

1996

Jerome K. Duncan v. Eileen M. Howard, Sandra Thorderson, and Larry Thorderson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEROME K. DUNCAN,

Plaintiff/Appellee,

vs.

EILEEN M. HOWARD; SANDRA
THORDERSON and LARRY
THORDERSON; STATE OF UTAH,
Department of Human
Services,

Defendants/Appellants.

Case No. 950227-CA

Priority No. 4
UTAH COURT OF APPEALS
BRIEF

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BRIEF OF APPELLEE DUNCAN

APPEAL FROM A PATERNITY ORDER OF THE THIRD
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
HONORABLE JOHN A. ROKICH, PRESIDING

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FILED

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JEROME K. DUNCAN,	:	
	:	
	:	
Plaintiff/Appellee,	:	Case No. 950227-CA
	:	
vs.	:	
	:	
EILEEN M. HOWARD; SANDRA	:	Priority No. 4
THORDERSON and LARRY	:	
THORDERSON; STATE OF UTAH,	:	
Department of Human	:	
Services,	:	
	:	
Defendants/Appellants.	:	

BRIEF OF APPELLEE DUNCAN

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Defendants/Appellants.

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Priority No. 4

BRIEF OF APPELLEE DUNCAN

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to *Utah Code Ann.*
§ 78-2a-3(2)(I) (1953, as amended).

STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT PROPERLY UPHOLD AND APPLY THE STANDARD SET FORTH IN *HUTCHISON V. HUTCHISON*, 649 P.2d 38 (Utah 1982) IN DETERMINING THAT THE PLAINTIFF/APPELLEE BE AWARDED CUSTODY OF HIS NATURAL SON OVER THE CHILD'S GRANDMOTHER AND STEP-GRANDFATHER?

Standard of Review: The standard of review to be applied in custody cases is whether or not the trial court's holding was clearly erroneous. See *Kishpaugh v. Kishpaugh*, 745 P.2d 1248 (Utah 1987) citing *Lemon v. Coates*, 735 P.2d 58, 60 (Utah 1987) and *Ashton v. Ashton*, 733 P.2d 147, 149-50 & n.1 (Utah 1987). The weight that the trial court gives to the various factors set forth in *Hutchison* is to be reviewed under an abuse of discretion standard. See *Hutchison v. Hutchison* at 41.

II. DID THE TRIAL COURT ERR IN DENYING THE
DEFENDANT'S/APPELLANT'S MOTION FOR
RECONSIDERATION?

Standard of Review: In considering a trial court's decision to deny a new trial this court will reverse only if there is an abuse of discretion by the trial court. *Crookston v. Fire Insurance Exchange*, 860 P.2d 937 (Utah 1993).

STATEMENT OF THE CASE

This action arose out of a paternity action filed by Mr. Duncan, the plaintiff/appellee in 1991 for the purposes of establishing that he was in fact the natural father of Clel

Howard who was born on October 12, 1988. The paternity action was filed after such time as the natural mother Eileen Howard, refused visitation to Mr. Duncan on the basis of her claim that he was not the father of the child. It was established that Mr. Duncan was in fact the natural father of the child and visitation resumed until April 7, 1992 at which time the child went to Pennsylvania to live with Sandra and Larry Thorderson, defendants/appellants, his maternal grandmother and step-grandfather.

On or about February 2, 1993 Mr. Duncan filed a Motion for Order to Show Cause in the Third Judicial District court, Salt Lake County, asking for temporary custody of the child. (R. 53). On or about February 12, 1993 the defendants/appellants filed a petition for custody of the child in the Court of Common Pleas of Montgomery County, State of Pennsylvania where they obtained a custody order at that time. A consultation between the Utah and Pennsylvania court resulted in a decision that Utah would retain jurisdiction over the matter of the custody of Clel Howard. (R. at 58, 64).

The Thorderson's joined in as a defendant in the Utah action at that time. (R. 95).

On or about June 17, 1993 a hearing was held on Mr. Duncan's Order to Show Cause. It was held at that time that the child would remain with the Thordersons during the pendency of the action but that he would travel to Utah for a one month visitation period. (R. 101-05). Mr. Duncan, along with his current wife did travel to Pennsylvania in order to pick the child up for the one month visitation. Although the child was initially not allowed to leave with the Duncans, eventually the Duncans were able to transport the child back to Utah for the period of visitation.

This matter went to trial before the Honorable Judge John A. Rokich on or about September 28, 29 and 30 of 1994. After taking the testimony of numerous witnesses including therapists, the parties themselves and other family members of the parties, the trial court applied the standard set forth in *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982) and granted custody of the minor child to the natural father Jerome Duncan

subject to visitation rights of the appellants. The court further ordered that the child be transferred to Utah in June of 1995 after the completion of the current school year; that the Duncans obtain a therapist for the child and that the therapists work together in preparing the child for a change in custody. Further, the child was to continue in therapy once in Utah in order to aide him in his adjustment to living with his father and step-mother. The defendants/appellants filed a motion for reconsideration on or about December 12, 1994. The trial court filed a minute entry on or about January 10, 1995 denying said motion. The Findings of Fact and Conclusions of Law were entered by the trial court on or about February 8, 1995 and a timely notice of appeal was filed in this matter.

