1972

Michael Lowell Sparks v. Barbara Jo Ann Sparks : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL LOWELL SPARKS,
Plaintiff & Appellant,

vs.

BARBARA JO ANN SPARKS,
Defendant & Respondent.

Case No. 12878

APPELLANT'S BRIEF

Appeal from the Second District Court of Davis County.
HONORABLE CALVIN GOULD, *Judge*

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STATEMENT OF KIND OF CASE

Plaintiff-father petitioned the lower court for an order changing custody of two minor children in the custody of defendant mother under the terms of a divorce decree.

DISPOSITION IN LOWER COURT

The District Court of Davis County, the Honorable Calvin Gould, District Judge, determined that the natural mother should retain the custody of two minor boys, ages 6 and 3, and the natural father appeals to the Supreme Court for a reversal of that judgment.

RELIEF SOUGHT ON APPEAL

The plaintiff prays that the judgment of the lower court be reversed and that plaintiff be granted the custody of his two minor sons.

STATEMENT OF FACTS

Plaintiff and defendant were divorced under the terms of a decree dated April 15, 1969. The terms of a stipulation were made part of the decree, and among other things provided that defendant would have the care, custody and control of the two minor boys, subject to reasonable rights of visitation in plaintiff. Except for some harassment (R. pages 37-39) the visitation has been constant and adequate in the usual sense for a noncustody parent. The visitation is not adequate to meet the needs of the children as expressed by Nancy Schofield, nor does the visitation right accord to these young boys the security and protection they so obviously need because of the environment and life style imposed upon them by the attitudes and behavior of the defendant.

The evidence is uncontradicted that defendant loves her children, takes reasonably good care of the children, and attempts to provide adequate care for the children when she is at work, with the exception of the arrangements she had with Peggy Varney when the defendant worked nights (R. page 118, line 11; page 115, line 3). The evidence is also uncontroverted that within six months the defendant had three different baby tenders and as many different boyfriends within a year. Neal J. Harris stayed in the home overnight for approximately one month as a "baby tender" (R. page

5, line 22-24), and also as a lover (R. page 10, line 10, 16-29) in spite of the representation otherwise in answers to interrogatories (R. page 5, line 2-7; page 14, line 18-22). The intimate association between the defendant and Mr. Harris continued for approximately four months to March or April 1971.

At approximately the time that defendant and Mr. Harris discontinued their relationship, defendant met Larry B. Seamons (R. page 24, line 5-8). Mr. Seamons moved into the defendant's home in May 1971, and stayed for approximately six months. (R. page 16, line 27-28; page 23, line 23-25) Defendant permitted Mr. Seamons to have a "father relationship" with the children and represented that Mr. Seamons was her husband (R. page 18, line 4-9). The defendant and Mr. Seamons intended to get married, but did not do so even though Mr. Seamons' divorce was completed two or three months before they separated (R. page 18, line 28-30; page 19, line 10-15). Defendant not only lied to plaintiff about her marriage to Mr. Seamons but at the time she and Mr. Seamons split the blanket defendant again lied to plaintiff in an effort to cover up her previous fabrication by telling the plaintiff that Mr. Seamons was TDY.

Miss Nancy Schofield testified that she has a Master's Degree in Psychology and that her work has been principally with children and retarded persons and that she tested the six year old boy, the three year old being too young to test accurately. She stated that in the area of creativity and spontaneity, Lonnie, is severely lacking (R. page 86, line 21-22); that he has difficulty with his sexual identity and would like to be a male but is really not sure how to go about it or what it is, and that this is a critical time in the life of the

child to make this determination (R. page 87, line 13-17); that he has a poor self-image and is looking for male affection and companionship (R. page 88, line 3-6); that the male identity problem may in fact be secondary in importance to the overriding anxiety of the obvious constriction in the child's feelings (R. page 101, line 18-22); finally, that regardless of the present visitation arrangement with the natural father it cannot override the conditions that exist the rest of the time (R. page 99, line 26-29).

After Mr. Seamons departed the scene John Pearl was the next man in the life of the defendant who admitted he stayed at the home past midnight and who has been around in the nighttime to watch TV with the children (R. page 22, line 27-30).

