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IN THE SUPREME COURT OF THE STATE OF UTAH

PHYLENNE TUTTLE (aka HENDERSON),

Plaintiff-Appellant,

vs. : Supreme Court No. 17104

DONALD L. HENDERSON,

Defendant-Respondent.

BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an action brought in the Fourth Judicial District Court by plaintiff-appellant, Phylenne Tuttle, against defendant-respondent, Donald L. Henderson for modification of a child custody decree entered in California on November 30, 1979.

DISPOSITION IN LOWER COURT

Plaintiff-appellant, Phylenne Tuttle, (hereinafter referred to as plaintiff) filed a petition for modification of a California divorce decree and subsequent custody order in the Fourth Judicial District Court of Utah County (case number 54,138) with the Honorable George E. Ballif, District Judge presiding. When counsel for the plaintiff appeared before the Court seeking to have a restraining order and order to show cause issued in that case, counsel for the defendant-respondent, Donald L. Henderson, (hereinafter defendant) appeared specially and called the Court's attention to civil number 52,460 filed several months earlier

in the district court by different counsel. Civil number 52,460 also sought to have the Court award the care, custody and control of the parties' two minor children to the plaint and without calling attention to the proceedings which were then pending in California. (R.2,3)

Following a hearing held before Judge Ballif on April 8, 1980, at which both counsel for the plaintiff and counsel for the defendant appeared, the Court ruled that it did not have jurisdiction to proceed in civil number 54,138 but could proceed in civil number 52,460 since it already had jurisdiction over both parties in that matter and since the defendant, Donald L. Henderson, had filed a pro se response to the pleadings. (R.16,20). In civil number 52,460, Judge Ballif had previously ruled that the California court appeared to have jurisdiction over the children and that the pro se letter of the defendant appeared to constitute an answer to the complaint. (R.20)

Plaintiff then refiled all of the previously filed pleadings in case number 52,460 and again moved the Court to issue an order to show cause and restraining order and to consolidate the proceedings for hearing. (R.25-31, 37-44)

Certified copies of the pleadings from the proceedings which were then pending in the California Court were provided to the District Court of Utah County (R.107-157).

An informal hearing was held before Judge Ballif on May 7, 1980. Counsel for both parties were present at that

time. Following a discussion between the Court and counsel (T.213-238), the Court ordered that until the plaintiff was in compliance with the previously entered orders of the California court and had returned custody of the two minor children to the defendant, that this Court would not schedule a hearing on the merits of the plaintiff's petition for modification of the decree of divorce filed therein. The Court further indicated that if custody of the parties' two minor children, to-wit, Stacy and Pamela, was not returned to the defendant within seven days, then the Court would consider an appropriate ex parte application by the defendant through his counsel for a writ of habeas corpus.

Plaintiff has refused to turn over custody of the two minor children on that basis and has continued to secret the children away from their father. The trial court issued an order dismissing plaintiff's petition for modification of the decree of divorce on May 21, 1980. Plaintiff-appellant then filed a notice of appeal in the Fourth District Court on May 29, 1980, appealling from the above-referenced orders.

RELIEF SOUGHT ON APPEAL

Defendant requests that this Court affirm the Fourth Judicial District Court both with respect to the order of May 8, 1980, and the order entered on May 21, 1980.

STATEMENT OF FACTS

Defendant disagrees with plaintiff's characterization of the facts recited in plaintiff's statement of facts and also desires to include additional facts for the Court's

consideration although some of the facts may necessarily be repetitive.

The parties hereto were divorced by interlocutory decree entered in the State of California on August 4, 1976 (R.108) and a final decree which was entered on January 11, 1977. (R.132) At the time of the Decree of Divorce, the plaintiff was awarded the custody of the two minor children of the marriage, to-wit, Stacy Henderson, date of birth January 11, 1973, and Pamela J. Henderson, date of birth January 10, 1976. Subsequent to the entry of the decree of divorce, defendant was consistently denied visitation rights with the parties' minor children until on February 4, 1978, he filed for a modification of the visitation schedule of the visitation order and contempt charges against the plaintiff. On February 27, 1978, a specific visitation order was made by the Court (R.102).

