

1986

Karen Shumann Marchant v. Donald J. Marchant : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860250-CA

IN THE COURT OF APPEALS IN AND FOR

THE STATE OF UTAH

KAREN SHUMANN MARCHANT,)	
)	
Plaintiff/Appellant,)	RESPONDENT'S BRIEF
)	
vs.)	
)	
DONALD J. MARCHANT,)	Case No. 860250-CA
)	Category No. 7
Defendant/Respondent.)	

APPEAL FROM TRIAL BEFORE
HONORABLE DONALD V. TIPPS,
SIXTH JUDICIAL DISTRICT COURT

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JURISDICTION AND PROCEEDINGS BELOW

This appeal is taken from a Decree of Divorce and Judgment entered on August 22, 1986, by the Honorable Don V. Tibbs of the Sixth Judicial District Court in and for Sevier County, State of Utah. Notice of Appeal to the Utah Supreme Court on September 16, 1986. Appellate review was subsequently assigned to this Court on January 28, 1987.

Plaintiff filed her Complaint seeking divorce from Defendant on August 5, 1985. The parties later stipulated to child custody and a partial property distribution, which stipulation was incorporated into a Stipulation for Temporary Order, and Temporary Order, dated October 2, 1986. The matter was tried to the Court on the merits on June 18, 1986 and the Court entered its Findings of Fact, Conclusions of Law, and Decree of Divorce on August 22, 1986.

STATUTES REQUIRING INTERPRETATION

1. Utah Code Annotated § 30-3-5 (1985) - see Addendum.
2. Utah Code Annotated § 30-3-10 (1977) - see Addendum.

STATEMENT OF FACTS

At the time of trial, Plaintiff and Defendant had been married in excess of 18 years. Mr. Marchant did not want the divorce when it was filed and would have even reconciled the day of trial. (Tr., p. 21, lines 1-7).

For the first 7 years of the marriage, the parties were childless and the two children, Brandon and Sara, were adopted when it appeared that the parties were not able to bear their own natural children. The children were undoubtedly the light and focus of the parties' attention at the time of birth, and, in Mr. Marchant's case, they continue to be. The children were raised in a stable family setting for a few years, but then, changes began to occur in the relationship of the parties, with the major contributing problems being created by the Plaintiff.

Defendant will not attempt to repeat many of the facts that have been set forth in Plaintiff's brief. However, additional facts need to be stated; facts which clearly and persuasively support the trial court's finding that the best interests of the children would be served by residing with their father. It is these facts that tipped the scales in favor of the father because the court, as did Dr. Elizabeth Stewart, the clinical psychologist, found that both parents were capable of being awarded custody of the minor children.

A. Facts Relating to Custody. At trial, Plaintiff called only herself as a witness in support of her claim that she should be awarded custody. Plaintiff's direct examination consists of only 17 pages in the record. (Tr., p. 26-43). On the other hand, Defendant called not only himself, but 3 other witnesses who gave the court considerable insight as to which parent should have custody of the children.

1. Don Marchant. Mr. Marchant was, of course, concerned about the relationship Mrs. Marchant was maintaining with her boss, Doug Fonnesbeck. While Plaintiff tried to convince the court that it was a casual relationship, Mr. Marchant did not see it that way and apparently, neither did the trial court. Mr. Marchant testified that he became concerned when Plaintiff started telling him that Mr. Fonnesbeck was a wonderful man, that he was understanding and that she very much appreciated him. Mr. Marchant was also told that Mr. Fonnesbeck had a "dumpy wife", that he wasn't understood at home, and soon Mr. Marchant started hearing things around town to the effect that something was going on between his wife and someone at work. (Tr., p.72, line 16-23). When Mr. Marchant asked his wife about that involvement, Mrs. Marchant told him that she had a strong attraction for Doug Fonnesbeck. When asked if it was a sexual attraction, she admitted that it was. (Tr., p.73, lines 1-3).

Even though Mr. Marchant only had visitation with the children on the weekend for almost a year (after Mrs. Marchant moved and went to Salt Lake City), Mr. Marchant testified concerning the activities he had with the children as follows:

"We've been fishing, we've been hunting, we've been to Disneyland, we've been bowling, we've been swimming, we've been to the Shakespearean Festival in Cedar City, we've been to church, we've been on boy scout trips, we have done a lot of things, horseback riding, we've worked and we have done farm work, we've been to the rodeos." (Tr., p. 88, lines 8-13).