Custody of the minor child was transferred to Mr. and Mrs. Duncan on or about June 25, 1995. The child has been in therapy since that time with Dr. Chris K. Wehl. Visitation has proceeded with the appellants, who have remained in Utah since the transfer of custody, pursuant to the visitation schedule

recommended by Dr. Wehl and approved by the trial court by Amended Order in or about September of 1995.

STATEMENT OF FACTS

Jerry Duncan, the natural father of Clel Howard, and Eileen Howard, the natural mother of Clel, met in the Fall of 1987 at the Grand Canyon, North Rim where they were both employed. (Trial Transcript at 77). At the end of the season the couple moved to Cedar City, Utah where they moved into an apartment together. Both of the parties obtained work at Brian Head Ski Resort. After a period of approximately five months Mr. Duncan got a job out of state and the parties split up. See *id.* at 79. Shortly thereafter Mr. Duncan moved to Texas. On or about January 17, 1989 Mr. Duncan received a letter in Texas from Eileen Howard. The letter stated that Clel Howard had been born on October 12, 1988 and that Mr. Duncan was the father. At this time Mr. Duncan immediately quit his job in Texas and returned to Utah. He also sent a check for \$150.00 to Ms. Howard before leaving Texas for the support of their son. See *id.* at 82-83.

Upon moving back to Utah Mr. Duncan obtained employment and began establishing a relationship with his young son. At that time Clel and his mother were living with the defendants/appellants Mr. and Mrs. Thorderson. Over the next few months Mr. Duncan continued to send support checks and began visiting with the child. He attempted to visit the child once a week but on some occasions the Thordersons would not allow him to visit with Clel stating that he was taking a nap or that the timing was bad. *See id.* at 89. The Thordersons would not allow Mr. Duncan to expand the visits or take Clel overnight. *See id.* at 104-05. During this same time period Mr. Duncan also filed an acknowledgment of paternity with the Department of Social Services. *See id.* In or about 1991 the Thordersons moved to the state of Pennsylvania and Clel stayed in Utah with his mother. During this time period Mr. Duncan had a greater amount of visitation with Clel including overnight visits and family outings. *See id.* at 103.

In 1991 Mr. Duncan filed an action to establish paternity in the Third Judicial District Court, Salt Lake County. At

that time the child's mother was denying that Mr. Duncan was the natural father of the child. After Mr. Duncan filed the action to establish paternity the defendant/appellant Howard cut off all visitation between Mr. Duncan and his son. *See id.* at 107. During the three month period it took to complete the blood tests Mr. Duncan was not allowed to visit Clel. After Mr. Duncan's paternity was established he discovered that Clel and his mother had gone to Pennsylvania to live with the defendants/appellants Thordersons. *See id.* at 108. At this time Mr. Duncan filed an action for visitation with his son. The trial court granted visitation and Mr. Duncan flew the child and his mother from Pennsylvania on two occasions during the summer of 1992 in order to have visitation with his son. *See id.* At the time of the second visit defendant/appellant Howard decided to stay in Salt Lake with Clel. From that time until Thanksgiving of 1992 Mr. Duncan had regular visitation with his son including overnight visitation. *See id.* at 111.

In November of 1992 Mr. Duncan was informed that Clel would be going to Pennsylvania for the Holidays in order to

visit the Thordersons. After Christmas of 1992 Clel Howard unexpectedly did not return to Utah, but rather stayed in Pennsylvania with the defendants/appellants. It was this action on the part of the defendants that led to the filing of the complaint in this action on behalf of Mr. Duncan seeking custody of his son. *See id.* at 116-17.

In the Summer of 1993 Mr. and Mrs. Duncan traveled to Pennsylvania to bring Clel to Utah for a one month visitation per the order of Judge Rokich.¹ Mr. Duncan was to pick the child up on July 15, 1993 and transport him back to Utah for the court ordered visitation. After arriving in Pennsylvania the Thordersons refused to let Mr. Duncan take Clel and it was not until after a hearing was held on July 23, 1993 in Pennsylvania that Mr. Duncan was allowed to take his son back to Utah for the visitation. *See id.* at 118-19. When Clel first arrived in Utah he was somewhat anxious. He had some trouble eating and getting to sleep. However, as his stay progressed he appeared to improve. *See id.* at 120-121. During this time

¹Mr. Duncan married his current wife Diane Duncan on March 10, 1993.

Mr. Duncan had his son evaluated by Todd Otanez who prepared a custody evaluation concluding that Mr. Duncan was the proper party to have custody of the child. *See id.* at 33-34. Although Mr. Otanez was hired to do an evaluation comparing Mr. Duncan to Ms. Howard, he stated at trial that he did meet with Mr. and Mrs. Thorderson and took their position into account in making his determination. *See id.* at 20. Mr. Otanez went so far as to state that one of the reasons that he was recommending that custody go to Mr. Duncan as opposed to Ms. Howard was that placing the child with Ms. Howard would be the same as placing him with the Thordersons. *See id.* at 34. Mr. Otanez testified at trial regarding Mr. Duncan's bond with the child and his sensitivity to the child's needs. He testified that Mr. Duncan had good parenting skills, that he tried very hard to be "in tune to Clel's emotional needs", that he was sensitive and that he had established a good bond with the child. *See id.* at 22-24. Mr. Otanez further visited Mr. Duncan's home and spoke with friends and relatives. Although Mr. Otanez did not have the time to spend with the child that

some of the other counselors had due to logistics, he completed a very thorough evaluation of the situation which the trial court clearly took into consideration.

