendant could not possibly pay anything additional to the plaintiff for the support of the minor children.

The plaintiff testified on August 1, 1969, that her net pay check each month was then $532.00 (T. 197) but that this would be increased since she would be claiming the three children as exemptions. This Court should take judicial notice that all of the teachers in the Salt Lake School

District also received a pay raise for the school year 1969-70, commencing in September, 1969. However, at a subsequent hearing on October 28, 1969, the plaintiff testified that her last check was less than $500.00 plus a bonus of $219.00 (T. 280, line 7). The plaintiff offered this testimony even though she had received an increase in her base pay, and had more exemptions to claim. The apparent conclusion is that the plaintiff was either lying or had "forgotten" the exact amount of her last check.

The plaintiff did not introduce evidence at the trial as to her expense requirements each month. However, at the hearing on October 28, 1969, under cross examination, the plaintiff testified as to her expense requirements each month to support her and the three children, which expenses aggregated $425.00 per month (T. 293-296). The Court on its own accord and without evidence or showing of a necessity for the same increased the aggregate allegedly needed by the plaintiff to $520.00 per month.

In its memorandum order of October 3, 1969, the Trial Court ordered the defendant "to attempt to obtain extra employment consistent with his teaching obligations," so that the defendant might be able to contribute some support for the minor children of the parties. On October 28, 1970, a hearing was held in the matter, at which time the defendant did testify that he had secured a part time job at Milne Truck Line (T. 324). The work was at night time, normally from 9:30 p.m. to 6:00 a.m. and the number of nights he would work in any month was both uncertain and subject to numerous factors (T. 325-

326). During the defendant's first two weeks on the job, he netted $122.00 (T. 326), but the evidence at the hearing was that the part time job was already having a negative effect upon the defendant's performance as a teacher of emotionally disturbed children (T. 339-340).

The defendant testified that he did not know how much if any work he would have at the part time job in the future (T. 325), and plaintiff, through her attorney, stipulated in open court that she was aware that the defendant's wages would vary from month to month according to the time the defendant was allowed to work (T. 337). Nevertheless, on November 3, 1969, the Trial Court informed defendant's counsel by letter (T. 38-39) of its decision to require defendant to pay plaintiff an additional $50.00 per month per child as support, which when added to the $253.00 the defendant was already paying on the family indebtedness totaled $403.00 per month in support payments. In making this order for additional support, the Trial Court found that the defendant had "a net income from Milne Truck of $220.00. . . ." (T. 38). The defendant urges that this finding by the Trial Court is without basis in fact and was the result of conjecture and speculation only. In addition, the Trial Court's failure to consider the testimony of the plaintiff as to her actual needs and expenses in relationship to actual income is shown by the following evidence in the record.

On August 1, 1969, the plaintiff had a net income of $532.00 per month. She testified that between August 1, 1969, and October 28, 1969, she received a "bonus" of

$219.00 for "teaching summer school" (T. 280). She further testified that in addition, during this period, her mother had given her either $200.00 (T. 302) or $115.00 (T. 302, 305, line 7) either one sum or the other, but not both (she was indefinite as to which), to open a checking account (T. 302, line 3). By adding the bonus of $219.00 and the $200.00 or $115.00 she received from her mother, the plaintiff had either an extra $419.00 or $334.00 as additional income from August 1, 1969, to October 28, 1969. During this same 3 month period, the plaintiff testified that she was robbed of $120.00 (T. 305) so that her normal income was effectively only increased by either $299.00 or $214.00.

During this same three months, with no more than $299.00 more than her normal income, the plaintiff testified that she invested $500.00 in a Dreyfus Leverage Fund (T. 301), paid $10.00 for her personal horsebackriding lessons (T. 306, lines 3-18); paid $13.00 for a little rug and $37.00 to upholster a counter or bar in her bedroom (T. 306-307); hired an electrician to hang three light fixtures; install a new door bell; and hook up a pump for the water fall in her bedroom (T. 309); paid $35.00 for a reading lamp at Auerbachs (T. 309 - 310); treated "friends" to dinner for "20 some odd dollars" (T. 311), and still ended up with at least $3.29 in her checking account on the date of the hearing (T. 303), not counting cash she had on her person. During this time there was no evidence that she was giving her children any more of her time and attention. In fact, testimony to the contrary is available, inasmuch as the children later testified that she still

came home late, etc. (T. 365).