Mr. Marchant also testified that his forest service job allowed him to have a flexible work schedule, he had the option to work anytime between the hours of 6:00 a.m. and 6:00 p.m., that he could work 4 days a week and have 3 days off, that because of a supervisory position, he could organize his own time to suit his particular needs. In addition, Mr. Marchant was entitled to 36 days of annual paid vacation. (Tr., p. 89, lines 7-12).

Plaintiff's sister Helen lived with her in Salt Lake City. Mr. Marchant objected to Helen being a mother to his children. Mr. Marchant felt that she was a bad influence on the children because her moral values did not coincide with what he thought was proper. (Tr., p. 89, lines 19-25; p. 90, lines 1-5).

Testimony was given by Mr. Marchant that he would hire a housekeeper or someone to be at the home at all times when he was not there and that he would do so, because of his concern that the children should not be left home alone, as he had

determined to be the case after the children moved to Salt Lake and resided with their mother. (Tr., p. 91, lines 8-10; lines 23-24; p. 92, lines 1-22).

Mr. Marchant also acknowledged that he had struck his wife on one occasion, and the court made specific inquiry as to that event. After the court made inquiry, Plaintiff's counsel (then David L. Mower) further inquired of Mr. Marchant as follows:

Q Karen was talking to me while you were giving your answer. The argument that led up to the striking was over the summer arrangement for the children, wasn't it?

A In truth, there were a whole bunch of things. It was one of those kinds of arguments that there probably should be a statute of limitations on how far back you can go. Fonnesbeck's relationship, our problems, the children, it was all there -- and I slapped her. (Tr., p. 111, lines 1-8).

2. Dale Hale Woolsey. Mr. Woolsey testified that he had known Don Marchant for approximately 10 years and that the two had served in a bishopric in the LDS Church. He testified that Mr. Marchant spent quite a bit of time with the children and even before the parties separated, Mr. Marchant would take the children fishing and hunting and that after the separation, he would spend 24 hours a day with the children when he could. (Tr., p. 112, lines 18-25; p. 113, lines 4-7).

3. Kay M. Bowden. Mrs. Bowden had been a friend and neighbor of Plaintiff and Defendant for 11 years and was employed as a teacher's aide at the elementary school where

the children attended prior to their move to Salt Lake City. At one time, she considered Karen Marchant to be her best friend and thought they had a lot in common up until about 1982. (Tr., p. 114, lines 20-25; p. 115, lines 13-19). Mrs. Bowden further indicated that Mr. Marchant was the one who brought the children to school and to church -- that he was always there, which didn't often happen in all father/children relationships.

Mrs. Bowden testified that on one occasion, she decided to try to talk to Karen. Of this experience, Mrs. Bowden testified as follows:

"This is my chance. I haven't talked to Karen for a long time. Karen had, even her appearance changed. Her dress had changed. Everything was for Karen, it seemed like. We no longer were in her field. And I confronted her. 'Karen, are you sure these trips are that important?' And she let me know and she let me know in no uncertain terms that she would not work for the peanuts that I worked for. She was going to the top and she said, 'When I leave my home, I leave homemade cookies and homemade bread.' And I said, 'Karen, that's not a marriage, that's not a family,' and that's the last she ever talked to me." (Tr., p. 116, lines 8-18).

When asked about what she observed between interaction of her own child and Sara, after Sara moved to Salt Lake City with her mother, Mrs. Bowden testified that Sara appeared to be more hyperactive than she could remember, having previously observed Sarah at the Bowdens' home, in

the neighborhood generally, and in school during the 1984-85 school year. (Tr., p. 116, lines 19-25; p. 117, line 1). She testified that she maintained the records for the school and that at the beginning of the year Sara was a top math student, but by April of that year she was at the bottom. She further stated that Mrs. Marchant was notified and advised that Sara would need remedial help the following year, and that it was up to Mrs. Marchant to let the school (in Salt Lake) know. (Tr., p. 117, lines 1-10). Of significance is the fact that on cross-examination, Mrs. Marchant admitted that in the year she had the children in Salt Lake, Sara was below average in several areas and not above average in any area. (Tr., p. 59, lines 15-20).