In April of 1979, plaintiff moved from the State of California to the State of Utah (R.42). At approximately the same time (April 1979), plaintiff filed a contempt citation in California against the defendant claiming that the defendant was delinquent in child support payments. Defendant counterclaimed denying the plaintiff's allegations and petition for a change of custody. (R.102) A hearing was held on May 7, 1979 at which both plaintiff and respondent were present and custody evaluations from the State of Utah and the State of California were requested by the California Court and the matter was continued for further hearing to

August 3, 1979. Both plaintiff and her attorney were present in court on May 7, 1979, when the matter was continued to the August 3rd date. (R.48)

Plaintiff, although represented by counsel, failed to present herself at the August 3rd hearing and the California Superior Court modified the previously entered Decree of Divorce and awarded temporary custody of the two minor children to the defendant. (R.133, 134) The Court continued the matter for permanent custody hearing until November 7, 1979 in the State of California. (R.135)

Following the August 3rd hearing, defendant was unable to obtain the children inspite of numerous requests made to the plaintiff and ultimately was forced to travel to Utah and hire a private investigator in order to obtain the custody of his minor children as awarded to him by the August 3rd order. (R.49)

Prior to the November 7th hearing in California, plaintiff retained counsel in Utah and filed a petition seeking custody of the children in civil number 52,460 in the Fourth Judicial District Court of Utah County. (R.49) Plaintiff then appeared at the November 7th California hearing and was represented by new California counsel. (R.49) Testimony and documentary evidence was presented to the California Court and after the hearing, the temporary order of August 3rd awarding custody to the respondent was made permanent. This order was signed on November 30, 1979. (R.135-137)

Although plaintiff's counsel now concedes for purposes

of this action that the November 30, 1979 order is a valid and binding order on both parties (T.222), plaintiff questioned the validity of the order at the time it was entered. In December of 1979, plaintiff wrote a number of letters to the California Court complaining concerning the results of the November hearing. (R.115-130) As a direct result of these letters and at the insistence of the plaintiff, Judge Makas (Judge of the Superior Court in California) reopened the case on the Court's own motion and ordered an investigation into the allegations made by the plaintiff and set a review hearing for March 28, 1980. (R.102)

On March 4, 1980, plaintiff wrote the defendant asking for visitation rights awarded to her in the November 30, 1979 order and requested that she have the children with her from March 28th to April 4, 1980. (R.114) Plaintiff was present in California on March 28th to pick up the children for a one week visitation period and personally appeared in Court on that date. (R.142) At that time, the hearing was continued until April 14th after the completion of the visitation period and plaintiff was ordered to appear and personally acknowledged that order. (R.142) On April 4th, plaintiff notified the defendant that she was not going to return custody of the minor children to him in direct contravention of the March 28th and November 30th orders. (R.50) Plaintiff failed to present herself at the April 14th hearing and has refused to relinquish custody of the children to the defendant since that date. (R.142)

On April 7, 1980, plaintiff filed in the Fourth Judicial District Court in civil number 54,138 seeking a modification of the California order entered on November 30, 1979, which granted the defendant custody of the parties' two minor children. Plaintiff also requested the issuance of an order to show cause and a temporary restraining order enjoining the defendant from attempting to remove the children from the custody of the plaintiff pending a hearing. (R.2-15)

On April 8th, both counsel appeared before Judge Ballif and argued their respective positions with regard to signing the order to show cause. The Court refused to sign the requested orders at least partially on the grounds that a previous action had been filed by different counsel representing the plaintiff in September 1979 in civil number 52,460 for the purpose of pursuing a custody action. The Court stated at the April 8, 1980 hearing that it felt it had no jurisdiction in the matter bearing civil number 54,138 but it did have jurisdiction over both parties in civil number 52,460. (R.16) Accordingly on April 10, 1980, plaintiff refiled all of the pleadings in the new action under civil number 52,460.

In the meantime, the California Superior Court held its hearing on April 14th and entered findings affirming its November 30th decision indicating that there had been absolutely no change in circumstances which would justify the Court in making any modification of its previously entered order (R.140-144) The Court at that time also issued a writ of habeas corpus pursuant to the request of

defendant's California counsel.

