1996

Jerome K. Duncan v. Eileen M. Howard; Sandra Thorderson, and Lary Thorderson : Brief of Appellant

Utah Court of Appeals

Wendy M. Lewis; John Spencer Snow; Mooney Law Firm; Attorneys for Appellee
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IN THE UTAH COURT OF APPEALS

JEROME K. DUNCAN, Plaintiff-Appellee, vs. EILEEN M. HOWARD, SANDRA THORDERSON, and LARRY THORDERSON, Defendants-Appellants.	Case No. 950227-CA Oral Argument Priority 4

BRIEF OF APPELLANT EILEEN M. HOWARD

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, UTAH
THE HONORABLE JOHN A. ROKICH

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LIST OF PARTIES

All current parties are listed on the case caption. The State of Utah Department of Human Services was previously a party (R. 16), but was dismissed out of the action nearly a year before trial. (R. 155.)

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BRIEF OF APPELLANT EILEEN HOWARD

JURISDICTION

This is an appeal as of right from a final award of custody in a civil district court case. Jurisdiction is conferred on this court by Utah Code Ann. § 78-2a-3(2)(i) (Supp. 1995). The Paternity Order appealed from was entered February 8, 1995. (R. 427-28.) The Thordersons' notice of appeal (R. 436) was filed March 6, 1995, within 30 days of the order appealed from, and was thus timely. Utah R. App. P. 4(a). Eileen Howard's notice of appeal (R. 444) was filed March 17, 1995,[1] within 14 days after the Thordersons' notice of appeal, and was thus timely. Utah R. App. P. 4(d).

[1]The filing stamp on the notice of appeal erroneously indicates the document was filed March 20, 1995. By order entered May 12, 1995, the trial court decreed that the notice was actually filed March 17, 1995. (R. 489.)

ISSUES PRESENTED

Eileen Howard adopts all the issues and supporting arguments made by Thordersons. She also presents the following additional issues:

1. Did the trial court err in holding that Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982), required a change of custody after five years with the mother and maternal grandparents, notwithstanding compelling evidence that the best interests of the child would be served only by maintaining the existing custody arrangement? This is a legal issue and is reviewed for correctness. Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979). Howard is not aware of any requirement that this issue be raised below, but the issue was raised, prior to entry of final judgment, in Thordersons Motion for Reconsideration. (R. 396-98.)

2. Did the trial court exercise its discretion based on a misunderstanding of the law, and thereby abuse its discretion, by holding that it lacked authority to enforce an order of custody to Eileen Howard contingent on her living with the Thordersons, and therefore refusing to consider any award of custody to Eileen Howard? This court should review de novo the legal question of whether the trial court exercised its discretion based on a correct understanding of the law. Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979); Gaw v. State, 798 P.2d 1130, 1134 (Utah Ct. App. 1990). The underlying custody award is reviewed for abuse of discretion. Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982).

Howard advanced this argument at the beginning of trial and in closing arguments. (R. 526-27, 1101.)

DETERMINATIVE PROVISIONS

Howard is not aware of any statutes or rules whose interpretation is determinative of the issues raised.

STATEMENT OF THE CASE

A. Nature of the Case. This is a civil paternity action. The only disputed issue at trial was custody of the minor child, Clel Howard.

B. Course of Proceedings and Disposition Below. Jerry Duncan, the natural father, filed his paternity action September 18, 1991, alleging that the mother, Eileen Howard, should be awarded custody but that Duncan should receive visitation rights. (R. 2-6.) Howard initially disputed Duncan's paternity (R. 27-29), but abandoned that defense following blood tests.

On February 2, 1993, Duncan filed a motion seeking an order directing Howard to show cause why Duncan should not be granted temporary custody. (R. 53.) The court issued the order to show cause. (R. 56-57.) The affidavit (R. 50-52) supporting the motion claimed that Clel was then in Pennsylvania with Howard and his maternal grandmother, Sandra Thorderson, and that Mrs. Thorderson would not allow Clel to return to Utah with Howard. Duncan further claimed that although he wanted to be with his son, he "would never interfere with [Howard]'s right to be with him as well." (R. 51.)

Thordersons had previously filed a petition in Pennsylvania seeking custody of Clel. In a telephone conference call between the Pennsylvania judge, the Utah domestic relations commissioner, and counsel for the parties, the courts decided that Utah would retain jurisdiction over the matter. (R. 58, 64.) Sandra Thorderson then joined the Utah action as a defendant. (R. 95.)