By contrast, the plaintiff is now married to Carol Sparks who does not hesitate to discipline the two boys when necessary but also tries to show them an abundance of love by engaging in activities with the boys and helping them with their learning experiences. (R. page 57, line 13-24). The home is stable; the relationship between the boys and Carol Sparks is stable and is no source of concern or worry to her (R. page 64). It is obvious from the record that the love of the plaintiff and his present wife for these two boys is genuine and is expressed not only orally but in meaningful activities and relationships. By contrast with the defendant, the plaintiff's association with his boys is a joy rather than a chore and a duty; his goals and activities are family oriented to include the boys rather than individually oriented to shield the boys from some type of association.

ARGUMENT

POINT I

A NATURAL MOTHER DOES NOT HAVE A PARAMOUNT RIGHT TO THE CUSTODY OF HER CHILDREN.

In *Sampsell v. Holt, 115 Utah 73, 202 p.2d 550 (1949)*, the court enunciated some basic rules in child custody proceedings. The court declared its own power to review the facts as well as the law on appeal in child custody proceedings between divorced parents and that such proceedings are equitable and the best interest and welfare of the minors involved is the paramount consideration. In subsequent decisions the court has not departed from these basic concepts. *Weise v. Weise, 25 U.2d 236, 469 P.2d 504, Hyde v. Hyde, 22 U.2d 429, 454 P.2d 884.*

Also, this court has determined that an award of custody in a divorce action is not necessarily permanent. *Hyde v. Hyde, Supra.* Nor does a stipulation involving custody made at the time of the divorce foreclose the noncustody parent where there is a change of circumstances. *Weise v. Weise, Supra.*

In *Sampsell v. Holt, Supra,* and subsequent cases, the court declared that 30-3-10, UCA, did not apply to divorce actions but only to cases of separation, and 30-3-5 was the applicable statute in divorce cases or custody proceedings. Both of those sections were amended by the legislature in 1969, and now read as follows:

> 30-3-10 * * * In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dis-

> solved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for young children. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise.
> 30-3-5 * * * When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance or the distribution of the property as shall be reasonable and necessary.

The 10 year old age limitation to express choice has been deleted from 30-3-5, and the provision with respect to the choice of the children is now a part of 30-3-10. Additionally, 30-3-10 appears to set up some guidelines on which the court shall determine custody, regardless of the nature of the proceeding. The natural presumption that the mother is best suited to care for young children is only one of the three general factors to be considered by the court.

In *Hyde v. Hyde, supra,* the court quoted with approval from *Steiger v. Steiger, 4 U.2d 273, 293 P.2d 418 (1956)* to the effect that all things being equal,

preference will be given to the mother in awarding custody of the children. The court then stated at page 886:

> It will thus be seen that the defendant has no absolute right to the custody of her child simply because she is the mother. At best she has an advantaged position when all things are equal. However, when things are not equal as regards the ability of the parties to care for and properly rear the child, then any advantage customarily given to a mother must be denied, and the award made so as to provide for the best interest and welfare of the child.

Thus the best that can be said for the defendant is that her motherhood may be sufficient to tip the scales in her favor but only after the scales are equally balanced. See also *Moore v. Moore, 12 Va. 153, 183 S.E.2d 172 (1971), Kelch v. Kelch, — Mo. , 462 S.W.2d 161 (1970), Yager v. Yager, 159 N.W.2d 125 (S.D. 1968) Hanson v. Hanson, 170 N.W.2d 213 (Minn. 1969).*

POINT II

THE PAST CONDUCT AND DEMONSTRATED MORAL STANDARDS OF THE DEFENDANT DEPRIVE HER OF AN EQUAL POSITION WITH PLAINTIFF AS A CUSTODIAN FOR THESE CHILDREN.

Throughout the hearings in the trial court, plaintiff was accused of character assassination toward the defendant on the theory that *Stuber v. Stuber, 121 Utah 632, 244 P.2d 650 (1952)* precludes a change of custody on the facts herein set forth. Plaintiff has no

desire to embarrass the defendant and fully concedes that the life style she has chosen for herself is accepted in every state of the union regardless of penal statutes to the contrary in some jurisdictions. Further, plaintiff acknowledges that a woman may be a bad wife and a good mother, and that extramarital relationships with persons of the opposite sex often considered a most serious offense against a spouse, may not be a serious offense against the children under some circumstances.