Judge Ballif then requested on it's own motion that counsel appear before the Court on May 7, 1980 to discuss the Utah case. (R.213) At this conference, the Court felt obliged to give full faith and credit to the California order of November 30, 1979 and indicated that the plaintiff was not coming before the Court with clean hands because she had refused to release the children to the defendant's possession. (R.220) The Court then ordered the plaintiff to return custody of the children to the defendant prior to agreeing to hear the merits of her petition for modification and further indicated that if the plaintiff refused to return the children to the custody of the defendant, that the Court would not hear her petition for modification on the merits and would issue an ex parte writ of habeas corpus directing Utah law enforcement officers to pick up the children. (R.100,101, T.219)

The trial court then issued an order dated May 8, 1980 directing the plaintiff to return custody of the children to the defendant. (R.100-101) Plaintiff failed to comply with the Court's direction and subsequently the Court on its own motion issued an order dismissing plaintiff's petition for modification. Both the May 8th and May 29th order dismissing plaintiff's petition have been appealed from.

POINT I

PLAINTIFF'S ARGUMENT AS TO THE TRIAL COURT'S JURISDICTION IS MOOT, AS THE TRIAL COURT CONCEDED THE EXISTENCE OF JURISDICTION.

Plaintiff's counsel has gone to great lengths to demonstrate that the trial court was technically possessed of jurisdiction to hear the merits of plaintiff's case. As its principal authority for this proposition, counsel paraphrases the following passage from Sampsell v. Holt, 115 Utah 73, 202 P.2d 550 (1949):

> By the weight of authority it is now well established 'that in the absence of fraud, or want of jurisdiction, affecting its validity, a decree of divorce awarding the custody of a child of the marriage must be given full force and effect in other states as to the right to the custody of the child at the time and under the circumstances of its rendition; but that such a decree has no controlling effect in another state as to facts and condition arising subsequently to the date of the decree; and the courts of the latter state may, in proper proceedings award the custody otherwise upon proof of matters subsequent to the decree which justify the change in the interest of the child.' Id. 202 P.2d at 554.

From this premise, plaintiff asserts that a substantial change in circumstances has occurred, constituting "facts and conditions arising subsequent to the date of the decree" which renders the California decree of November 30, 1979 of "no controlling effect." (Plaintiff's brief at p.7) This of course ignores the findings of the California Superior Court on April 15, 1980 made one week after the filing of plaintiff's initial petition in the Fourth Judicial District

Court, civil number 54,138:

"20. There has been absolutely no change in circumstances to warrant a change in the award of custody of the children." (R.143).

There is no dispute that the California Court has jurisdiction to hear the matter and was in the process of reconsidering its prior orders at the request of the plaintiff. There was no allegation of any material change in circumstance after the California Court's April 15, 1980 order. Plaintiff was clearly attempting to take two bites of the same apple by trying to invoke jurisdiction of the Utah Court while proceedings were continuing in California. It is interesting to note that each time plaintiff received an adverse ruling from the California Courts or even in one instance from the Utah courts she changed counsel, a total of six (6) times. (R.89-93).

Plaintiff outlines the general requirements for personal jurisdiction in child custody cases, as delinated in various Utah cases. Plaintiff argues that any one of these requirements will establish jurisdiction. They are as follows: 1) the presence of the child in the forum, 2) the presence of either parent, and 3) the situs of the original decree.

Most of the cases cited by the plaintiff in support of her first argument are factually distinguishable from the instant case.

In Oleen v. Oleen, 15 Utah 2d 326, 392 P.2d 792 (1964), the paternal grandmother had obtained temporary custody of

her infant granddaughter in an ex parte proceeding in the Oregon Juvenile Court. The natural father was given no legal notice of such proceedings. Thereafter, the father obtained a divorce from the child's mother in Utah and was awarded custody of the minor child. The grandmother brought a habeas corpus proceeding in Utah and the trial court dismissed the grandmother's petition for the writ of habeas corpus and allowed the natural father to retain custody. The Utah Supreme Court was very much aware that the natural father in Oleen was given no opportunity to controvert the alleged facts upon which the Oregon Juvenile Court made its temporary custody order. Furthermore, the circumstances of the divorce and the father's new home and relationship with the child lent additional support to the trial court's decision and the Supreme Court affirmed, supra at 793.

The case at bar does not suffer from such lack of notice requirements. In fact, plaintiff has, at all times, actively sought assistance from and participated in the California Court proceedings. These proceedings were continuing even after the initial filing of plaintiff's petition here in Utah. (R.140-144).