During the trial in this matter there was also lengthy testimony from many of Mr. Duncan's family members. All of Mr. Duncan's family testified about the close relationship between Mr. Duncan and Clel when they were able to spend time together. They further testified about the closeness of the Duncan family in general and expressed their wish to have Clel as a member of the extended family. *See id.* at 169-330. Mr. Duncan himself further testified about the emotional problems that his son experiences. He testified regarding the efforts he had gone to in order to find a therapist for Clel and discussed his concern that Clel have one doctor he could work with as opposed to many. *See id.* at 122. Mr. Duncan testified about the difficulty in reestablishing the bond with Clel after lengthy separations and the steps he had taken to make this transition easier. *See id.* at 125-26. He further testified about his current wife and the fact that she and

Clel have a very good and comfortable relationship. *See id.* at 127. Lastly, Mr. Duncan testified regarding his financial and living situation which appeared to be quite adequate for raising a child. He testified that he and his wife would be arranging their work schedules so one of them could be with Clel at almost all times. The need for surrogate care was virtually non-existent, however, Mr. Duncan testified that he had made arrangements with a neighbor lady who ran a day care in case the need were to arise. *See id.* at 128-130.

During the course of the trial there was also testimony from the defendants and their experts who all concluded that the child should remain in Pennsylvania. This testimony was based primarily on a best interest of the child standard although there was some testimony that the defendants felt that they had adequately rebutted the *Hutchison* requirements due to their belief that Mr. Duncan did not have a strong bond with the child and did not understand his needs.

After the three day trial in this matter was concluded Judge Rokich found that the defendants had not rebutted the

presumption set forth in *Hutchison* and that Mr. Duncan could provide a good home for the child. The trial court made extensive Findings of Fact and concluded that custody was to be awarded to Mr. Duncan. The defendants filed a motion for reconsideration which the court denied on or about January 10, 1995. The final Findings were signed on or about February 8, 1995.

SUMMARY OF ARGUMENT

The trial court in this matter properly applied the presumption set forth in *Hutchison v. Hutchison*, 649 P.2d 38 (Utah, 1982) in awarding custody to Mr. Duncan, the plaintiff/appellee. The defendants in this matter did not rebut the presumption that it is in the best interest of the child to reside with a natural parent as opposed to a non-parent unless the non-parent demonstrates that there is no strong mutual bond between the child and the parent, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's, and that the parent lacks the sympathy for and understanding of the child

that is characteristic of parents generally. Only when these standards are rebutted will the court then turn to an analysis that depends solely on the "best interest of the child" standard. To argue that this standard was rebutted as appellants Thorderson attempt to do, or that a "best interest of the child" standard should have been used in place of the *Hutchison* standard as appellant Howard attempts to do is erroneous. Further, the case of *State ex rel. H.R.V.*, 278 Utah Adv. Rep. 13 (Ut. Ct. App. 1995) is distinguishable on its facts from the case at hand and does not change the standard implemented by the court below. The trial court did not commit error in refusing to grant custody to Eileen Howard and lastly, the trial court did not commit error in denying the defendants/appellants motion for reconsideration.

ARGUMENT

- I. DID THE TRIAL COURT PROPERLY UPHOLD AND APPLY THE STANDARD SET FORTH IN *HUTCHISON V. HUTCHISON*, 649 P.2d 38 (Utah 1982) IN DETERMINING THAT THE PLAINTIFF/APPELLEE BE AWARDED CUSTODY OF HIS NATURAL SON OVER THE CHILD'S GRANDMOTHER AND STEP-GRANDFATHER?

A. Standard of Review:

The standard of review to be applied in custody cases is whether or not the trial court's holding was clearly erroneous. See *Kishpaugh v. Kishpaugh*, 745 P.2d 1248 (Utah 1987) citing *Lemon v. Coates*, 735 P.2d 58, 60 (Utah 1987) and *Ashton v. Ashton*, 733 P.2d 147, 149-50 & n.1 (Utah 1987). The weight that the trial court gives to the various factors set forth in *Hutchison* is to be reviewed under an abuse of discretion standard. See *Hutchison v. Hutchison* at 41.

B. Discussion:

The case law in Utah developing the legal standards to be used in determining the custody of a child is rather extensive and has resulted in a body of law that gives trial courts relatively clear guidelines on making these weighty decisions. This Court and the Utah Supreme Court have also been willing to change the standards previously set forth in custody disputes in order to keep the best interest of the child in mind. For many years Utah law presumed that all other things being equal the mother was the preferred parent in custody

disputes. However in *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986) the Utah Supreme Court determined that this presumption should no longer apply because in many cases "all things being equal" the father was still the most appropriate custodial parent. As our society has changed over the past decade we are now faced with situations where many children are not raised by two parent families and custody disputes more often are between not just parents but also extended family members or step-family. We are also unfortunately faced with the situation many times where children are born out of wedlock resulting in a situation where one of the natural parents may not be in the position to establish the type of early bond with the child that they would have otherwise. This is the situation that faces this Court in the case of Clel Howard.