The order to show cause was heard before the domestic relations commissioner on June 17, 1993 (R. 100), and resulted in a recommendation that Clel remain with the Thordersons pending final resolution of the action, but that he travel to Utah for one month visitation with Duncan and one month with Howard. (R. 101-05.) Howard and Mrs. Thorderson both objected to the recommendation (R. 106-08, 113-50), but the district court sustained the recommendation. (R. 153, 154.)

Sandra Thorderson's husband, Larry Thorderson, joined as a defendant (R. 188-89), and the Thordersons filed a petition for custody. (R. 180-87.) Howard responded to the petition. (R. 151-53.) Duncan did not answer the petition or ever formally amend his petition to seek custody. Duncan did file a motion seeking temporary custody of Clel (R. 191), but that motion was denied. (R. 254.)

The case was tried before the Honorable John A. Rokich on September 28-30, 1994. (R. 338-40.) On December 5, 1994, the court entered a Memorandum Decision holding that Duncan should be awarded custody. (R. 386-94.) Finding of Fact and Conclusions of

Law (R. 429-34) and a Paternity Order (R. 427-28) were entered February 8, 1995.

C. Statement of Facts[2].

Eileen Howard and Jerry Duncan lived together in Cedar City, Utah, for four or five months starting in the fall of 1987, while they were working together at Brian Head ski resort. (R. 591-92.) Duncan had been married twice[3] before, and had two children from his first marriage. (R. 649-50.) Duncan moved to seek other employment, and the parties split up. (R. 592-93.) Clel James Howard was born to Eileen Howard on October 12, 1988. (R. 2, 27.) At that time, Howard was living with her mother and stepfather, Sandra and Larry Thorderson, in Salt Lake City, Utah. Howard nursed and cared for Clel, with some assistance from Mrs. Thorderson, for approximately nine months. (R. 1068.) With Mrs.

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[2]The discussion of facts below is not intended to be comprehensive, but to only present a general overview of the facts important to Howard's argument. In particular, there are several statements in the trial court's Findings of Fact which are not supported by the evidence. For example, the findings state that Duncan has two adult children from a prior marriage. (R. 430 ¶ 7.) In fact, the record indicates the children were three and four years old at the time of Duncan's divorce in 1984, and they would therefore still be minors. (R. 652, 664.) Paragraph 14 of the Findings (R. 431) asserts that Howard abandoned Clel when he was three months old. This contradicts paragraph 5 of the Findings, and is contrary to the evidence that Howard, Clel, and the Thordersons all lived together until September 1992, when Clel was nearly four years old, and that Howard cared for and helped support Clel during that time. (R. 857, 862, 1068.) There are other similar errors. These errors are generally not critical to Howard's argument and will not be addressed further.

[3]He had married again by the time of trial. (R. 633.)

Thorderson's encouragement, Howard then obtained employment and Mrs. Thorderson took over more of the care of Clel. (R. 1068-69.)

Howard notified Duncan, who was then living in Texas, of Clel's birth by letter dated January 17, 1989. (R. 595.) Howard then moved back to Utah. (R. 596.) He visited with Clel approximately every other Wednesday for several months (R. 1014), until he switched to a job with an irregular schedule. (R. 603, 618, 1015.) Visitation then became more sporadic because Duncan frequently would not give sufficient advance notice of his desire to visit, and Mrs. Thorderson and Clel would be unable or unwilling to accommodate Duncan's requests. (R. 1015-16.)

Thordersons and Howard moved to Pennsylvania in April 1992. Howard and Clel traveled to Utah twice during the summer of 1992 to allow Duncan to visit with Clel. (R. 622.) During the second visit, in September 1992, Howard decided to stay in Utah with Clel. (R. 623.) Duncan commenced having Clel overnight for visitation about once a week. (R. 625.) In November 1992, just before Thanksgiving, Mrs. Thorderson took Clel back to Pennsylvania for the holidays. (R. 626, 1043.) The plan at that time was that Howard come go to Pennsylvania for Christmas and take Clel back to Utah with her. (R. 1043-44.)