Hathaway v. Hathaway, 24 Utah2d 118, 466 P.2d 842 (1970) is cited by plaintiff as supporting the proposition that jurisdiction was proper in Utah even where the mother seeking a change of custody had violated a California decree vesting temporary custody in the father. (Plaintiff's brief at 11) Two crucial facts have been omitted from plaintiff's

recitation of the facts in Hathaway: 1) the court expressly held that the father was not a resident of California at the time he was awarded custody, and therefore the California decree in favor of the father was defective for lack of jurisdiction, and 2) the default decree of divorce entered in favor of the mother was set aside as to the custody issue and remanded for further hearing. These two facts qualify substantially plaintiff's statement of the holding of the case.

McLane v. McLane, 570 P.2d 692 (Utah, 1977) is cited by plaintiff as an "amazingly parallel" case. (Plaintiff's brief at 12) The facts of that case, if parallel, are parallel in reverse. The party seeking jurisdiction in McLane was not the party who had absconded with the children; the party seeking custody entered the court with "clean hands." In the instant case, plaintiff, the party seeking jurisdiction, is the same party who absconded with the children. She did not have a prior custodial order in her favor and does not have "clean hands." See McLane at 693.

Furthermore, the case at bar differs from Oleen, Hathaway and McLane in that in the instant case, plaintiff already had proceedings pending in the California Superior Court concerning the same subject matter (i.e., custody and the minor children). These proceedings had been initiated at plaintiff's request through her own correspondence with the California Superior Court. (R.102-106, 117-130, 140-144, 147-150). She had appeared at a hearing on visitation

and custody on March 28, 1980 in California (R. 49,142) and the California Court had scheduled a further hearing in California for April 14, 1980 (R.49, 50, 142, 143, 144) following the completion of plaintiff's one week visitation period. In the meantime, of course, plaintiff ignored the California Superior Court's orders (R.143), chose not to attend the hearing in California on April 14, 1980, (R.140) chose to file a Petition seeking a custody change here in Utah (R. 1,2) and then chose to ignore Judge Ballif's order directing her to return custody of the children to the defendant (R. 100, 101).

Plaintiff's assertion of technically proper jurisdiction, however, is a moot question. The trial court at no point denied that jurisdiction was technically proper. To the contrary, in an informal hearing before Judge Ballif on May 7, 1980, the Court delineated the jurisdictional requirements set forth in Plumb v. Plumb, 555 P.2d 1205 (1976), very similar to those urged by the plaintiff:

> The Court: . . . In any event, (referring to the Plumb case) the mother came in and objected to the proceedings in Salt Lake saying that since the child was in another state that state had the exclusive jurisdiction to proceed and make any kind of custody determination, and the Supreme Court of the State of Utah decided it had adopted the so-called enlightened new approach to custody determination and jurisdiction in this area and said all three, wherever the child was, either of the parties, and the State of original jurisdiction had jurisdiction to make any kind of modification or determination of the ongoing circumstances that would warrant modification of the decree. So I suppose that under the circumstances

> here we couldn't say there isn't jurisdiction to proceed in Utah. . . .The case goes on to say that you need to make -- generally speaking you would have the jurisdiction in all those places. There could be as many as four different states that could be involved. You have the parent one in one State, parent two in another, the initial decree of divorce entered in a third State and a child existing in the fourth State. You could have four areas where jurisdiction could attach. . . . (R. at 215, 216). (Emphasis added)

It is clear, then, that the trial court judge recognized the technical propriety of jurisdiction in his court but declined to grant the relief requested by the plaintiff on other grounds. (See R. 100,101).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS JURISDICTION IN REFUSING TO CONSIDER PLAINTIFF'S REQUEST FOR THE ISSUANCE OF AN ORDER TO SHOW CAUSE AND PROPERLY RULED THAT THE PROCEEDINGS IN CALIFORNIA WERE ENTITLED TO FULL FAITH AND CREDIT.

It is axiomatic that divorce and custody suits are equitable proceedings, and legal concepts of jurisdiction must be considered in light of equity principles. This principle is almost too well established to admit elaboration, but reference to a few cases, including those cited by plaintiff, will bear out its validity:

> Child custody proceedings are equitable in the highest degree, and this court has consistently held that the best interest and welfare of the minor child is the controlling factor in every case. Sampsell v. Hoyt, supra at 553.

> Child custody proceedings are highly equitable in character and the controlling factor in such cases is usually the best interest and welfare of the

child. Oleen v. Oleen, supra at 793.