It is beyond reason that the Trial Court should feel that it was a wise use of its equity powers to compel the defendant to secure extra employment to pay additional support to the plaintiff when the only "needs" demonstrated by the record were the plaintiff's personal extravagances and desires. This ruling by the Trial Court takes on added repugnancy in view of the fact that the plaintiff made no showing of a need for additional funds to support the children of the parties, although she did testify as to her ability to easily live on and maintain the children from her personal income.

For the Trial Court to place this additional responsibility upon the defendant was and is both unjust to the defendant as a person and a father, as well as to the emotionally disturbed children whom he must teach after having worked for 36 hours or more without sleep or sufficient time to prepare his teaching materials. Also, the Trial Court failed to give any weight to the evidence that the defendant had no control over the amount of hours or nights that he worked for Milne Truck Line (T. 325). Such a finding and order is inequitable, unjust and contrary to the preponderance of the evidence. The defendant cannot see how such an order can possibly achieve what this Court announced *DeRose v. DeRose,* 19 Utah 2d 77, 426 P. 2d 221, (1967), was the "desired objective of the decree; that is to make such arrangement of the property and economic resources of the parties that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis."

The defendant urges that under the fact situation of this case, the Trial Court's finding and order that the defendant pay the plaintiff $50.00 per month per child as support should be reversed, and that the support paid by the defendant to the plaintiff to date be returned to the defendant.

POINT III.

THAT THE TRIAL COURT SHOULD NOT HAVE AWARDED THE PLAINTIFF AN ATTORNEYS FEE OF $550.00 FOR THE USE AND BENEFIT OF HER ATTORNEY.

The defendant acknowledges the power or authority of the Trial Court to award attorney's fees.[2] The defendant further acknowledges that the Trial Court has the prerogative to assess an attorneys fee as part of its power as a court of equity[3] and in its sound discretion when "* * * the circumstances of the parties are such, that in fairness to the wife she should be given financial assistance by the husband".[4]

This Court further stated in *Griffiths v. Griffiths* 3 Utah 2d 82, 278 P.2d 983, (1955) that:

> "* * * under the facts * * *, where it appears that the husband is better able to bear the costs of divorce and no gross or immoral conduct has been proved against the defendant [wife], the wife,

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[2]Section 30-3-3, Utah Code Annotated (1953), Replacement Volume 3).

[3]*Christensen* v. *Christensen*, 18 Utah 2d 315, 422 P. 2d 534 (1967).

[4]*Weiss* v. *Weiss*, 111 Utah 353, 179 P. 2d 1005, (1947).

> although the losing party, should be allowed suit money."

In the Griffiths case (supra), this Court cited the case of *Alldredge v. Alldredge,* 119 Utah 504, 229 P.2d 681 (1951). The Alldredge case sets forth the reasoning and public policy involved in awarding a wife suit money. The language of the court is as follows:

> "The reason for permitting a wife suit money to defend an action for divorce rests on the ground that the wife normally has no separate estate from which to pay for bringing or defending the action. This is the situation in the case at hand. Not to allow the wife expenses and counsel fees would in the majority of cases work an injustice by denying her the power to enforce any marital rights she might have. Here, as in the case of alimony, gross or immoral conduct may cause a denial of attorneys fees, but such conduct was not found in this case * * * *" (page 687).

The defendant will show that the Trial Court erred in awarding an attorneys fee to the plaintiff for three reasons, namely: (1) The award was not supported by competent evidence; (2) The award was contrary to public policy, and (3) The plaintiff's conduct was of such a nature so as to bar her claim for attorneys fees. Each of these are hereinafter considered.

A. The Trial Court's award was not supported by competent evidence.

The transcript is void of any proof that the defendant was better equipped or able than the plaintiff to bear the costs of the divorce. In fact, testimony indicates that the

plaintiff was better able than the defendant to bear the costs of the divorce.

The defendant testified that he had had to borrow money in order to pay his attorney a fee of $550.00, pay his insurance premiums, and for necessary repairs and expenses on his car (T. 331. During this same time, the plaintiff testified that despite the fact that she had been robbed of $120.00, that she was able to invest $500.00 in a Dreyfus Leverage Fund (T. 301); paid $10.00 for personal horesbackriding lessons (T. 306); paid $13.00 for a little rug and $37.00 to upholster a counter or bar in her bedroom (T. 306); hired an electrician to hang three light fixtures, install a new door bell, and hook up a pump for the waterfall in her bedroom (T. 309-310); treated friends to dinner for "20 some odd dollars" (T. 311), still had a credit balance in her checking account, and was able to pay for all of the expenses of operating her home and caring for her family.