Thordersons noticed significant changes in Clel when he returned to Pennsylvania in November 1992 (R. 1011), and in January 1993 determined to seek custody themselves and did not let Clel return to Utah. (R. 1044.) Howard remained in Utah to gain some

independence to enable her to be a better parent (R. 1071), but telephoned and wrote Clel weekly, and visited him in Pennsylvania during May 1993 and January 1994 (R. 1072) and in Utah as described below. She moved back to Pennsylvania in June 1994 to be with Clel. (R. 1075.)

In February 1993, after learning that Clel would remain in Pennsylvania with Thordersons, Duncan sought visitation rights or temporary custody. (R. 53.) The court ultimately ordered that Clel travel to Utah and spend one month with Duncan and the following month with Howard. (R. 101-05, 153.) Clel returned to Pennsylvania following that visitation with severe disorders, including oppositional defiant disorder, separation anxiety disorder, and post-traumatic stress disorder. (R. 918.) He would go into rages upon very minor provocation, developed severe food phobias, and had an amazing loss of attention span. (R. 973.)

The court ordered an additional visitation in July 1994. (R. 300.) Clel's therapist in Pennsylvania spent two weeks of intensive therapy to prepare Clel for the visit (R. 1032), and the visitation was also monitored by a therapist in Utah. (R. 873.) The changes in Clel after that visit were not as severe as the prior year, but Clel did regress into staring into space, and started eating sand following that visit. (R. 974.)

SUMMARY OF ARGUMENT

Eileen Howard dearly loves her son and seeks his best interests of her son, and believes that currently requires that Clel live with his maternal grandparents, Larry and Sandra Thorderson. Howard therefore supports the arguments made in Thordersons' brief in addition to those set forth below.

The trial court abused its discretion by not considering the best interests of the child, but instead applying a presumption in favor of a natural parent. That presumption does not apply to exclude a grandparent, particularly where the grandparent has essentially been the primary caretaker of the child since birth.

Rather than remand this case for reconsideration without applying the presumption, this Court should remand with instructions to award custody to the Thordersons. The overwhelming weight of the evidence compels such an award.

Alternatively, this Court should remand with instructions to consider an award of custody to Howard contingent on her living with Thordersons. The trial court refused to even consider such an arrangement, based on a mistaken assumption that it was beyond the court's power to enforce. Expert testimony showed that such an award would be in Clel's best interest if custody could not be granted directly to Thordersons. The refusal to consider a contingent award to Howard was an abuse of discretion.

ARGUMENT

POINT I

THE HUTCHISON PRESUMPTION DOES NOT APPLY AGAINST A GRANDPARENT WHO HAS BEEN THE PRIMARY CARETAKER OF A CHILD SINCE BIRTH.

Utah Code Ann. § 30-3-10(1) (1995) mandates that a trial court consider the best interest of a child in awarding custody. The findings in the instant case, however, do not even use the phrase "best interests." The trial court did not purport to find that a transfer of custody to Duncan was in Clel's best interest, but instead, citing Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982), relied on a presumption in favor of natural parents.

Hutchison states:

> 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.

Hutchison, 649 P.2d at 40 (footnote omitted, underlining added).

Other decisions of the Utah Supreme Court, analyzed in Thordersons' brief at pages 52-55, clearly show that this presump-

tion does not apply against a grandparent, particularly one who has been the primary caretaker since the child's birth. The Court recognized that "[t]he affection of a grandparent can safely be said to be no less in depth than parental affection." Tuckey v. Tuckey, 649 P.2d 88, 90 (Utah 1982).

No expert witness at trial testified that, based on circumstances existing at the time of trial, the best interest of Clel would be served by transferring custody to Duncan. To the contrary, even Mr. Otanez, who advocated changing custody to Duncan, acknowledged he had concerns about the effect of such a change on Clel's stability. (R. 571.) Dr. Steven Richfield, who was familiar with Clel's current circumstances and emotional state, was more explicit. He testified that "it would be emotionally devastating to uproot him from the security that he has established in the home of the grandparents," and that it would likely "lead to antisocial behavior later in childhood and adulthood as well as [Clel] retreating into a shell of internal preoccupations." (R. 932. See also R. 956-60.)