> The local forum, from facts gleanable from a rather unsatisfactory record and the minor's presence in this State, presents a proper jurisdictional situs for a determination, after competent substantial evidence is adduced, of what may be for the best interest of the minor. . . (Emphasis added) Hathaway v. Hathaway, supra at 843.

Given the fact that equitable considerations are paramount in custody proceedings, it remains to see what effect, if any, they may have on the issue of jurisdiction. It is interesting here to note that plaintiff did not cite Plumb v. Plumb, the case relied on by the trial court in making its determination of the jurisdiction issue. The following passage from Plumb readily indicates the reason for plaintiff's exclusion of this critical case:

> The final question is whether the trial court should have assumed and exercised jurisdiction. It is not under all circumstances, regardless of what has occurred, that once a court had acquired jurisdiction in a divorce action it should assume and exercise jurisdiction for all subsequent motions relating to the custody of minor children. (Emphasis added)(Supra at 1207).

The Court subsequently found that the trial court had properly assumed jurisdiction, but the real importance of the Plumb case is that it vests the trial court with discretion to assume jurisdiction. This discretion was also recognized in Hathaway v. Hathaway, supra:

> The local forum. . .presents a proper jurisdictional situs for a determination, after competent substantial evidence is adduced, of what may be for the best interest of the minor. (Emphasis added)(supra at 843.)

"After" as used in the above quotation denotes that equitable considerations (i.e. the best interest of the child, proper forums, contacts of all parties with the forum, etc.) must be considered before jurisdiction may be properly assumed.

Judge Ballif correctly recognized this alternative:

> You have four areas where jurisdiction could attach. But thereafter it depends upon what the court determines is in the best interest of the child as to whether it should take the jurisdiction it has and go forward with it or decline to do so. So it's a matter of discretion. (R. at 216)

Plaintiff contends that U.C.A. 30-3-5 mandates the assumption of jurisdiction in cases where it is technically proper. (Plaintiff's brief at 13, 14) Plaintiff does not, however, cite case law supporting his assertion. The Utah Supreme Court in Plumb was expressly construing U.C.A. 30-3-5; and in Hathaway, though not doing so expressly, the Court again implies that the trial court has broad discretion in these matters.

Because custody proceedings are equitable in nature, principles of equity must be imposed on legal concepts, the former controlling the latter. In the case of jurisdiction, Utah case law clearly vests the trial court with discretion to assume or eschew jurisdiction based on the equitable considerations affecting the case.

It is interesting to note that our legislature has attempted to define some of the factors that the Court shall consider in determining whether it is in the interests of the child for this state or another state to assume jurisdict

These factors are codified in the new Uniform Child Custody Act §78-45c-1 et.seq, which was adopted by our legislature effective July 1, 1980 and had been adopted several years previous to that time in the State of California. Ironically, perhaps, one of the chief legislative sponsors of this legislation was plaintiff's present counsel.

Section 78-45c-7(3) of the Uniform Child Custody Act provides as follows:

> (3) In determining if it is an inconvenient forum, the court shall consider if it is in the interst of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:
> (a) If another state is or recently was the child's home state;
> (b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;
> (c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
> (d) If the parties have agreed on another forum which is no less appropriate; and
> (e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 78-45c-1.

All of the factors listed would indicate that the State of California is a more convenient forum to litigate the custody issues between these parties. California was the children's home prior to the plaintiff's absconding with the children and refusing to return them. California was closely connected with both the children and the family and there was substantial evidence concerning the children's present and future care together with protection, training and personal relationships being more readily available

there. The parties had agreed on California as a forum. The exercise of jurisdiction by the Utah courts could contribute to some of the evils which the enactment of §78-45c-1 seeks to prevent.

One of the most fundamental principles of equity jurisprudence is that he who seeks equity must do equity, i.e. he must come to equity with clean hands. Carbon Canal Co. v. Sanpete Water Users Ass'n, 19 Utah2d 6, 425 P.2d 405 (1967); Glenn v. Player, 7 Utah2d 428, 326 P.2d 717 (1958); Jacobson v. Jacobson, 557 P.2d 156 (Utah 1976); Coleman Co. Inc. v. Southwest Field Irrigation Co., 584 P.2d 883 (Utah 1978).