The earnings and obligations of the parties have previously been discussed in detail in relationship to the issue of support money, and the testimony referred to in that argument is fully applicable here to establish the fact that there is no competent evidence upon which the Trial Court could have concluded that the defendant was better able to finance the plaintiff's litigation, than was the plaintiff herself. In fact, the testimony in this record demonstrates that the plaintiff was better able to bear the expenses of bringing her action than was the defendant. It is unjust and inequitable to compel the defendant to borrow more

money to pay the plaintiffs attorney, so as to provide the plaintiff with free litigation when she herself has assets and income sufficient to pay her attorney, and yet the order of the Trial Court leaves the defendant no other choice if it is to be complied with.

B. The Trial Courts award was contrary to the public policy or reason for the award of attorney fees in divorce cases.

As stated by this Court in the Alldredge case (*supra*), the reason for permitting the wife suit money is because she normally has no separate estate for her own. In the case at hand, while neither party had a large estate, the plaintiff had more assets upon which to rely than did the defendant. The plaintiff had a greater income than the defendant as a result of her tenure with the Board of Education (T. 197). She had less indebtedness of the family to pay off, she had more discretionary money at her disposal, and she was able to purchase while this action was pending in the Trial Court, $500.00 worth of the Dreyfus Leverage Fund.

Since the reason for allowing the wife suit fees is because she "normally has no separate estate from which to pay for bringing or defending the action," see *Alldredge v. Alldredge, supra*, and since that reason does not exist in the instance case, the award of attorneys fees to the plaintiff in this matter was contrary to the public policy or reason, behind the law that grants the Trial Court the discretion to award the same.

C. The gross misconduct of the plaintiff should bar her claim for attorneys fees.

This Court has made it clear that in the event of gross or immoral conduct on the part of the wife, that her claim to attorneys fees should be barred. *Griffiths v. Griffith, supra.* The defendant urges that the testimony clearly shows the conduct of the plaintiff to be gross and perhaps immoral.

The testimony was that she was found parked with another man on two or more occasions (T. 227, 229); that she was regularly escorted to and from meetings or other places by this same man (T. 229); that she refused to explain her absence from the home to her husband (T. 103); that she made fun of her husband's attempts to ascertain what her activities were (T. 103); that she refused to discontinue her activities with other men (T. 228); that she massaged or rubbed a fellow employee's feet in front of her husband and children (T. 96); that she was locked in her bedroom with a married man late at night where her oldest son found her when the man's wife came to find him (T. 118); that she allowed another married man to put his arm around her while riding alone together in the front seat of a truck (T. 352); and that she refused to accommodate her husband as a wife (T. 233). If such conduct on the part of the wife is not immoral, it surely is gross conduct, and in either event, the plaintiff should not be awarded an attorneys fee.

CONCLUSION

This Court has made it clear that it will not disturb

the findings and orders of the Trial Court, "unless it appears to be unjust, inequitable and contrary to the evidence ,and therefore an abuse of disecretion," see *McBroom v. McBroom, supra.* As demonstrated by the foregoing arguments, the findings and orders of the Trial Court regarding the custody of the children, the payment of child support and the indebtedness of the parties, which are contrary to the evidence, and are, therefore, an abuse of its discretion.

This Court, by directing the Trial Court to award the permanent custody of the children to the defendant, and for the Trial Court to make additional findings regarding support and the indebtedness of the parties, which are consistent with the award of the children to the defendant, will accomplish the desired equitable objectives of any decree, namely to make such arrangements as well give the parties the best possible opportunity to reconstruct their lives on a happy basis.

Respectfully submitted,

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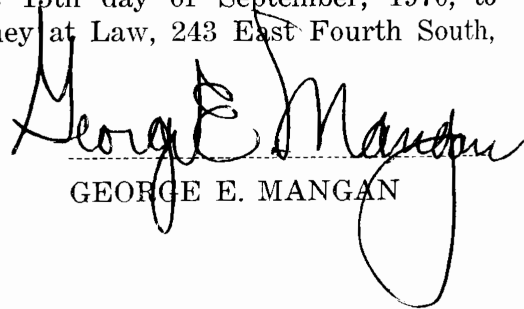
I hereby certify that I mailed a true and correct copy of the foregoing this 15th day of September, 1970, to C. VanDrunen, Attorney at Law, 243 East Fourth South, Salt Lake City, Utah.



GEORGE E. MANGAN