Mr. Otanez was not sufficiently informed to testify concerning Clel's best interests at the time of trial. (R. 587.) Duncan himself was the only other witness who had some personal knowledge of both Thordersons and Howard and who testified that the best interests of Clel would be served by granting custody to Duncan. Given the self-serving nature of Duncan's testimony and the overwhelming testimony to the contrary, including the undisputed

evidence that Thordersons had been Clel's primary caretakers since birth, this Court should remand with directions to award custody to Husband.

A similar situation was addressed in Paryzek v. Paryzek, 776 P.2d 78 (Utah Ct. App. 1989). The parties' one child was about seven years old when the parties separated. The mother had been the primary caretaker prior to the separation, but the father was awarded temporary custody. The case was tried two years later. All the experts found both parties to be capable parents, but each party had an expert in his or her favor. The trial court gave little or no weight to the fact that the father had been custodian for the two years before trial, and awarded custody to the mother.

This Court on appeal reversed and directed that custody be awarded to the father (Vladimir):

> Where the call is a close one, we believe the child's interests will best be promoted by maintaining the prior, stable and healthy arrangement. That is, where the evidence was otherwise inconclusive--if anything, favoring Vladimir somewhat--the paramount consideration of stability conclusively tips the scale in Vladimir's favor and warrants awarding custody to him, as a matter of law.

776 P.2d at 83-84.

The interests of stability in this case likewise demand that custody be awarded to Thordersons as a matter of law.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER ANY TYPE OF CUSTODY AWARD INVOLVING HOWARD.

The expert witnesses acknowledged Clel's love for his mother and her importance in his life, but expressed reservations about her current ability to have sole custody of Clel without assistance. Howard recognized that she needed help in parenting, and attempted to argue that she should be awarded custody contingent on her living with her mother, Sandra Thorderson. Even before hearing the evidence, the trial court refused to even hear arguments concerning such an arrangement. (R. 526-27.) At the conclusion of the evidence, in a conference in chambers, the court again refused to consider any custody award to Howard contingent on her living with Thordersons, claiming that the court lacked authority to enforce such an order.[4]

Although a trial court is given considerable discretion in awarding custody, that discretion must be exercised within the confines of legal standards. Schindler v. Schindler, 776 P.2d 84, 87 (Utah Ct. App. 1989). Where a court makes a discretionary ruling based on a misunderstanding of the law, "the party adversely affected thereby is entitled to have the error rectified and a

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[4]While the conference in chambers is not reported, the record does reflect that the conference was held because the court did not want counsel presenting arguments concerning whether Howard should have custody (R. 1092), and that in chambers and following in open court the judge curtly refused to even allow arguments advocating any type of custody arrangement involving Howard. (R. 1101.)

proper adjudication under correct principles of law." Ferris v. Jennings, 595 P.2d 857, 859 (Utah 1979).

Several expert witnesses testified at trial. Todd Otanez, who performed his evaluation during the 1993 visit in Utah, was the only one who recommended that Duncan receive custody of Clel. Otanez compared only Duncan and Howard, and did not attempt to determine whether Clel's best interests would be served by remaining with Thordersons. (R. 533, 550.) Otanez acknowledged that his recommendation was based in part on the fact that Howard was not then living with Thordersons, who were Clel's primary caretakers and with whom Clel had a strong bond. (R. 582, 571, 576.) Otanez was not able to give an opinion concerning what would be in Clel's best interests based on the current circumstance of Howard living with Thordersons. (R. 587.)

Other expert testimony at trial showed that, if there was some legal reason that Thordersons could not be awarded custody, the best interests of Clel would be served by awarding custody to Howard contingent on her living with Thordersons. (R. 809-10.) All of the witnesses acknowledged that Thordersons had been Clel's primary caretaking essentially since his birth. No one questioned the Thordersons' ability to properly care for Clel.

The trial court clearly had the authority to make an award of custody contingent on Howard living in a particular location. Sukin v. Sukin, 842 P.2d 922, 925 (Utah Ct. App. 1992); Curry v. Curry, 7 Utah 2d 198, 321 P.2d 939, 943 (1958). The trial court

here abused its discretion by refusing to even consider such an arrangement. Sukin, supra. If this Court holds that the Hutchison presumption does apply to preclude a direct award of custody to Thordersons, the Court should remand with instructions to consider whether Clel's interests would best be served by an award of custody to Howard, contingent on her continuing to live with Thordersons.