As is stated above, Clel Howard was born in October of 1988 as the result of a relationship between his mother, Eileen Howard and his father, Jerry Duncan. Mr. Duncan was not aware of the pregnancy, or the birth until some three months after his son was born. As stated above, at this time he

immediately quit his job in Texas and returned to Utah so that he could begin to establish a relationship with his son. He paid child support and attempted to visit his young son as much as he possibly could given the circumstances between himself and the child's mother. He quickly discovered that not only did he have to deal with the child's mother but that he must also deal with the child's maternal grandmother and step-grandfather because this is where the child was spending most of his time. Even though it was difficult to arrange visitation, and the Thordersons would not allow overnight visitation, Mr. Duncan always continued to build and maintain a relationship with his son. After the Thordersons moved to Pennsylvania this became easier due to the fact that the child's mother allowed Mr. Duncan overnight and extended visitation.

It was not until the child moved to Pennsylvania permanently that Mr. Duncan began the process of trying to seek custody of his son. By this time Mr. Duncan had remarried and obtained steady employment. It became apparent at that

time that the only way he would be able to establish the type of relationship that he wanted with his son was by seeking full custody of him. It was this background that lead to the case at hand between Mr. Duncan, the Thordersons and Ms. Howard.

In *Hutchison v. Hutchison*, 649 P.2d 38 (Utah, 1982), the Utah Supreme Court set forth the standard to be used when making a custody determination between a parent and a nonparent.

In a controversy over custody, the paramount consideration is the best interest of the child but where one party to the controversy is a nonparent, there is a presumption in favor of the natural parent. *Walton v. Coffman*, 110 Utah 1, 169 P.2d 97 (1946). This presumption recognizes "the natural right and authority of the parent to the child's custody. . . ." *State in re Jennings*, 20 Utah 2d 50, 52, 432 P.2d 879, 880 (1967). It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than

anyone else. *Walton v. Coffman*, 110 Utah at 13, 169 P.2d at 103.

Id. at 40. Although the Utah Supreme Court was clear on the fact that residing with a natural parent should be presumed to be in the best interest of the child they did set forth that the presumption is not conclusive. It is accurate that there may be situations where a nonparent is the better custodian of the child, however, this presumption is not easily rebutted. The appellants in this case go to great length to argue that the Thordersons, or Eileen Howard and the Thordersons combined are the better parents in this case because they are the ones that have had this child for a significant portion of his life. They argue that the appellants have a deeper love for this child than the father, that they are more sensitive to his needs and that they are in a better position financially to provide for this child. The *Hutchison* Court makes it clear that this is not enough to overcome the presumption in favor of the natural parent.

The parental presumption is not conclusive,
. . . but it cannot be rebutted merely by
demonstrating that the opposing party

possesses superior qualifications, has established a deeper bond with the child, or is able to provide more desirable circumstances. If the presumption could be rebutted merely by evidence that a nonparent would be a superior custodian, the parent's natural right to custody could be rendered illusory and with it the child's natural right to be reared, where possible, by his or her natural parent.

Id. at 41.

This is a particularly important consideration in cases like the one at hand where the natural parent has been deprived of the ability to rear his child through no fault of his own. When a child is born out of wedlock it is typical that the child not live with the natural father during his or her early years. In this case Mr. Duncan quit his job in Texas immediately upon learning of the birth of his son and moved to Utah so that he could establish a relationship with the child. The fact that the natural mother in this case chose to abandon the child leaving him primarily in the care of his grandparents plays no part in rebutting the presumption that rightfully belongs to Mr. Duncan.

In order for a nonparent to rebut the presumption they must rebut three characteristics set forth by the court. Only when the non-parent demonstrates by evidence that the natural parent lacks all three of these characteristics will the presumption be rebutted and then the "contestants for custody compete on equal footing, and the custody award should be determined solely by reference to the best interest of the child." *Id.* at 41. The three characteristics which must be demonstrated by the nonparent in order to rebut the presumption are that 1) no strong mutual bond exists between the child and the natural parent, 2) the natural parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's, and 3) that the natural parent lacks the sympathy for and understanding of the child that is characteristic of parents generally. The appellants in this matter did not demonstrate by evidence that the plaintiff/appellee lacked these three characteristics and therefore the trial court was proper in its ruling that the

best interest of the child in this case was served by awarding custody to Mr. Duncan, the child's natural father.

A. The Appellants Did Not Demonstrate That A Bond Does Not Exist Between the Child And His Natural Father.

Mr. Duncan did in fact establish a bond with his son in spite of the obstacles that he was faced with. During the trial there was testimony from numerous witnesses who were able to speak about the relationship between Mr. Duncan and Clel. Kenneth Duncan, Mr. Duncan's brother testified about interactions he had observed between the appellee and his son. He testified that Mr. Duncan had brought Clel to many family activities and that their interactions were very typical of any father and son. (Trial Transcript at 171). He testified that Mr. Duncan and Clel would ride bikes together and that Mr. Duncan was exceptionally loving and tender towards his son. *See id.* He further testified that when Clel was not with his father that Mr. Duncan would speak of him often and show pictures to the family. *See id.* at 172. He testified that Clel always seemed to be having fun when he was around the family

and in fact it was almost surprising that the situation appeared so normal and that Clel was so close and loving with the extended family given his limited opportunities to spend time with them. *See id.* at 173-74.