But the case at bar is not comparable with Stuber. There the court found that after divorce the mother placed the child with the father on a temporary arrangement and then the mother began living with another man who was not her husband; and she did not request that the court return the child to her home but rather to the home of her mother, thus insulating the child from her life style at that time; and finally, at the time of oral argument before this court the mother had entered into an "advantageous marriage" with another man. As to the child, the court found that while in the custody of the father "he was thin, nervous, and unstable and not getting along well in school." Speaking for the court Mr. Justice Wade said at page 652:

> The fact that she lived with a man whom she expected to marry, although censurable, does not in itself make her an unfit and improper person to have the custody of her child.

The only similarity in the case at bar to the Stuber case is the life style of the defendant, and even on that comparison this defendant seems to have established a pattern not shown in Stuber. In the case at bar, defendant has not only had the children living with her during the time she has been living with another man but in-

sists that this is past conduct that cannot be considered in determining what her future conduct will be. The answer is that "past conduct and demonstrated moral standards" is one of the guidelines set forth in 30-3-10, UCA annotated as amended, by which a trial court should determine custody, and may in fact be a far more accurate indicator of the future than anything the defendant may say. Had plaintiff listened to the verbal representations of defendant, he would never have known that in fact defendant was not married to her "husband". The testimony of defendant is recorded at page 18 of the record, beginning at line 4.

Q. Okay. Now during the time that he was in the home, what was his relationship to the children, Mrs. Sparks?

A. He had a father relationship with them.

Q. Did you represent to the children that he was your husband?

A. I did.

* * *

Q. Okay. Why did you represent to Mr. Sparks that you were married to Mr. Seamons?

A. We had planned to get married.

Q. When? When was the marriage set for?

A. He was waiting for a divorce to go through. We planned to get married. And then I asked him to leave, I changed my mind.

Then when defendant's male friend left the home, defendant again lied to plaintiff about the circumstances surrounding their separation, as reflected on page 35 of the transcript:

Q. In approximately October of 1971, did you make any inquiry of your former wife as to where Mr. Seamons was?

A. Yes, sir, I did.

Q. And what was the reply? What did she tell you concerning Mr. Seamons' absence from the home?

A. She said he was on TDY for Hill Field.

Q. Did the defendant ever tell you that in fact there was no marriage to Mr. Seamons?

A. No, sir.

The life style demonstrated by defendant's association with three different men in and of itself should make her an "unfit and improper person to have custody of her child", but in any event it certainly detracts from her equal status with the plaintiff under the doctrine of *Hyde v. Hyde, supra.* The fact is, that under the doctrine of *Sampsell v. Holt, supra,* a father seeking custody does not have to prove that a mother having custody is an unfit or improper person for that custody and the quote from Mr. Justice Wade's opinion is really meaningless dicta. The real question is: Does such conduct on the part of the mother impair her equal status so that her motherhood is not enough to tip the balance in her favor.

Sission v. Sission, 77 Nev. 478, 367 P.2d 98, (1961) was a divorce action with facts substantially similar in the behavior of the mother. She there complained that her husband ran his life the way the Navy ran him, strictly according to the rules, and he complained that her sex life did not match the Kinsey report. On the other hand, the wife had been separated for more than a year and had been living with another man as husband and wife, and were so known to many persons in their immediate community. They were each engaged in church work and devoted substantial time and attention to the activities of the children, including family picnics, auto races, swimming, and other group activities. At page 103, the court stated:

> It is evident and without dispute that the father, under the circumstances of this case, could have provided the children with as much love, with more security and stability, and with a more wholesome moral environment than did the mother. * * * Though the mother professed great love and affection for them it became incidental to her passion for another man. Adult passions, apparently, sometimes provoke illicit togetherness. However, we cannot approve such conduct, especially its exhibition before beloved children. This is not a case where adultery is but an isolated occurrence. To the contrary, the wife —mother deliberately subjected her children to a shameful, immoral, unwholesome environment of more than a year's duration. That a more satisfactory solution was available for the children's welfare pending divorce, is without question. We note that the father was not found unfit. Indeed such a finding was not possible under the facts here present * * *. We have not found authority from any court which would support a custody award to the mother, under circumstances like

> these. The adultery with which we are here concerned probably did not effect the husband—wife relationship, for reasons hertofore related, but it must have caused terrible harm to the children.