CONCLUSION

The best interests of Clel would be served by awarding custody to the Thordersons. The evidence compels that conclusion, and this Court should remand with directions to award custody to Thordersons subject to reasonable visitation rights to Duncan.

Alternatively, this Court should remand for reconsideration without applying any presumption in favor of a natural parent, and should direct that the trial court consider an award to Howard contingent on her living with Thordersons. The witnesses uniformly acknowledged that transferring custody away from Thordersons would be traumatic. The trial court abused its discretion by refusing to even consider alternate methods to have Clel remain with Thordersons, who have been his primary caretakers since birth.

DATED this 15th day of December, 1995.

LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant Howard

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the *foregoing were mailed to each of the following, postage prepaid,* this 1st day of December, 1995.

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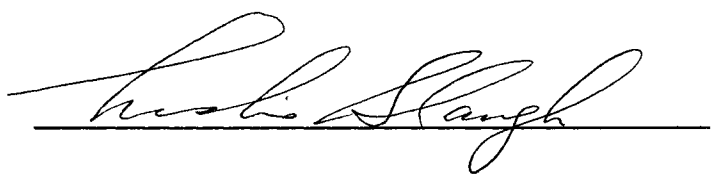

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APPENDIX "A"

MEMORANDUM DECISION

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JEROME K. DUNCAN,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 910905919
vs.	:	
EILEEN M. HOWARD, et al.,	:	
Defendants.	:	

This case was tried on September 28, 29, 30, 1994. Plaintiff was represented by Dean B. Ellis. Defendants Sandra and Larry Thorderson were represented by John Spencer Snow. Defendant Eileen Howard was represented by Leslie Slaugh. The Court heard oral testimony, admitted documentary evidence and reviewed in detail the custody evaluations submitted by the respective parties. The Court took the matter under advisement.

FACTS

The child, Clel Howard, who is the subject matter of these proceedings is the natural child of Jerome Duncan and Eileen Howard. Clel was born out of wedlock on October 12, 1988.

Plaintiff learned of Clel's birth three months after Clel's birth and commenced paying $150 per month for Clel's support.

Plaintiff paid support for about four and one-half years and established a regular routine of weekly visits with Clel.

In 1991, plaintiff filed a paternity action and established that he was the natural father of Clel. Upon the establishment of paternity, visitation with Clel was resumed until April 7, 1992 when defendant Howard allowed Clel to live with his natural grandmother in Pennsylvania.

A series of hearings were held in the Utah court and in the Pennsylvania court regarding visitation and custody of Clel during the pendency of this action. Defendants Thorderson were granted custodial rights to Clel with the final resolution of custody and visitation issues.

Defendant Howard left Clel when he was nine months old with his maternal grandmother. Defendant Howard did not exhibit an interest in Clel. Defendant did not develop parental skills or develop a bond with Clel. Defendant's lifestyle did not create an environment where Clel could be nurtured, loved, shown affection or attention that would allow him to have the normal mother/son relationship.

Defendant left the responsibility of raising Clel to her mother, who with her husband assumed the role of parents for Clel.

Plaintiff, Duncan, is now in his third marriage and exhibited a lack of stability in his early adulthood. Plaintiff had two adult children by a prior marriage. Plaintiff has not maintained a relationship with these children.

Plaintiff is presently married to Diane Duncan who was previously married and had three children by her first marriage. She is employed at Stauffers in Utah County.

Plaintiff is a college graduate and is also employed at Stauffers. Plaintiff and his present wife have adequate living quarters and income to provide for Clel.

The defendants Thorderson have had custody of Clel since April of 1992 and have assumed the role of parenting Clel. Mrs. Thorderson was previously married and had four children by her first marriage. This is Mr. Thorderson's first marriage. He is 52 years old and Mrs. Thorderson is 41 years old. Defendants have a stable marriage, and more than adequate living facilities. Defendants Thorderson provide a stable environment for Clel.

As a result of the instability in Clel's life, he has developed emotional problems which will require continued therapy in order for him to adjust to the custodial and visitation orders entered by the Court.

ARGUMENT

In custody disputes between a parent and a non-parent, the Utah State Supreme Court has ruled that there is a presumption in favor of custody being awarded to the parent which can only be rebutted by showing that: (1) no strong mutual bond exists; (2) the parent has not demonstrated a willingness to sacrifice his or her own interests and welfare for the child's interest and welfare; and (3) the parent lacks a sympathy for and understanding of the child that is characteristic of parents generally. Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982).