4. Dave Brown. Mr. Brown also testified that he had known both Plaintiff and Defendant for approximately 10 years and that he had children close to the ages of Brandon and Sara. He testified that Mr. Marchant was a good example as a father and admired him for the time he spent with his children. He also testified that he observed a change in Mrs. Marchant during the 3 years prior to the time she left the family home and moved to Salt Lake City.

A Well, it has been mentioned before, Karen was always active, a loving person. My wife and her were good friends. I thought a lot of Karen. And then the past few years she just slowly changed, especially when she started to work at her new job. And I don't remember -- Zions Bank was when I really noticed, we noticed her changing a lot.

Q What ways did she change?

A It seemed that I felt like she forgot her goals that was important to her in her religious beliefs, in her marriage, and in her relationship with her children. I also observed the kids coming home from school and being alone, and that was something that upset me that Karen didn't care enough not to work when her kids were home. (Tr., p. 124, lines 7-20).

When asked on cross-examination if he thought that Karen was a good mother, he indicated that he did not. (Tr., p. 125, lines 9-12).

SUMMARY OF ARGUMENT

1. The trial court acted within the bounds of its discretion in making the determinations of custody and property distribution. The trial court's findings concerning child custody were specifically related to the best interests of the children, their living conditions, and the respective parental qualifications and attitudes. Likewise, the trial court's approach to property division and alimony was equitable and within the recognized bounds of discretion.

2. The trial court fully and appropriately considered the best interests of the children and other pertinent criteria in awarding custody to the defendant. The specific findings regarding child custody are based on and articulate factors relevant to the best interests of the children as well as the

past conduct and demonstrated moral character of the parties. These criteria are statutorily prescribed in U.C.A. § 30-3-10 (1977) and are among those set forth in case precedent and expert commentary. Being faced with a choice between "good and better," the trial court specifically based its decision on the respective home environments, Plaintiff's evolving moral attitudes as a factor in the marital breakup, and Plaintiff's apparent selfishness at the family's expense. All of these and other determinative criteria were based in applicable law and well within the trial court's bounds of discretion.

3. An award of alimony was unnecessary and would have been inappropriate under the circumstances. Both parties were employed; each having good job security and each having an income sufficient to meet their respective needs. Both parties admittedly had been living beyond their means, and therefore, neither could expect to continue with their "accustomed lifestyle." Neither party represented any great potential for becoming a public charge. No alimony was warranted and the trial court, as a matter of discretion and obvious choice, made no such award.

4. The property distribution was fair and equitable in all respects, and the trial court exercised appropriate discretion in making its awards. Plaintiff received exactly one-half of all marital assets except for defendant's pension fund. The Plaintiff will be "cashed out" of a diversity of family property

including real property whose values have been economically eroded since the decree was entered. By at least one stated rule of thumb, Plaintiff might have received only one-third of the marital property as a matter of acceptable trial court discretion. Defendant would have had to quit his job to have access to the accumulated pension amount sought by Plaintiff which would have worked an unfair hardship on Defendant. The trial court's award was just, equitable and devoid of prejudicial discretion.

ARGUMENT

POINT ONE

THE TRIAL COURT ACTED WITHIN THE BOUNDS OF ITS DISCRETION IN MAKING THE DETERMINATIONS OF CUSTODY AND PROPERTY DISTRIBUTION

The factors upon which the trial court relied in rendering its decision are clearly stated and properly applied to the resolution of the issues before it. The court's observations with respect to the best interests of the children and other pertinent custody considerations are rational and straightforward. Likewise, the property values and the basis for the respective awards are specifically spelled out.

On review of such issues, the Utah Supreme Court has stated:

The trial court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests. A party appealing therefrom has

the burden to prove there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderates against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion.

English v. English, 565 P.2d 409, 410 (Utah 1977). See also Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974) and Baker v. Baker, 551 P.2d 1263 (Utah 1976).