The trial court also heard testimony from Peggy Duncan, Mr. Duncan's sister-in-law who testified that Mr. Duncan had brought Clel to visit almost every time he had him in his custody. She testified that Clel was shy when he was little and that his father would stay right with him and get down on the floor and play with him and was always very excited to have Clel with him. She further testified that Clel appeared just as excited to be with his father. *See id.* at 182. She also testified that she thought it was amazing that Clel appeared so comfortable around his father given the fact that they were not able to see each other very often. *See id.* at 183.

Mr. Duncan's brother Stuart Duncan also testified at trial regarding the relationship between the plaintiff and his son. He testified that Mr. Duncan was a very good father,

always very concerned about his son. He further testified that the relationship between Clel and his father appeared to be quite normal and that Clel would always go to his father first if he needed something. He testified that Mr. Duncan was good at disciplining Clel and that when Clel was not with him he spoke of him all the time. *See id.* at 320.

The appellants point out that the experts in this case testified that there was a stronger bond between the child and the Thordersons than between the child and his father. Given the fact that this child had spent most of his life in the home of the Thordersons it would make sense that his primary bond would exist with them. However, the fact that they may have a stronger bond with the child does not rebut the question of whether or not the father also has a bond with the child. Mr. Otanez testified that Mr. Duncan did in fact have a bond with his child. *See id.* at 27. Mr. Otanez did point out that Mr. Duncan had not had the opportunity to establish the type of bond with his son that one might normally expect but that it was clear he wanted custody of his son for "no other

reason except that he has that desire, that responsibility in his mind to protect and care and love his son." *Id.* Mr. Otanez further testified that it appeared to him that Clel made negative comments about his father because he knew that he was not supposed to have a good time when he was with his father. *Id.* at 26. However, when Clel didn't know he was being watched he would laugh and play with his father in a normal manner. *Id.*

The appellants Thordersons point out testimony of Steven Richfield and Bryne Rivlin. Ms. Rivlin testified that the appellants were distrustful of Mr. Duncan. She further testified however, that Mr. Duncan was very appreciative of the Thordersons taking care of his son and felt that they were good people. She testified that Mr. Duncan had attempted to maintain contact with his son while Clel was in Pennsylvania but felt that the Thordersons had thwarted that effort. *See id.* at 231. Ms. Rivlin also testified that Mr. Duncan told her that Clel behaved differently when the Thordersons were not there and that he was afraid to show love to his father in

front of the Thordersons. See *id.* at 233. Although Dr. Richfield testified that the child's psychological bond was with the Thordersons he also testified that Mr. Duncan was establishing a bond with his son. See *id.* at 417.

Based upon the testimony the trial court found that although the child's strongest bond was with the Thordersons, that Mr. Duncan's bonding with the child had been hampered because he had not had the opportunities to establish a bond in the way that the Thordersons had. The court found that Mr. Duncan had met with much resistance in establishing a close relationship with his son and that all of the evidence in the case established that a bond did exist between father and son and led the court to believe that a strong bond could and would be established if the opportunity was available. Based upon the court's findings regarding this issue it is clear that the court considered the testimony and found that the appellants did not demonstrate the first characteristic necessary to rebut the presumption set forth in *Hutchison*.

B. The Appellants Did Not Demonstrate That Mr. Duncan Was Not Willing To Sacrifice His Own Interest And Welfare For That Of The Child.

It is clear from the evidence presented at trial that Mr. Duncan has and continues to sacrifice his own interests and welfare for that of his child. Mr. Duncan began sacrificing for his child immediately upon learning of his birth by quitting his job and moving to Utah in order that he could be close to the child. Further, upon learning of the birth of his child he sent a check to Ms. Howard and has continued to pay support on behalf of this child even though there has never been a court order in place directing him to do so. (Trial Transcript at 82). Upon returning to Utah, even though Mr. Duncan was faced with obstacles in establishing a relationship with his son he continued to have as much contact with the child as possible. By reviewing the testimony it becomes apparent that there has never been a period in this child's life when his father did not continue to try and build a relationship with him. Even when the child was moved to Pennsylvania, Mr. Duncan paid for the child and his mother to

return to Utah for visits and even drove to Pennsylvania on one occasion to pick the child up and drive him back to Utah for visitation. *See id.* at 108-120.

Mr. Duncan voluntarily registered his paternity with the state and underwent blood tests when Ms. Howard refused to recognize him as the father. *See id.* at 107. Mr. Duncan has hired numerous therapists to try and help him deal with the problems of his son both before and after the transfer of custody. No one in this case testified that Mr. Duncan's motives in seeking custody of his son were anything but pure. The simple fact that Mr. Duncan has gone to the time and expense of a trial and now an appeal in this matter demonstrates that he is willing to sacrifice for the interest of his son. Further, Mr. Duncan testified at trial that if he were awarded custody of his son he and his current wife would change their job schedules so someone could be home with Clel at all times even though this would mean spending much less time with each other. *See id.* at 128-130.