Clel's strongest bond appears to be with his maternal grandmother which is understandable, because he was placed with her shortly after birth. However, his bonding to plaintiff has been hampered because plaintiff has not had the opportunity to develop the bonding relationship with the child. The review of the file and the transcript of those proceedings evidences the resistance plaintiff has met in establishing a close relationship with Clel. The testimony of the custody evaluators in this case led the Court to believe that with continued therapy sessions, Clel can develop a strong bond with his father.

Clel has suffered a great deal of trauma in his life because of his mother abandoning him at three months of age, and not being

allowed to establish a normal relationship with his father. As a result of the trauma in his life, Clel suffers from emotional problems which are presently being treated and must be treated for an extensive period of time.

Plaintiff understands that Clel must continue in a therapy program in order for Clel to overcome the fears and anxieties he has developed as a result of the custodial issue. Plaintiff and defendants have expressed a willingness to continue to work with therapists to resolve Clel's emotional problems.

Plaintiff has demonstrated a willingness to sacrifice his own interest and welfare for the child's. It 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.

There was no significant evidence that plaintiff lacked the sympathy for and understanding of the child that is characteristic of parents generally. The Court believes 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.

Plaintiff's extended family testified about the importance of family and are desirous of making Clel an integral part of the extended family.

The Court has considered Clel's feelings in this case and understands the apprehension he may have in establishing a new home, a new environment and the sense of security he may have with the defendants Thordersons. However, the Court is convinced that with the cooperation of all of the parties and the continued therapy sessions for Clel, that Clel can make the adjustment to new surroundings satisfactorily.

Clel would probably prefer to remain with defendants Thorderson, because they have been the primary caretakers for most of his life. However, defendants Thordersons created much of the problem in Clel accepting his father because of their resistance to allowing plaintiff to become the father he desired to be. The fact that he had to file a lawsuit is indicative of the defendant's resistance to allow plaintiff to be a father.

There is no evidence that plaintiff is now engaged in immoral activity. The Court believes that the plaintiff has matured from the time he met defendant Howard and is a much more stable person than he was in 1988.

Granted, plaintiff does not enjoy the same economic status of the Thordersons, but he has the financial means by which to adequately provide for Clel's needs.

In this case plaintiff and defendants are of the same religious faith and are active members, assuring Clel of compatible religious training with plaintiff and defendants.

CONCLUSION

The Court awards custody to plaintiff, subject to the following conditions.

1. Clel shall remain with the Thordersons until the end of the present school year. Ten days after the school year ends, Clel shall be delivered to plaintiff at Salt Lake City at plaintiff's expense.

2. Clel shall remain in the therapy program that he is presently enrolled, and the therapist shall prepare Clel for the transition of custody to his father. Plaintiff and defendants Thorderson shall bear the costs equally.

3. Plaintiff's therapist and Thorderson's therapist shall communicate and establish a treatment program and a visiting schedule for defendant Howard and defendants Thorderson to visit with Clel which shall be submitted to the Court for approval by the end of the school year.

4. Plaintiff and defendant shall name their therapists within 30 days from the date of entry of this Judgment.

Each party shall bear their own fees and costs.

Plaintiff's counsel shall prepare Findings of Fact and Conclusions of law, and a Judgment in accordance with this Memorandum Decision.

Dated this 6 day of December, 1994.

John A Rokich

JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 6th day of December, 1994:

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APPENDIX "B"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

JEROME K. DUNCAN, Plaintiff, vs. EILEEN M. HOWARD, SANDRA THORDERSON and the STATE OF UTAH, Dept. of Human Services, Defendants.	FINDINGS OF FACT and CONCLUSIONS OF LAW Judge Rokich Case No. 910905919PA

This case was tried on September 28, 29, 30, 1994. Plaintiff was represented by Dean B. Ellis. Defendants Sandra and Larry Thorderson were represented by John Spencer Snow. Defendant Eileen Howard was represented by Leslie Slaugh. The Court heard oral testimony, admitted documentary evidence and reviewed in detail the custody evaluations submitted by the respective parties. After taking the matter underadvisement, the court enters as follows:

FINDINGS OF FACT

1. The child, Clel Howard, who is the subject matter of these proceedings is the natural child of Jerome Duncan and Eileen Howard. Clel was born out of wedlock on October 12, 1988.