Trial court discretion is particularly broadened and emphasized in child custody decisions. In Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979) the Utah Supreme Court emphasized their position with respect to alteration of custody decisions stating:

[T]he trial court is given particularly broad discretion in the area of child custody incident to separation or divorce proceedings. A determination of the "best interests of the [children]" frequently turns on numerous factors which the trial court is best suited to assess, given its proximity to the parties and the circumstances. Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment.

Id. at 511-12, quoted in, Wall v. Wall, 700 P.2d 1124, 1125 (1985).

Based on the evidence presented, the trial court in the present case has articulated specific findings relative to the best interests of the children, their living conditions, the relative parental qualifications, and parental disposition with respect to the care and nurturing of the minor children.

All of the findings made by the trial court in this matter are completely within its discretion. There was no misunderstanding or misapplication of the law which resulted in substantial and prejudicial error, there is no evidence which clearly preponderates against any finding, nor is there any serious inequity resulting which might otherwise manifest an abuse of the trial court's discretion. With respect to the custody of the children, there is nothing in evidence or on record to persuasively show that the custody determination made by the trial court is "flagrantly unjust" or contrary to the best interests and welfare of the children and the family.

POINT TWO

THE TRIAL COURT FULLY AND APPROPRIATELY CONSIDERED THE BEST INTERESTS OF THE CHILDREN AND OTHER PERTINENT CRITERIA IN AWARDED CUSTODY TO THE DEFENDANT

It is generally understood that in a divorce action, the court has and retains jurisdiction over matters of child custody as directed by Utah Code Annotated Section 30-3-5(3) (1985). In making the initial determination of which of the divorcing parents should have custody, the court gets its direction from Utah Code Annotated Section 30-3-10 (1977) which states:

[W]henver a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties (Emphasis added.)

From this statutory instruction, recent opinions have focused on categorical consideration of some of the factors which may be determinative of the best interests of the child. See Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982); Pusey v. Pusey, 728 P.2d 117 (Utah 1986). In both of these opinions, the court cites factors which might be considered in developing an overall view of the best interests of the child, as indicated by the above-cited statute.

Plaintiff cites Hutchinson and Pusey in her brief to support her position that the court is somehow bound solely to these criteria. However, the language of the various cases is most illustrative with respect both to the various factors, and the court's discretion in applying or dealing with them. For example, in Hutchison, the court emphasizes the broad discretion vested in the trial court both as a preamble to the factors noted in the opinion, and in the court's concluding remarks on the point, stating:

Some factors the court may consider in determining the child's best interests relate primarily to the child's feelings or special needs; the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodian's character or status or their capacity or willingness to function as parents; moral character and emotional stability, duration and depth of desire for custody, ability to provide personal rather than surrogate care, significant impairment of ability to function as a parent through drug abuse,

excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including in extraordinary circumstances, step-parent status; and financial condition. (These factors are not necessarily listed in order of importance.)

Assessments of the applicability and relative weight of the various factors in a particular case lie within the discretion of the trial court. "Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment. (Parenthetical in original. Emphasis added.)

Id., citing Jorgensen, supra, at 512.

Certainly the court did not intend by this helpful instruction to generate a finite list of factors to be considered. The court in effect added to the list in Pusey:

We believe that the choice in competing child custody claims should instead be based on function-related factors. Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child and the identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy. Another important factor should be the stability of the environment provided by each parent. (Emphasis added.)

Id. at 120, citing Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 18 Fam. L. Q. 1 (Spring 1984).

It is interesting and pertinent to note that the general emphasis of the Pusey case was to disavow any gender-based preference for determining the custodial parent. It is also interesting in that case that the court makes reference to the

earlier hypothetical scenario where "all other things being equal," there was a presumed preference to place children with the mother. Such a preference or presumption was specifically overruled in Pusey. However, in the case at bar, based on the testimony of Dr. Elizabeth Stewart, the clinical psychologist, the court specifically found that both parties are good parents, and both parties could be awarded custody of the minor children. (Tr. at page 7.) This sets up the situation alluded to in Pusey where from the start all things appeared to be equal. The trial court subsequently considered other criteria to "break the tie."

