

1971

## **Bobbie Dean Mullins v. Elma May Olsen Mullins : Brief of Defendant-Respondent**

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IN THE SUPREME COURT OF THE STATE OF UTAH

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BOBBIE DEAN MULLINS,

Plaintiff-Appellant,

-vs-

ELMA MAY OLSON MULLINS,

Defendant-Respondent.

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Case No. 12248

BRIEF OF DEFENDANT-RESPONDENT

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Appeal from judgment of the Third District Court for  
Salt Lake County,  
Hon. Emmett L. Brown

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ESSIE DEAN MULLENS, :  
Plaintiff Appellant, : Case No. 12245  
-vs- :  
EMMA MAY OLSEN MULLENS, :  
Defendant-Respondent. :

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BRIEF OF DEFENDANT-RESPONDENT

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NATURE OF CASE

This is an action in divorce involving custody of the children of the parties.

DISPOSITION IN LOWER COURT

The Counter-claim of the Defendant-Respondent, Emma May Olsen Mullins, praying for a decree of divorce and custody of the minor children of the parties, was granted by the Third Judicial District Court, the Honorable Emmett Brown presiding, and the Complaint of the Plaintiff-

Appellant v. dismissed.

## NATURE OF RELIEF SOUGHT ON APPEAL

Respondent desires this Court to affirm the judgment of the District Court.

## STATEMENT OF FACTS

Respondent substantially agrees with the statement of facts set forth in plaintiff's Brief, but feels the following additional facts should be included for proper consideration of this matter.

On May 19, 1970 the court by oral order, ordered the Conciliation Department of the Domestic Relations Court to carry out a post-hearing investigation in the matter and to return its report to the court not later than six months from the date of the oral order. (R. 131) Judge Brown stated that he would discuss the investigation report with the attorneys and that if either of the parties desired to bring the matter before the court they could do so. If such notice were submitted, a further hearing would then be held. (R. 256.) The report was prepared and is

... part of the record on appeal. Counsel for  
... have had no opportunity to raise the issue. ...  
... side now indicates a desire for a further hearing.

## ARGUMENT

### POINT I

#### TRIAL COURT PROPERLY GRANTED THE DECREE OF DIVORCE TO THE DEFENDANT-RESPONDENT.

The trial court did not err in granting the decree of  
divorce to the Defendant-Respondent. The Court ruled:

"As is often the case, in fact, in most instances  
it is a difficult thing for the court to be put to the  
task of determining who is at fault the most in a  
matter such as this. Unfortunately, our law does  
not allow me to say both of them are entitled to a  
divorce. If it were so, I presume that is what I  
would say in this case. But since I have to make a  
choice, and since the choice does not have any  
bearing particularly except as it affects the children,  
but does not have any bearing on the division of  
property, the court finds that the defendant is entitled  
to a decree of divorce on her Counter-claim in this  
matter and this decree will become final within  
three months from the date of the filing and signing  
of that decree." (R. 252, lines 29-30 to R. 253,  
lines 1 to 11)

Plaintiff contends that the court erred because the court

... stated that it felt that both parties were entitled to be

... granted the divorce and that the determination had little

...  
...  
... the Supreme Court  
... a very similar view of the situation as  
...  
... part of one paragraph of  
... however, when this is placed back into context  
... and proper, perspective is observed:

It is apparent that, as is usually the case, neither party was without fault in contributing to the increasing difficulties which finally resulted in the necessity of terminating the marriage. Where the parties both felt that the other's faults and failings in their relationship with each other were of such consequence as to destroy the purpose of marriage and make further living together intolerable, and the trial court regarded the conduct complained of as of sufficient gravity to warrant the granting of a divorce under our statutes, the wise and practical course was that followed in granting a divorce to the party which, in the court's judgment, was least to blame in causing the failure. Indiscretion as it is obvious that this was the necessary  
and we can see no useful purpose in being unduly  
concerned as to which party was granted the divorce,  
by giving the traditional and required indulgence to its prerogatives, the court's finding is sustainable and the granting of the divorce to the defendant can be justified, as will appear below. We say this advisedly upon the basis of the record herein and in awareness of the correctness of the proposition advocated by the plaintiff that in divorce cases this court may review the evidence and may substitute its judgment for that of the trial court if that is warranted.<sup>2</sup> However, our

Utah, 333 P.2d 923 (1958).  
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Mr. Summerhays stated in his opening statement,  
"I think that to a large extent the testimony of the parties  
will govern the result." (R. 153, lines 15  
through 17). Mr. Summerhays was correct that credibility  
was the issue and that this decision rests solely with the  
fact. As stated in Stocks v. Stocks, 14 Utah 2d  
94, 333 P. 2d 928 (1958):

"The trial court was in a much better position to  
understand and evaluate the testimony than we are.  
The court has observed the attitudes, manners and  
personalities of the parties and has had the opportunity  
to evaluate the ability of the parties and the effect  
that association with these parties will have on the  
child's life." 14 Utah 2d at 316, 333 P. 2d at 924.