2. Plaintiff learned of Clel's birth three months after Clel's birth and commenced paying $150 per month for Clel's support for about four and one-half years and established a regular routine of weekly visits with Clel.

3. In 1991, plaintiff filed a paternity action and established that he was the natural father of Clel. Upon the establishment of paternity, visitation with Clel was resumed until April 7, 1992 when defendant Howard allowed Clel to live

with his natural grandmother in Pennsylvania.

4. A series of hearings were held in the Utah court and in the Pennsylvania court regarding visitation and custody of Clel during the pendency of this action. Defendants Thorderson were granted custodial rights to Clel with the final resolution of custody and visitation issues reserved for trial.

5. Defendant Howard left Clel when he was nine months old with his maternal grandmother. Defendant Howard did not exhibit an interest in Clel. Defendant Howard did not develop parental skills or develop a normal parent-child bond with Clel. Defendant's lifestyle did not create an environment where Clel could be nurtured, loved, shown affection or attention that would allow him to have the normal mother/son relationship.

6. Defendant left the responsibility of raising Clel to her mother, who with her husband assumed the role of parents for Clel.

7. Plaintiff, Duncan, is now in his third marriage and exhibited a lack of stability in his early adulthood. Plaintiff had two adult children by a prior marriage. Plaintiff has not maintained a relationship with these children.

8. Plaintiff is presently married to Diane Duncan who was previously married and had three children by her first marriage. Diane Duncan is employed at Stouffers in Utah County.

9. Plaintiff is a college graduate and is also employed at Stouffers. Plaintiff and his present wife have adequate living quarters and income to provide for Clel.

10. The defendants Thorderson have had custody of Clel since April of 1992 and have assumed the role of parenting Clel. Mrs. Thorderson was previously married and had four children by her first marriage. This is Mr. Thorderson's first marriage. He is 41 years old and Mrs. Thorderson is 52 years old. Defendants have a stable marriage, and more than adequate living facilities. Defendants Thorderson provide a stable environment for Clel.

11. As a result of the instability in Clel's life, he has developed emotional problems which will require continued therapy in order for him to adjust to the custodial and visitation orders entered by the Court.

12. In custody disputes between a parent and a non-parent, the Utah State Supreme Court has ruled that there is a presumption in favor of custody being awarded to the parent which can only be rebutted by showing that: (1) no strong mutual bond exists; (2) the parent has not demonstrated a willingness to sacrifice his or her own interests and welfare for the child's interest and welfare; and (3) the parent lacks a sympathy for and understanding of the child that is characteristic of parents generally. Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982).

13. Clel's strongest bond appears to be with his maternal grandmother which is understandable, because he was placed with her shortly after birth. However, his bonding to plaintiff has been hampered because plaintiff has not had the opportunity to develop the bonding relationship with the child. The review of the file and the transcript of these proceedings evidences the resistance plaintiff has met in establishing a close relationship with Clel. The testimony of the custody evaluators in this case led the Court to believe that with continued therapy sessions, Clel can develop a strong bond with his father.

14. Clel has suffered a great deal of trauma in his life because of his mother abandoning him at three months of age, and not being allowed to establish a normal relationship with his father. As a result of the trauma in his life, Clel suffers from emotional problems which are presently being treated and must be treated for an extensive period of time.

15. Plaintiff understands that Clel must continue in a therapy program in order for Clel to overcome the fears and anxieties he has developed as a result of the custodial issue.

Plaintiff and defendants have expressed a willingness to continue to work with therapists to resolve Clel's emotional problems.

16. Plaintiff has demonstrated a willingness to sacrifice his own interest and welfare for the child's. It 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.

17. There was no significant evidence that plaintiff lacked the sympathy for and understanding of the child that is characteristic of parents generally. The Court believes 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.

18. Plaintiff's extended family testified about the importance of family and are desirous of making Clel an integral part of the extended family.

19. The Court has considered Clel's feelings in this case and understands the apprehension he may have in establishing a new home, a new environment and the sense of security he may have with the defendants Thordersons. However, the Court is convinced that with the cooperation of all of the parties and the continued therapy sessions for Clel, that Clel can make the adjustment to new surroundings satisfactorily.