The court found itself in a situation quite similar to that of the trial court in Hogge v. Hogge, 649 P.2d 51 (Utah 1982). There it appeared that both the father and the mother were fit and proper and it was recognized that the court's decision required a finding of what was "'reasonable and necessary' for the 'best interest' of the child -- a standard which may frequently and of necessity require a choice between good and better." Id. at 55.

In the present case, in deciding between good and better, the trial court articulated various specific findings which governed its ultimate decision on custody. Some of the stated findings are among those cited in Hutchinson and Pusey. Those findings dealing specifically with custody are the following:

1. Finding of Fact 5.A. That both the plaintiff and defendant are good parents, and that both parties could be awarded custody of the minor children.

As discussed above, this finding wherein the court knew that it was dealing with a "close call," placed the court in the difficult position choosing between good and better.

In Wall v. Wall, 700 P.2d 1124 (Utah 1985), the lower court was similarly faced with a determination between good and better. In affirming the lower court's award of custody to the mother, this court stated:

In the instant case, the evidence, depending upon how it is viewed, could support a custody award to either party. In such case, we will defer to the judgment of the trial court. It was therefore not an abuse of discretion for the trial court to award custody to defendant.

Id. at 1125

2. Finding of Fact 5.B. That the marriage entered into between Plaintiff and Defendant was broken by the actions on the part of Plaintiff which were not justified.

This finding supports the court's apparent conclusion that Mrs. Marchant's unjustified acts of selfishness and rebellion and her unstable and changing moral values were inconsistent with a parental role. Without listing any specific actions, this finding is indicative of the court's consideration of the "past conduct and demonstrated moral character of each of the parties," particularly when viewed in light of the testimony of Dale Woolsey, Kay Bowden and Dave Brown. Since this standard is clearly articulated in the custody statute, it would certainly be within the court's discretion to apply such a finding to its overall custody decision.

3. Finding of Fact 5.C. That when the plaintiff vacated the family home in Central, Utah, and moved to Salt Lake City, Utah, in September of 1985, she moved into an apartment and in approximately November or December of 1985, her sister, another woman who is divorced, moved in with her, together with her minor child. That the standard of living under which plaintiff has been residing while having the temporary custody of the children in Salt Lake City, Utah, is not what it should have been nor was it in the best interests of the children.

There is no question that this finding is specifically related to the best interests of the children. The finding recognizes that the children were living in a situation where two families were found under the same roof. Testimony indicated that Plaintiff's sister, Helen, did much of the caring for and "mothering" of the children. There is direct testimony that this "mother figure" had no qualms about bringing alcohol into the home which necessitated specific moral instruction to the children with respect to it.

By comparison, the father's home presented no such moral obstacles, and in fact it represented the childrens' closest association with the typical and traditional home life. As a matter of the childrens best interests, the trial court disapproved of the communal lifestyle presented by the Salt Lake City arrangement in favor of the traditional lifestyle in the father's home and surroundings where the children had both been raised since birth.

4. Finding of Fact 5.D. That during the latter part of the marriage between plaintiff and defendant, plaintiff became involved with another man and this had an influence with the court in determining what is the best interests of the minor children.

Again, this addresses Plaintiff's past conduct and demonstrated moral character which is a statutory criteria for determining child custody. Although different conclusions may be drawn from this finding with respect to the seriousness of the involvement, the court need not be more specific or explicit in its language. There was some conflict in the evidence where Plaintiff stated that she had never been sexually involved outside the marriage; but, she admitted to spending some time alone in a motel room with a man she admittedly loved to whom she had sexual attractions, and who had repeatedly given her gifts and flowers. (Tr., p. 72-76). The trial court obviously found it morally inappropriate for Mrs. Marchant to tolerate and rejoice in these gifts from her boss. These and other subtle indications that a new relationship was in bloom allow the direct conclusion that such overtures aided the cooling process in the marital relationship. For Mrs. Marchant to flaunt these gifts from a man to whom she was not married, while not immoral per se, had an obvious undermining effect on the marriage and, at a minimum, presented to the children an unhealthy example of matrimonial conduct. Plaintiff argues that such instances of gifts and routine associations with her boss do not go beyond the normal "friendship relationship with a man." The trial court obviously took a different view. Furthermore, to argue that such behavior and such a relationship could have been in any way "in the best interests of the children," is ludicrous.