There was no evidence of harm to the children, but this did not bother the court. After separation the husband lived in his parents' home which was found by the court to be adequate. The Supreme Court of Nevada was in this case called upon to assess the moral standard of the State of Nevada and determined that such conduct on the part of a wife—mother was below the standard for that state. In *Cooley v. Cooley, 86 Nev. 751, 467 P.2d 103, (1970)*, the Nevada court was again called upon to decide the exact same issue in a custody proceeding where the mother lived with her paramour only one month before they got married. The trial court's decision to grant custody to the mother was affirmed by a divided court distinguishing Sisson on the difference in time between one month and one year affirming the principle that an admitted adultress, by that fact alone, is not an unfit mother.

However, the facts of the Cooley case do not parallel the case at bar. The time period involved here is in excess of six months, involved at least two men, and there has been no marriage to the men with whom she has lived.

On somewhat similar facts the Oregon Court of Appeals in Mackey v. Mackey, 460 P.2d 371 (1969), stated at page 372, quoting the trial court:

> It is my opinion that the conduct of plaintiff with her present husband (before her marriage to him) and other men in the presence

> of the children, as established by the evidence, has rendered plaintiff unfit to continue as the custodian of the children. I am of the further opinion that defendant can better meet the needs of the children and that their welfare and future interest will best be served by awarding their custody to him.

And in conclusion the court stated:

> * * * The record amply demonstrates that the plaintiff utterly failed in the responsibility of properly raising her two children. After the divorce she chose to pursue a course of conduct wholly incompatible with her parental responsibilities * * *.

There is no evidence that the plaintiff father is not a good parent for his two sons. Indeed, the greatest indictment against the plaintiff is that when he heard that the defendant was leaving the children alone in her apartment while she and her boyfriend went to work (she had made arrangements with a neighbor upstairs to look in on the children before the neighbor went to bed), he became solicitous about the welfare of his children under such circumstances. He made a ruckus that brought the parties into juvenile court and succeeded in getting that kind of baby tending changed. He has attempted to maintain a close relationship to his children through consistent visitation and has been a dutiful father under the circumstances. In *McNamara v. McNamara, 181 N.W.2d (Iowa 1970)*, the trial court found that the wife had engaged

in an adulterous relationship during the marriage and granted custody of the children to the husband. On review the Supreme Court stated:

> * * * Furthermore, no showing is made which reveals he has ever done anything which would lead this or any other court to believe the children would be raised by him in less than a moral and proper atmosphere.
>
> On the other hand, defendant mother's conduct has unquestionably been less than moral.
>
> Moreover, in the course of her adulterous affair defendant exhibited a total disregard for the children's welfare by leaving them alone at various times and by bringing her paramour to the family home where she "entertained" him while the youngsters were present, presumably asleep.
>
> Although immorality would not, in itself, mean defendant is an unfit person to have custody of her children, there is little or nothing to indicate she had so amended her ways at the time of trial as to have preferential custody rights.
>
> It is thus apparent the children's best interests would not be served by placing them in defendant's custody.

And in *Warren v. Warren, 191 N.W.2d 659,* the court stated at 662:

> * * * We should note that this decision is not alone based on plaintiff's extramarital activities, both before and after the divorce. Such moral transgressions are factors to be considered but are not determinative. * * * More importantly the record shows plaintiff to have disregarded her responsibilities to provide proper care, training, and environ-

> ment for the basic needs as well as the development of the child. Conversely, defendant and his present wife have shown themselves able and willing to provide such care and training* * *.

Pacheco v. Pacheco, 246 So.2d 778 (Fla. 1971), is a case that has some very striking similarities. At page 782 the court discusses the quality of proof for adultery, and finally concludes:

> On the contrary, the evidence is convincing that the mother has not given the boy a proper home. It appears without dispute that the mother frequently drank intoxicating liquor to excess and with other men and women in the presence of the boy; that she harbored in her home a married man under such circumstances as to indicate adulterous relations between them extending over a considerable period of time and that such relations were known to her son. Such conduct on the part of the mother in her home and to the knowledge of her son, 12 to 14 years of age, can-
> of not be accepted by a court as the furnishing of a suitable home for a son of that age.