Judge Brown had the opportunity to observe the parties,  
to hear the testimony and to judge the demeanor of the  
persons testifying. It is obvious from his conclusion that

...the fact that the trial court was not bound to grant a divorce in such cases, and that the decree of divorce should be granted to her.

In conclusion, Judge Brown had the opportunity to determine which party was more at fault in causing the failure of the marriage. He obviously felt that Mr. Madlins was more at fault. The plaintiff's contention that Judge Brown erred in remarking that from a practical point of view it did not matter which party was granted the divorce is unfounded in light of Dearden v. Dearden, supra.

#### POINT II

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT DEFENDANT-RESPONDENT IS A FIT MOTHER AND THAT CUSTODY OF THE CHILDREN SHOULD BE AWARDED TO THE DEFENDANT-RESPONDENT.

The trial court did not err in granting custody of the children to the defendant since the defendant is a fit parent. Except for the wild bias of untruthful allegations made against the defendant by the plaintiff (and denied under oath

Dr. Madsen is the only evidence adverse to the defendant  
and Dr. Carlsson, Madsen.

Dr. Madsen's conclusion not to state his opinion as  
to whether the defendant was a fit parent. (R. 169). He did  
believe that the total time that he spent with the defendant  
was the 30-minute interview. (R. 158) He further indicated  
that the interview was adequate for an initial diagnosis and  
for beginning course of action, (R. 165 to 166) and that  
he did not believe that his diagnosis which was made after  
only one interview could be a final diagnosis. Dr. Madsen  
stated that Mrs. Mullins could rehabilitate herself (R. 168)  
and that the children should not be separated from the mother  
during this treatment. (R. 169).

It is important to point out that in Dr. Madsen's  
letter to the court of December 2, 1969, he states:

"Mrs. Mullins shows no disturbance in her basic  
orientation, she is aware of the reality of the  
situation around her, she responds to this reality;  
however, in a manner which reflects her feeling  
that she is a person to be acted upon, that she is  
dependent upon the actions of others to set her own  
course of action." (letter in envelope) filed 1/14/71.

Dr. Madsen's conclusion was that Mrs. Mullins has a

perfect personality structure. But, as indicated above, I felt that therapy could definitely help her.

It appears that Dr. Madson's diagnosis that Mrs. Mullins could rehabilitate herself was accurate. In the post-hearing custody evaluation the counsellor-investigator stated, "I feel that Mrs. Mullins is making progress as far as her emotional stability is concerned." (Custody report, p. 5, Recommendation) "I recommend that Mrs. Mullins receive permanent custody of the three children. However, Mr. Mullins should be allowed to spend more time with the children, especially games; at special events." (Custody report, p. 5)

The custody report states, "During these visits I found her [Mrs. Mullins] to be pleasant, concerned and composed although somewhat nervous." (Custody report, p. 2) "During all of my visits I found the home to be clean and orderly, and the children well-behaved while in the presence of their mother. Interaction between Mrs. Mullins and her children indicated that there was much love and

... (Custody report, p. 3). Mrs. Mullins is a sensitive person who is greatly upset by the contention of the divorce proceedings. Under oath she stated that she was upset by the divorce and the lies being told against her and the disturbance to her routine by the litigation. (N. 218) Simply because a person is not a child-fighter in divorce litigation does not make her an fit mother.

In fact, the termination of the divorce proceedings appears to have resulted in an improvement in Mrs. Mullins' emotional state. The custody report interview with Mr. and Mrs. Bob Balle, Mrs. Mullins' neighbors, indicates that since the separation, Mrs. Mullins' defensiveness of her children has decreased and that, "Mrs. Mullins now seems to be more calm." (Custody report, p. 4). Similarly,

...the court's effective custody report, in referring to the wife as the "custodian." The court said that this report found that Mrs. Mullins is functioning at a more independent level than ten months ago and that she may wish to request another evaluation." (Custody report, p. 4.)

There is no substantial evidence to support the wife's conclusion that Mrs. Mullins is a fit mother and that welfare of the children dictates that Mrs. Mullins should have custody of the children. Furthermore, in judging the credibility of the parties, the police report appended to the custody report indicates that Mrs. Mullins' allegations concerning Mr. Mullins' mother and Mr. Mullins' moral conduct are not unfounded. Stocks v. Stocks, supra.

### CONCLUSION

The court did not err in granting the divorce and custody of the children to the defendant when all of the evidence in the record is considered. Appellant obviously agrees with the court's judging of the facts, but it is

...the trial court's finding of a substantial possibility  
of abuse. The trial court's finding of a substantial  
possibility of abuse is supported by the testimony  
of the Appellee's children, therefore, respectfully  
submit that the decree of divorce and the decree awarding  
custody of the children to the Appellee should be affirmed.

Respectfully submitted,

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