5. Finding of Fact 5.E. That during the latter years of the marriage, Plaintiff's lifestyle changed and that change was not in the best interests of the family unit, but rather the change was pursuant to Plaintiff's desires and for her benefit to the exclusion of the family unit.

Plaintiff's pursuit of personal, selfish interests at the expense of the family unit is a resounding negative with respect to the overall best interests of the children. This notion is consistent with the opinion of the psychologist, Elizabeth B. Stewart, Ph.D., who, in her evaluation of Mrs. Marchant, under the heading "Capacity for Custody," states:

"Mrs. Marchant's desire for a better life for herself very probably will be a disadvantage for the children who may be exposed to a less desirable lifestyle."

(The entire context of Dr. Stewart's evaluation is attached in the Addendum as Exhibit 5.)

In Hutchinson v. Hutchinson, supra, the court was dealing with a custodial contest between a parent and a non-parent. The court recognized a presumption in favor of the parent and articulated factors which would overrule the presumption. In that context, all three of the factors which give rise to the presumption must be absent:

That no strong mutual bond exists, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child, and that the parent lacks the sympathy for an understanding of the child that is characteristic of parents generally.

Id. at 41.

Although the present case presents a contest between both

parents, the fact that Plaintiff was given to her own desires and benefits to the exclusion of the family unit was one of the foremost factors warranting that custody be given to Mr. Marchant. Then, the trial court's observations are consistent with the Hutchinson court as to the practical effect upon the children and the childrens' best interests.

The cumulative effect of the Court's findings with respect to child custody gives precise and ample indication of those factors to which the Court looked in making its determination between good and better. Considerations of those factors of past conduct and demonstrated moral standards in addition to the best interest of the children, as weighed by the trial court, were sufficient to warrant the custody award to Defendant.

POINT THREE

AN AWARD OF ALIMONY WAS UNNECESSARY AND WOULD HAVE BEEN INAPPROPRIATE UNDER THE CIRCUMSTANCES

In English v. English, 565 P.2d 409 (Utah 1977), the Utah Supreme Court expressed the purpose of alimony as follows:

[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge.

English v. English, 565 P.2d at 411, citing Nais v. Nais, 107 Ariz. 411, 489 P.2d 48, 50 (1971).

In Jones v. Jones, 700 P.2d 1072 (Utah 1985), the Utah

Supreme Court quoted with approval this language in English, and enumerated the three factors which must be considered in fixing a reasonable alimony award:

1. The financial conditions and needs of the wife;
2. The ability of the wife to produce a sufficient income for herself;
3. The ability of the husband to provide support.

Id., at 1075.

In the present case, Finding of Fact 10 specifically provides that as of June 18th, 1986, "Plaintiff receives as net income the sum of \$1,321.00 per month, and Defendant receive net income in the sum of \$2,114.00 per month." The difference in earnings is \$793.00 per month in favor of the Defendant. Recognizing that the Defendant had been awarded the care, custody and control of two minor children, together with the incumbent expenses of day-care and other aspects of child support, the numbers do not then become as disparate as they may initially appear. The Defendant was also charged with the responsibility to maintain health and accident insurance on the minor children and for any costs not covered. Defendant was also charged with the responsibility to pay past medical and dental bills pursuant to the Temporary Order of the Court dated October 2, 1985. (Finding of Fact 12.) The Defendant remains saddled with the lion's share of the marital debts totalling \$32,800. (Finding of Fact 13.)

In terms of property division, Defendant was responsible for payment of \$40,250 to Plaintiff for equity from the sale of the farm, which may or may not take place for the values contemplated at the time. Plaintiff's only indication of "need", was her expressed desire to return to school. This would cost her \$135.00 per semester hour and she testified that she estimated her needs for alimony at \$200.00 per month. (Tr., p. 43). At the time of trial, Plaintiff earned net income of \$1,321.00 per month which allowed her to live in an area she selected and in a residence that she thought was totally satisfactory for herself and the two children. Furthermore, Plaintiff had lived in Salt Lake City during the separation period without a temporary alimony award and did not seek one during that period of time.