The May 8, 1980 trial court order required plaintiff to purge herself of "unclean hands" by returning the children to their father as a condition precedent to hearing the merits of the petition for modification (R.at 100) In other words, Judge Ballif would not exercise his equity jurisdiction in favor of a party with "unclean hands." Counsel for plaintiff contends that this was an abuse of discretion, that plaintiff was merely exercising a legal right granted her by Utah law, and was not guilty of "unclean hands." (Plaintiff's brief at p. 14) It will be the purpose of the remainder of this brief to demonstrate that plaintiff was in fact guilty of "unclean hands," that the plaintiff's own conduct was not in the best interests of the two minor children, and that the trial court did not abuse its discretion.

Although the trial court specifically limited its

finding of unclean hands to events occurring subsequent to the November 30, 1979, modifications decree in California, (R. 223) a brief review of the facts prior to that time will serve as a useful background for the scenario which unfolded subsequent to the entry of the November 30th Order.

The parties to this action were divorced in California by a decree which became final in January of 1977. (R.132) Custody of the two minor children was awarded to plaintiff, with reasonable rights of visitation to the defendant. (R. 108, 109) Subsequent to the decree of divorce, plaintiff consistently denied defendant visitation rights until in February of 1978, he was forced to obtain a court order to enforce his visitation rights. Approximately a year later, in April of 1979, plaintiff filed contempt charges against defendant claiming delinquency in child support payments. (R.37,48) Defendant counterclaimed, denying the allegations, and petitioned for a change of custody. (R.48) A hearing was held on May 7, 1979, at which both plaintiff and defendant were present. (R.33) The Court ordered the matter continued until August 3, 1979. (R.133,134) Plaintiff, although represented by counsel, failed to present herself at the August 3 hearing. (R.133,134) Temporary custody of the children was then awarded defendant, (R.133,134) who was unable to obtain the children after numerous requests of the plaintiff, and was ultimately forced to travel to Utah where the plaintiff had moved a few months earlier and hire a private investigator to aid him in obtaining the custody

awarded him by the August 3 order. (R.42) The August 3rd hearing was continued by the California Superior Court to November 7, 1979, pending receipt of reports from the Utah State Department of Social Services. (R.135,136) Prior to the November 7 hearing in California, plaintiff retained counsel in Utah and filed a petition seeking custody of the children in civil number 52,460 in the Fourth Judicial District Court of Utah County. (R.2,3,5,6) Plaintiff then appeared at the November 7th California hearing, represented by new California counsel. Testimony and documentary evidence was presented to the California Court, whereupon the temporary order of August 3rd awarding custody to defendant was made permanent. (R.135-137) This order was signed November 30, 1979.

Plaintiff's counsel, for the purposes of this action, concedes that the November 30, 1979, order is a valid and binding order. (R. 222) It appears, however, that plaintiff questioned the validity of that order. In December of 1979, plaintiff wrote a number of letters to the California court, complaining of the treatment accorded her in the November hearing. (R.102-106, 117-130, 140-144, 147-150) As a direct result of these letters and at the insistance of plaintiff, Judge Malkus (Judge of the Superior Court in California) re-opened the case on the court's own motion, ordered an investigation, and set a review hearing for March 28, 1980. (R.49, 142) On March 4, plaintiff wrote defendant asking for visitation rights from March 28 to April 4, 1980.

(R. 114) Plaintiff was present in California March 28 to pick up the children, and appeared personally in court. (R. 49,142) At that time the hearing was continued until April 14 (after completion of the visitation period) and plaintiff was ordered to appear and personally acknowledged that order. (R.49,50,142,143,144) In direct contravention of that order, and the November 30th order awarding custody to defendant, plaintiff failed to present herself at the hearing and refused to relinquish custody to defendant on April 4. (R.138,139) Apparently aware that she could not prevail in the California proceeding, plaintiff then instituted the instant action in Utah, again seeking a modification of custody on alleged changed circumstances. (R.198,199) Plaintiff failed to attend the April 14, 1980 hearing in California and writs of habeas corpus and orders to show cause re: contempt have been issued by both the California and Utah courts. (R.138,139,145-146, 94-96) Plaintiff has failed to comply with any of them and has refused to return the custody of the children to their father and has gone into hiding. (R. 158,159)

If ever there was a classic case of unclean hands, this would appear to be it. Since the November 30 order, plaintiff has violated no less than five court orders, has snatched the children from their father who has legal custody, and has consistently attempted to subvert the orderly functioning of the judicial process. Every time a ruling has been adverse to her interest, plaintiff has either sought a new

attorney, a new forum, violated a valid court order, or done all three. Even given the opportunity to purge herself of "unclean hands" as she was ordered to do by Judge Ballif's May 8 order, plaintiff flatly refused. Equity is designed to rescue innocent parties from harsh tenets of the law. A prerequisite to equitable relief, however, has always been that the party seeking equity be willing to do equity. This the plaintiff has not and continues to refuse to do. Therefore she is not entitled to equitable relief.