Reversing the trial court and granting custody to the father, the court stated at page 502:

> When the wife is proven to be morally unfit to have the custody of the minor children of a married couple and there is no testimony that the father is incompetent, unfit or unworthy to have the care and custody of the children, their care and custody should be awarded to him if he can provide for them a suitable home with competent and proper supervision in his absence.

See also *Olson v. Olson, 180 N.W.2d 426 (Iowa 1970)*.

POINT III

AN ILLICIT RELATIONSHIP THAT EITHER CAUSES OR CONTRIBUTES TO THE PROBLEMS OF THE CHILDREN IS NOT PROTECTED BY MOTHERHOOD.

The rationale of *Hyde, supra,* is that all things being equal, a mother is entitled to the custody of her minor children. See also *Steiger v. Steiger, supra.* In *Dearden v. Dearden, 15 U.2d 105, 388 P.2d 230 (1964)*, the Utah Supreme Court, speaking through Justice Crockett, said at page 231:

> It is generally held that such misconduct as found against plaintiff although, of course, censurable and not to be condoned, will not necessarily of itself deprive a parent of her child. Social ideas have changed considerably since the time of the "East Lynne" concept when for moral transgression a wife was cast into outer darkness and deprived of all, including her children.

However, the legislature in 1969, after the Dearden case, has indicated that "past conduct and demonstrated moral standards of each of the parties" shall have a bearing on custody, and it seems clear that the life style we are dealing with here (rather than isolated instances of illicit togetherness) is sufficient to deprive the natural mother of that equality, and motherhood is not weighly enough to tip the unequally balanced scale. Further the rationale of *Dearden, supra,* and *Cooley, supra,* is that moral misconduct alone

should not deprive a mother of her children. But where such conduct is the cause of or contributes to problems affecting the normal behavior of the children, a fortiori, such conduct will justify a change in custody.

Nancy Schofield is a qualified child psychologist who examined Lonnie Sparks, age 6, with the consent of the defendant and explained that Rodney Sparks, age 3, was not old enough to test adequately. At page 86 of the record, Miss Schofield stated beginning at line 7:

> I feel that he will respond best to a low keyed low pressure approach from adults. Lonnie needs a lot of non-verbal signs of acceptance rather than overt outreach. On the Stanford Binet, I found he is bright to superior intelligence. However, his anxiety and fear often interfere with his ability to perform.

And again at page 87 of the record, beginning at line 13:

> From my experience it seems that he has some difficulty with his sexual identity at this point. He would like to be a male, but he is not really sure of what maleness is at this point. And this is a crucial time in a child's life when they do develop their male or female identity. Also he seemed to be rigidly controlling his impulses and is very frightened of showing any of his feelings. * * * I think that it is very important at this age for his role as a male to be clarified and definitions of the expectations of what a man does as a person.

And at page 88 of the record, beginning at line 3:

> Once again it shows that he is looking for affection from a male. He has a poor self-image, and he feels he has done something wrong. There is a lot of guilt involved.

When Miss Schofield was asked to superimpose upon her observations, the fact that Lonnie "is residing in a home where the male figure in the home may change" or was not constant, in her answer at page 89 of the record, she said:

> Well, if he begins to form an attachment to a male or female for that matter, and identified with this male, thinking that he is really a neat guy, and he wants to be like him, and this is the man, you know, that he is going to make himself like, because children very definitely model after older people, and then this person is gone and replaced by someone who is different, and once again he tentatively forms a relationship and starts modeling all over again he is going to be fairly confused and there will be no continuity in his identity as a male or as a person. Some children form strong attachments with teachers, you know, and this fulfills a need when there is no father in the home. But if it is a short term and continuous changing, I would say in any type of situation that it would be not very stabilizing for the child and would probably confuse his identity even more.

Under cross-examination Miss Schofield was asked if a child in Lonnie's circumstance could overcome the male identity problem with regular visitation from the natural father during the school and extended

visitation of two months in the summer. In her answer at page 99 of the record, beginning at line 26, Miss Schofield stated:

> And no matter how much time the child would spend, you know, four days a month with the father, that isn't going to make up for those expectations that are occurring the rest of the time.

And at page 100 she stated at line 13:

> The person that the child is most consistently with probably exercises a greater influence in the long run, just from what I know.