With respect to the factors enumerated in Jones v. Jones, supra, it is evident that the trial court found in the Plaintiff an ability to produce sufficient income for herself, that her financial needs and conditions were not beyond her productive ability, and that Defendant's ability to provide support was not so substantial as to justify an award of alimony. It is also evident from the testimony, that both parties were living beyond their means and that both would have to curtail their spending and retreat to a point where they could utilize their available income to satisfy their existing obligations. In this context,

neither party would have been able to maintain his or her "accustomed life style." Plaintiff had been working as a secretary for Intermountain Health Care for some time with no indication that her job was in jeopardy or that her income would be any way affected by the divorce. It would be difficult to conclude from such facts that the Plaintiff represented a potential for becoming a public charge.

In Dorrity v. Dorrity, 645 P.2d 56 (Utah 1982), the Utah Supreme Court articulated the established standard of review in alimony disputes as follows:

It is well settled that this court will not disturb the trial court's distribution of property and award of alimony in a divorce proceeding unless a clear and prejudicial abuse of discretion is shown.

Dorrity v. Dorrity, 645 P.2d at 59.

Both parties' standard of living had been affected in the negative. Both parties were then living beyond their means. Both parties are firmly established in their employment and each has continuing employment possibilities. Neither party presents any great potential for becoming a public charge. Therefore, no alimony was warranted by the circumstances. The finding that Plaintiff is not entitled to alimony (Finding of Fact No. 5), was entirely within the Court's discretion and under no circumstances was that discretion exercised to the extent of undue prejudice.

POINT FOUR

THE PROPERTY DISTRIBUTION WAS FAIR AND EQUITABLE IN ALL RESPECTS, AND THE TRIAL COURT EXERCISED APPROPRIATE DISCRETION IN MAKING ITS AWARDS

In the recent case of Claus v. Claus, 727 P.2d 184 (1986), the court was asked to review a disputed property distribution. The Court cited its earlier opinion in Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980), for the following proposition:

[T]here is no fixed formula upon which to determine a division of properties, it is a prerogative of the court to make whatever disposition of property as it deems fair, equitable and necessary for the protection and welfare of the parties. In the division of marital property, the trial judge has wide discretion, and his findings will not be disturbed unless the record indicates an abuse thereof.

Id. at 185, citing Fletcher, supra, at 122.

In the instant case, Plaintiff accurately points out that, except for the pension plan, the Court divided the marital property equally between the parties and required in the form of a Judgment, that the sum of \$40,250 be paid to the Plaintiff over a five year period, in yearly installments, with interest on the amount at the rate of 8% per annum. (Decree of Divorce, paragraph 6-B.) Plaintiff curiously overlooks the fact that Defendant was also required to pay all of the marital debts in the approximate amount of \$32,800.

For the Plaintiff to argue that she did not get an equal share of the retirement fund and that therefore the property award is inequitable and an abuse of discretion is ludicrous.

Indeed, in this matter the Court might well have resorted to the rule of thumb followed in Cox v. Cox, 532 P.2d 994 (Utah 1975) wherein the court stated:

Because of the variableness and complexities involved in family troubles there is no firm rule or formula that can be uniformly applied in all cases in the legal surgery necessary to severing such relationships which will best serve the desired objective of allocating the economic resources so that the parties involved can reconstruct their lives in the most happy and useful manner. However, as an aid in that endeavor, in the past the courts have often resorted to a general "rule of thumb" of one-third to the wife and two-thirds to the husband; and that is what the court appears to have done here. Upon our survey of the circumstances of these parties we see no reason to believe that the application of that general formula was so inequitable or unjust that we should interfere therewith.

Cox v. Cox, 532 P.2d at 997. (emphasis added)

Following the Cox rule, the court might well have fashioned a less equitable result and still have been within the bounds of appropriate discretion.

Mr. Marchant testified that the only way he could have gotten any distribution from his pension was to quit his job. Should this court wish to make further inquiry into the equities, Defendant would likely offer Plaintiff \$3,000 to assume \$16,400 of the marital debt (one-half of the \$32,800 total). Also, this court may wish to consider the fact that had Mr. Marchant been able to withdraw \$6,000 from his retirement fund, he would have triggered an income tax liability for which he would have been solely responsible. Mrs. Marchant would have received this \$6,000 tax-free. In order to avoid these tax consequences, Mr.