The evidence presented at trial was overwhelming that Mr. Duncan has in fact sacrificed his interests and welfare for his son. The only testimony to the contrary was from the Thordersons and Eileen Howard. The trial court, who is in the best position to weigh the credibility of the witnesses found that Mr. Duncan had "demonstrated a willingness to sacrifice his own interest and welfare for the child's." The court further found that "[i]t is evident that plaintiff cared about Clel and is willing to sacrifice his own interests for the child's, however, the defendants were not cooperative and did not further a father/son relationship between Clel and plaintiff." (Memorandum Decision at 5).

C. The Appellants Did Not Demonstrate That Mr. Duncan Lacks Sympathy For And Understanding Of His Son.

The third characteristic set forth in *Hutchison* is that the nonparent must demonstrate that the natural parent lacks sympathy and understanding for the minor child. The appellants in this matter did not meet this requirement in order to rebut the presumption that the best interest of the child is in

being with his natural parent. The appellants argue that Mr. Duncan does not have an understanding of Clel's unique emotional and psychological problems and that a change in custody will damage this child forever. The evidence presented at trial showed that Mr. Duncan does in fact have an understanding of his child's unique situation and the trial court found as such.

Mr. Duncan has put much time in effort into dealing with the problems faced by his son. He has always been willing to consult with therapists chosen by the appellants and has further consulted numerous therapists on his own. The testimony at trial did not show anything different. The only comment about Mr. Duncan's lack of cooperation came from Mr. Stewart Smith who testified that the plaintiff had said he did not want to take a lengthy personality test although he did consent to a shorter version of the test. (See Trial Transcript at 368). It is important to note that Mr. Smith spent a limited amount of time in this case only seeing the participants for a total of nine hours. Even with this limited

contact however he did testify that the interactions between father and son were good although awkward because they all took place in his office. *See id.* at 360, 362-63).

The appellants also cite to Dr. Richfield for the proposition that the plaintiff lacks sympathy for his son. Interestingly, even Dr. Richfield was willing to state that many of the problems faced by this child come from the fact that he was abandoned by his mother, defendant/appellant Eileen Howard. *See id.* at 419, 451-52. Further, Dr. Richfield was not hired to perform a custody evaluation in this case, rather he was hired by the Thordersons as a therapist for Clel. Dr. Richfield testified that he was not able to make any judgment on Mr. Duncan's parenting abilities and his recommendation that the Thordersons retain custody was based on the fact that it would be detrimental to remove this child from his present environment.² *See id.* at 450.

² It is of interest to note that Clel Howard's current therapist, Dr. Chris Wehl believes that the emotional problems suffered by this child are no greater than any other child in this situation.

After hearing the testimony in this matter the trial court found that there was no significant evidence that the plaintiff lacked the sympathy and understanding of the child that is characteristic of parents generally. In fact, the trial court further found that "plaintiff understands the problems that have been created by Clel being born out of wedlock, the abandonment of Clel by his mother, and the lack of regular visitation by him with Clel." (Memorandum Decision at 5).

D. The Court Did Not Err In Its Refusal To Place The Parties On Equal Footing And Rely On A Strict Best Interest Of The Child Standard.

The appellants in this case argue that the trial court did not implement a best interest of the child standard in determining custody and they go on to cite numerous cases which outline the issues to be considered when making a determination regarding the best interest of the child. The trial court in the matter did in fact implement a best interest of the child standard as is required in *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982). However, under *Hutchison*

it is presumed that the best interest of the child lies in being placed with a natural parent over a non-parent unless the non-parent rebuts that presumption as discussed above. The trial court found that the Thordersons did not rebut this presumption and therefore the best interest of the child was in being placed with his natural father. It is only after that presumption is rebutted that "the contestants for custody compete on equal footing, and the custody award should be determined solely by reference to the best interests of the child." *Id.* at 40. As discussed at length above the Thordersons clearly did not rebut this presumption.

Both appellants Thorderson and Howard rely heavily on the case *Tuckey v. Tuckey*, 649 P.2d 88 (Utah 1982) which was issued almost simultaneously with the *Hutchison* decision. Appellants rely on this case for the proposition that there may be circumstances where the best interest of the child lies in being placed with the child's grandparents. Although this proposition is undoubtedly true, the appellants completely ignore the fact that the Supreme Court of Utah remanded the

Tuckey case in order that the trial court could make findings regarding the presumption set forth in *Hutchison*. In the *Tuckey* case the natural mother was fighting for custody of her two children with the paternal grandparents. The trial court found that both the mother and grandparents were fit but awarded custody to the mother. The grandparents appealed arguing that the proper standard to be applied was the best interest of the child notwithstanding the relative fitness of the parties. The Utah Supreme Court reversed and remanded holding that the trial court had made no findings regarding whether or not the grandparents had rebutted the *Hutchison* presumption. The Court held that "[w]ithout specific findings, we cannot properly review the trial court's order. . . ." *Tuckey* at 90. Only if the presumption had been rebutted would the best interest of the child standard be implemented in the way requested by the grandparents. In the case at hand the trial court made lengthy and specific findings regarding the *Hutchison* presumption concluding that the grandparents had not rebutted the presumption and the best interest of the child

was in having custody placed with Mr. Duncan, his natural father.