20. Clel would probably prefer to remain with defendants Thorderson, because they have been the primary caretakers for most of his life. However, defendants Thordersons created much of the problem in Clel accepting his father because of their resistance to allowing plaintiff to become the father he desired to be. The fact that he had to file a lawsuit is indicative of the defendants' resistance to allow plaintiff to be a father.

21. There is no evidence that plaintiff is now engaged in immoral activity. The Court believes that the plaintiff has

matured from the time he met defendant Howard and is a much more stable person than he was in 1988.

22. Granted, plaintiff does not enjoy the same economic status of the Thordersons, he has the financial means by which to adequately provide for Clel's needs.

23. In this case plaintiff and defendants are of the same religious faith and are active members, assuring Clel of compatible religious training with plaintiff and defendants.

Having made the above findings, the court enters the following:

CONCLUSIONS OF LAW

The court awards custody to plaintiff, subject to the following conditions:

1. Clel shall remain with the Thordersons until the end of the present school year. Ten days after the school year ends, Clel shall be delivered to plaintiff at Salt Lake City at plaintiff's expense.

2. Clel shall remain in the therapy program that he is presently enrolled, and the therapist shall prepare Clel for the transition of custody to his father. Plaintiff and defendants Thorderson shall bear the costs equally.

3. Plaintiff's therapist and Thorderson's therapist shall communicate and establish a treatment program and a visiting schedule for defendant Howard and defendants Thorderson to visit with Clel which shall be submitted to the Court for approval by the end of the school year.

4. Plaintiff and Thordersons shall name their therapists within 30 days from the date of entry of this Judgment.

5. Each party shall bear their own fees and costs.

Dated this 8 day of ~~January~~ February 1995.

BY THE COURT:

JOHN A. ROKICH, District Judge

approved:

John Spencer Snow

JOHN SPENCER SNOW, Attorney for Thordersons

approved:

LESLIE W. SLAUGH, Attorney for Eileen Howard

Mailed a true copy of the foregoing this 20th day of January 1995 to John Spencer Snow 261 E 300 S #300, SLC, UT 84111 and to Leslie W. Slaugh P.O. Box 778, Provo, UT 84603.

Eileen Howard

APPENDIX "C"

PATERNITY ORDER

JUDGMENT
15240

Dean B. Ellis, #4976
Attorney for Plaintiff
3600 South Market Street
West Valley City, Utah 84119
Telephone: (801) 965-8605

Third Judicial District

FEB 08 1995

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

JEROME K. DUNCAN, Plaintiff, vs. EILEEN M. HOWARD, SANDRA THORDERSON and the STATE OF UTAH, Dept. of Human Services, Defendants.	PATERNITY ORDER 2198095 2-9-95 8:30 am Judge Rokich Case No. 910905919PA

Having heretofore entered Findings of Fact and Conclusions of Law, IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff Jerome Duncan is the natural father and defendant Eileen Howard are the natural parents of the minor child, Clel Howard born out of wedlock on 10-12-88.

2. Plaintiff is awarded custody of Clel subject to the following conditions:

a. Clel shall remain with the Thordersons until the end of the present school year. Ten days after the school year ends, Clel shall be delivered to plaintiff at Salt Lake City at plaintiff's expense.

b. Clel shall remain in the therapy program that he is presently enrolled, and the therapist shall prepare Clel for the transition of custody to his father. Plaintiff and defendants Thorderson shall bear the costs equally.

c. Plaintiff's therapist and Thorderson's therapist shall communicate and establish a treatment program and a visiting schedule for defendant Howard and defendants Thorderson to visit with Clel which shall be submitted to the Court for approval by the end of the school year.

d. Plaintiff and Thordersons shall name their therapists within 30 days from the date of entry of this Judgment.

3. Each party shall bear their own fees and costs.

Dated this 8 day of ~~December~~ February 1995.

BY THE COURT:

JOHN A. ROKICH, District Judge

approved:

JOHN SPENCER SNOW, Attorney for Thordersons

approved:

LESLIE W. SLAUGH, Attorney for Eileen Howard

Mailed a true copy of the foregoing this 9th day of December 1994 to John Spencer Snow 261 E 300 S #300, SLC, UT 84111 and to Leslie W. Slaugh P.O. Box 778, Provo, UT 84603.