And finally at page 101, Miss Schofield concluded at line 19:

> These are the feelings he is having. In fact the male identity might not even be so important as the fact that Lonnie is so constricted in his feelings. He is afraid to show his feelings.

All of the facts presented to the court concerning the life style of the plaintiff are in sharp contrast to the defendant. The plaintiff has remarried and has a stable home. A child has been born to plaintiff in his second marriage and another one is expected.

All of the evidence before the court shows that plaintiff is better able to care for, maintain, and supply the mental and emotional needs of these two boys than is the defendant. He would dearly like to be a full-time father and from the facts in evidence it would appear that a change in custody would be in the best interest and welfare of the boys.

POINT IV

THE TRIAL COURT ABUSED DISCRETION IN FAILING TO CHANGE THE CUSTODY OF THE TWO MINOR CHILDREN UNDER THE FACTS OF THIS CASE.

The preoccupation of this trial court, and indeed all other trial courts, along the Wasatch Front' with the principles enunciated in *Stuber v. Stuber, supra,* and *Dearden v. Dearden, supra,* is extremely unfortunate. The decision in each case is geared to the facts of the case, and the general proposition that moral misconduct standing alone is not sufficient to deprive a mother of her children applies essentially to misconduct outside the presence and environment of the children. But whatever good can be said of that general rule vanishes when it is used in defense of the illicit togetherness practiced by this defendant. Indeed, reason is dealt a mortal blow when clean faces and clean clothes and full bellies are the full measure of parental responsibility. The life styles of the parties are not comparable, nor are their homes comparable in the love and security available to these two boys. The well-being of the children cannot be isolated from the life style of the parent who has custody. If the parent's life style embraces moral misconduct in the presence and environment of the children, who can expect more from the children themselves? To perpetuate a general rule of law relating to occasional moral misconduct out-

side the presence of the children into a legal justification for a life style based on illicit togetherness in the presence of the children is an abandonment of the basic structural values of our society. There is a sense of fidelity, security, and purpose associated with marriage that have their origins in antiquity but are as worthy of preservation for the benefit of the children as are the constitutional principles we attempt to perpetuate. Family organization and the pride of legitimate parental and filial association do much to enhance obedience to and respect for law, and the value of achievement within the framework of the law. The presence or absence of these basic attitudes, and the life styles resulting therefrom, are often reflected in the lives of our children as demonstrated in the life of this six year old. To allow the rationale of Dearden to be applied to the facts of this case constitutes the very condonation which is there denied. This misapplication of the rules announced in *Stuber v. Stuber, supra,* and *Dearden v. Dearden, supra,* constitutes an abuse of discretion and plaintiff urges that the decision of the trial court be reversed.

SUMMARY

Most jurisdictions have accepted the general rule that moral misconduct, standing alone, is not a sufficient ground to deprive a mother of the custody of her children, either at the time of divorce or in post divorce hearings. However, the general rule

presupposes that such moral misconduct is outside the presence of the children and under circumstances where the children cannot be adversely affected by such conduct. There are some cases, such as the Cooley case in Nevada, that tolerate such moral misconduct in the presence of the children for a short period of time, terminating in a valid marriage relationship. However, no recent decisions have been found by appellant where the toleration has extended to a six-month period, involving more than one man, where no marriage was consummated, and where there is some considerable emotional disturbance for at least one of the children. Indeed, most of the cases follow the reasoning expressed in Sisson regardless of any demonstrable effect on the children. It was the intent of the legislature to make moral conduct one of the determining factors for custody, and in this case, it is so flagrant and detrimental to the welfare of the children that is should create a disability for the defendant that cannot be healed by motherhood. Appellant does not have the burden of proving that respondent is an unfit mother, but must only produce sufficient evidence to support a finding that it is in the best interest and welfare of the children that custody be changed to the natural father. There is ample evidence to support that finding, unless defendant's motherhood weights heavier in the balance than defendant's conduct. If the people of this state, speaking through their legislature, desire to place limits on the unbridled application of the general principles announced in Stuber and Dearden, the opportunity to set some limits is now at hand.

CONCLUSION

The trial court should be reversed and custody of the two minor boys should be awarded to the appellant and the case should be remanded to the District Court of Davis County for further hearing to determine adequate visitation for the respondent and such other matters as may effect the support and well-being of the children.

Respecfully submitted,
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