The appellants cite numerous other cases in support of their proposition that the trial court should have implemented solely a best interest of the child standard, however, all of these cases are factually distinguishable from the one at hand. In *Paryzek v. Paryzek*, 776 P.2d 78 (Utah Ct. App. 1989) the custody dispute was between two natural parents and the children had been living with the father. The trial court granted custody to the mother. This Court reversed and remanded holding that when the call is a close one maintaining the present stable environment should be taken into consideration. The *Hutchison* presumption was not an issue in this case.

In both *Moon v. Moon*, 790 P.2d 52 (Utah Ct. App. 1990) and *Sukin v. Sukin*, 842 P.2d 922 (Utah Ct. App. 1992) relied on by the appellants the custody dispute was between the natural mother and the natural father. This Court held that the trial court must make specific and detailed findings of

fact in awarding custody in these situations and remanded so that could be accomplished in the *Sukin* case and found that the trial court had adequately accomplished this in the *Moon* matter.

The appellants further cite to the recent case of *State ex re. H.R.V.*, 278 Adv. Rep. 13 (Ct. App. 11/22/95). This case is also distinguishable from the case at hand. Appellants argue that the *H.R.V.* decision does away with the parental presumption set forth in *Hutchison v. Hutchison*, 649 P.2d 38 (Utah 1982), in the situation where the natural parent does not already have custody of the minor child. This is a serious misreading of *H.R.V.* What the *H.R.V.* court in fact held was that a natural parent who had already lost custody to a nonparent could not then rely on the parental presumption in attempting to get custody back. In *H.R.V.* Legal custody had already been granted to the minor children's paternal aunt. It had already been determined by the trial court that the natural father should not have custody of the children. The natural father then brought a petition to change custody. In

that petition he attempted to rely upon the parental presumption. This Court held that "once the parental presumption has been rebutted or lost, and the natural parent has been deprived of custody, that parent is not entitled to reassert the parental presumption at a later date unless custody has since been restored to the parent. *Id.* at 15. This is clearly distinguishable from the case at hand. Mr. Duncan never lost custody of his son nor did the appellants ever rebut the presumption and gain custody of the child. This child was born out of wedlock and Mr. Duncan never had an opportunity to have custody of the child before now although he did provide support for the child and exercised visitation with the child. This was Mr. Duncan's first opportunity to rely on the parental presumption since he was never found to be an unfit parent and never lost custody of the child. For the appellants to argue that Mr. Duncan should not be awarded this presumption because through no fault of his own the child had never lived with him borders on bad faith.

E. The Trial Court Did Not Commit Reversible Error In Refusing To Consider Any Type Of Custody Award Involving Howard.

Eileen Howard, defendant/appellant, the natural mother of Clel Howard has maintained since the beginning of this matter that she is not interested in having custody of her son and it is her wish that custody be placed with her parents the Thordersons. It was not reversible error for the trial court in this matter to state that custody would not be granted to appellant Howard. The testimony at trial was consistent from all the experts on the point that Ms. Howard was not the appropriate person to have custody of the child. Mr. Todd Otanez testified that Ms. Howard made it very clear during his evaluation that "she had no intentions of being the primary caretaker of her son." (Trial Transcript at 30). Mr. Otanez further testified that when he questioned Ms. Howard about her feelings on being a parent to her son her response was "depressing". *Id.* Mr. Otanez also stated that raising a child was not what Ms Howard had in mind for her life at this time. *See id.* at 31.

Ms. Bryne Rivlin, a social worker who also evaluated the parties testified that she had only visited with Ms. Howard on two occasions but that there did not appear to be much bonding between Clel and his mother. *See id.* at 238-39. Ms. Rivlin further testified that Ms. Howard had expressed to her that she wanted Clel to remain with the Thordersons and that she was not able to take care of him. *See id.* at 256-57. Mr. Steward Smith, a social worker who had some limited contact with the parties in this matter testified that Ms. Howard's leaving the child at an early age was a contributing factor to his emotional problems *Id.* at 391, and as stated above Dr. Steven Richfield testified that many of the problems faced by the child were a result of his abandonment by his mother. *See id.* At 419, 451-52. Dr. Richfield further testified that the relationship between Ms. Howard and her son was peripheral and that Ms. Howard had difficulties with "attunement to Clel's emotional needs." *Id.* at 419. Dr. Richfield also testified that it was clear that Clel was not the uppermost priority in Ms. Howard's life. *See id.* at 426.

Ms. Howard herself testified that she had never been the primary caretaker of her son *Id.* at 542. Ms. Howard further testified that when her son came to Utah for visitation with his father in the summer of 1993 that even though she was living here she did not have visitation with the child because she was not able to handle him without her mother. *See id.* at 558. Ms. Howard also testified that if she were to have custody of Clel that she would continue to live with the Thordersons who would remain the primary caretakers. *See id.* at 566.