The particular equitable concern in this custody proceeding is the welfare of the two minor children. In order for plaintiff's "unclean hands" to deny her relief, plaintiff's actions must be somehow detrimental to the children's welfare. This is easily demonstrated. One of the principal concerns of the courts in these matters is that the child have a stable environment in which to live. Plaintiff has consistently acted in contravention of court orders, taking the children from their father, hiding them, and generally exposing them to the fear of being snatched by a sheriff's deputy at any given moment. The plaintiff's past gyrations from court to court, attorney to attorney, and apartment to apartment cannot help but accrue to the detriment of the children.

Finally, the April 15, 1980, order of the California court makes it abundantly clear that plaintiff's allegations of changed circumstances are groundless, and that her "unclean hands" are indicative of her lack of fitness as a parent. The following are a few of the more salient findings of

Judge Butler of the California Court:

13. Over a period of 3 years and 10 months, this Court has ordered and received 7 reports from various social service agencies relating to the fitness of both parties as parents. The Court has further ordered and received psychiatric evaluations of both parents.

14. Petitioner has failed to return the 2 minor children to respondent after exercising her Easter visitation rights in violation of the November 7, 1979 order.

15. Petitioner has failed to provide respondent with an address and phone number where the children could be reached in violation of the October 26, 1979 order; and in fact petitioner provided respondent with a false address and phone number.

16. Petitioner has failed to appear this date in violation of the March 28, 1980 order.

17. Based upon the findings and recommendations of the various social service agencies who have reviewed the parties; the petitioner's letters to the Court, a part of the record herein; the Court's observations of her demeanor while before the Court, her past disobedience of three lawful Court orders, the petitioner is hereby found to be an unfit and untrustworthy parent. (Emphasis added)

18. Respondent and his current wife, Linda Liggett Henderson, have provided the two minor children with a nurturing and wholesome environment.

19. Respondent is a fit parent.

20. There has been absolutely no change in circumstances to warrant a change in the award of custody of the children. (Emphasis added)

21. Absent stringent supervision, the continuing intrusion of petitioner into the lives of the two minor children will result in continuing trauma and irreparable harm to the children. (Emphasis added)

> 22. The home state of the minor children is the State of California, as evidenced by personal, family, church, school and medical contacts. This Court has had jurisdiction over the custody of the children for a period of three years and ten months, said jurisdiction having been invoked by petitioner on June 14, 1976, and thereafter stipulated to by petitioner on October 26, 1979, and again on November 7, 1979. This Court continues to have jurisdiction as to the welfare of the minor children. (R.142,143,144)

Given these findings, together with the events previously noted, Judge Ballif's order of May 8 seems lenient, rather than harsh. Plaintiff was clearly guilty of "unclean hands" and the trial court was well within its discretion in requiring her to return the children before it would exercise jurisdiction

CONCLUSION

As demonstrated herein, it is clear that the trial court has discretion to exercise or refuse jurisdiction in equitable proceedings. It is equally clear that the plaintiff herein is guilty of "unclean hands" and that the trial court acted well within its discretion in requiring plaintiff to purge herself of taint before affording her equitable relief in the form of a hearing on the merits. Plaintiff having not complied with the trial court's orders, the trial court was fully justified in dismissing the action. It is unlikely that plaintiff will suffer prejudice via the dismissal, because given the facts and the findings of the lower courts in Utah and California, the likelihood of her success is minimal at best. The decision of the trial court should be affirmed and custody of the two minor children should be

returned to their father before they suffer further harm.

Respectfully submitted this 3rd day of November, 1980.

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MAILED two (2) copies of the foregoing Brief to Mr. Robert B. Sykes, Attorney for Plaintiff-Appellant, 261 East 300 South #210, Salt Lake City, Utah, 84111, this 3rd day of Nov., 1980.

Diane Perry
SECRETARY