Appellant Howard argues that the trial court made the determination that she would not be given custody of the child without hearing any of the evidence. One can tell by reviewing the record below that this simply is not the case. During the cross examination of Ms. Howard the following exchange took place:

Mr. Ellis: You mentioned that if you were
 awarded custody it would not be
 your intention to move away (from
 the Thordersons); is that
 correct?

Ms. Howard: Correct.

The Court: Counsel, look, that's not an issue here, custody. I have had the therapists testify, the mother testify about custody. Let's not put this woman through that. It's hard enough for her now. Not one of them recommended that she have custody. Dr. Richfield said, no, she wasn't. Her mother said she wasn't. So I don't know why we're putting this woman through this.

(Trial Transcript at 566). During closing argument a further exchange took place between plaintiff's counsel and the court regarding the possibility of custody being awarded to defendant/appellant Eileen Howard:

Mr. Ellis: . . . comparing the parents it appears from the evidence and, we think the court can see that the only realistic choice is to award custody of that child to his father, the only parent that has his own home, and can provide stability.

And frankly, for the important reasons, I believe that awarding custody to the mother, in this case would be essentially equivalent to awarding custody--

The Court: That's a finding I'll make right now so nobody has to argue that. I would

not award custody to the natural mother. That has come across loud and clear, and in good conscience I could not do that.

Mr. Ellis: Thank you, Your Honor.

The Court: So that's a finding I'm making.

Id. at 575.

It simply is not accurate that the trial court made a legal error by refusing to grant custody to appellant Howard. The transcript is clear that all of the experts testified that she was not the appropriate person to be awarded custody and that the court did not make this final determination until after hearing the testimony.

II. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S/APPELLANT'S MOTION FOR RECONSIDERATION?

Standard of Review:

The standard of review for a motion for reconsideration is the same as would be implemented in considering a trial court's decision to deny a new trial. This court will reverse only if there is an abuse of discretion by the trial court. *Watkiss & Campbell v. FOA son*, 808 P.2d 1061 (Utah 1991) and

Crookston v. Fire Insurance Exchange, 860 P.2d 937 (Utah 1993).

Discussion:

The appellants in this case filed a "Motion for Reconsideration" on or about December 12, 1994 prior to a final order being entered by the trial court. In a Minute Entry dated January 10, 1995 the trial court denied appellant's motion. It was not an abuse of discretion for the trial court to deny such a motion.

Although it is accurate that a judge is free to change his or her mind on the outcome of a case prior to a final decision being rendered, the rules of procedure make no provision for a "motion for reconsideration". The appellants claim that such a motion is allowed under Rule 59 of the *Utah Rules of Civil Procedure*, however, the Supreme Court of Utah has already held that provisions for such a motion do not exist. See *Watkiss & Campbell v. FOA & Son*, 808 P.2d 1061 (Utah 1991). Rule 59 which is relied upon by the appellants states as follows:

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

The rule then goes on to list some of the causes that may result in a new trial such as newly discovered evidence, excessive or inadequate damages, irregularity in the proceedings of the court to name a few. Nowhere does this rule provide for a "motion for reconsideration". The Utah Supreme Court has held as follows regarding the reasons why motions to reconsider are inappropriate:

If the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for re-reconsideration asking the court to again reverse himself? Tenacious litigants and lawyers might persist in motions, arguments and pressures and theoretically a judge could go on reversing himself

periodically at the entreaties of one or
the other of the parties ad infinitum.

Watkiss & Campbell at 1064.

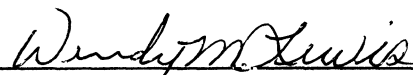
The motion that the appellants should have filed in this matter is a motion for a new trial. However, regardless of what one calls the motion the trial court did not abuse its discretion in denying it. The motion was filed December 12, 1994. The trial court did not deny the motion until January 10, 1995. With the passing of almost a full month before the Minute Entry it is difficult to say that Judge Rokich did not consider the motion of the appellants. There is no requirement that a judge must make findings as to why a motion for new trial, or in this case reconsideration, was denied. It is within the judge's full discretion to either grant or deny the motion as he or she sees fit. The trial court in this matter was in the best position to review the evidence and to weigh the credibility of the witnesses. It is clear from both the trial transcript and the court's Finding of Fact and Conclusions of Law that this was a difficult case and much consideration was given to its outcome. It is further clear by

looking at the time that passed between the end of trial and a final judgment being entered by the court that Judge Rokich did not make this decision lightly and most certainly did not commit an abuse of discretion.

CONCLUSION

The trial court in this matter properly applied the presumption that the best interest of the child lies in being placed with a natural parent over a non-parent. The trial court made complete and detailed findings that the appellant did not rebut this presumption and properly awarded custody to the plaintiff, Mr. Duncan. Further, the trial court did not commit error in refusing to place custody with the natural mother based upon the testimony at trial and lastly the trial court did not commit an abuse of discretion in denying appellants Motion for Reconsideration. The appellee in this matter respectfully requests that this Court affirm the opinion of the trial court in its entirety.

RESPECTFULLY SUBMITTED this 2nd day of February, 1996.


WENDY M. LEWIS
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of February, 1996, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLEE/DUNCAN to the following:

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