Marchant's only alternative would have been to borrow the money, incur additional interest expense, and place the remainder of his unencumbered assets in further legal jeopardy.

There is no evidence that the property distribution was in any way a prejudicial abuse of the trial court's discretion. With property values in the Sevier Valley receding, in liquidated dollars, the practical effect has worked to the Plaintiff's advantage. In Graff v. Graff, 699 P.2d 765 (1985), the Utah Supreme Court has observed the following rule on appellate review of such matters:

The rule on appellate review affords considerable deference to the trial court's findings and conclusions. The burden is on the one attacking the decree to show that the evidence does not support the findings.

Id. at 766.

Plaintiff's allegation of inequity simply does not compute. The real equities favor her and she suffers from no prejudice or abuse of discretion.

CONCLUSION

Appellate courts have generally emphasized that the trial court is vested with certain presumptions of propriety in making a final ruling on a given matter. This general presumption favoring the intimacy of the trial forum and the trial court's ultimate discretion regarding factual and legal issues has

typically been given even greater difference in domestic matters.

The trial court is given "particularly broad discretion in the area of child custody." Likewise, as to financial and property interests, the trial court is vested with "considerable latitude."

This latitude and broad discretion is not without its limits. These limits only exist where it can be shown, by the party attacking the trial court's decision, that evidence "clearly preponderates against the findings," that there was a "misunderstanding or misapplication of the law," that the trial court's action is "flagrantly unjust" or that the trial court's decision works such a harsh inequity as to give "clear evidence" that the trial court has "abused its discretion." Plaintiff has not shown, nor can she show that any of these limits were exceeded because they simply were not.

All of the testimony relative to child custody developed the issue as a "close call" -- a choice between "good and better." The trial court made a specific finding to this effect. With statutory direction the trial court found that Plaintiff's past actions and conduct were not justified and caused the marriage to fail. The trial court specifically found that Plaintiff's living arrangements in Salt Lake City were not in the best interests of the children. There was articulated disapproval of Plaintiff's past moral conduct and a specific statement that such conduct was

influential in the court's overall determination regarding the best interests of the children. Finally, the trial court specifically found that the Plaintiff's lifestyle had changed and that the change did not work to the best interests of the children or the family unit.

Cited cases have developed veritable "laundry lists" of non-exclusive or suggested criteria. Many of the listed factors are implicit in the trial court's pronounced findings. For example, the court didn't say that Plaintiff was "unstable"; however, it did find that her lifestyle had changed. The trial court did not find that Plaintiff had demonstrated an unwillingness to function as a parent; but it did find that the Plaintiff's standard of living was not what it should have been and that Plaintiff had chosen to pursue her personal desires to the exclusion of the family unit. There is no requirement that the court consider all available criteria and make a specific finding as to each. Such word games should not be condoned or encouraged on appellate review.

The appropriate requirement is, and should be, that the trial court articulate the specific findings on which the custody determination was based. Such specific findings were articulated in this case. They are set forth herein, with abundant review and commentary. These findings give substantial and significant support to the custody determination made by the trial court. Contrary to Plaintiff's assertions, the findings, as articulated,

do not evince any misapplication or misunderstanding of the law nor do they demonstrate any "flagrant injustice" or abuse of discretion.

An alimony award should be preceded by a finding that the wife has needs which she cannot meet and that the husband has an ability to meet those needs. (In this context, "needs" should be distinguished from "wants.") Also considered is the wife's accustomed lifestyle and an interest in preventing her from becoming a public charge.

In this case, both had grown accustomed to living beyond their means. Both parties had a stable and fairly respectable income. Their employment potentials were bright, leaving little concern of public burden. In testifying concerning her "needs," Plaintiff stated that she "wanted" to go back to school. With an anticipated cost of \$135 per semester hour. There were no calculations of need beyond this. Plaintiff arbitrarily stated that she would "need" \$200 per month. Otherwise, this purported "need" was unsupported by the evidence. Without such evidence, the trial court appropriately declined the request for alimony.

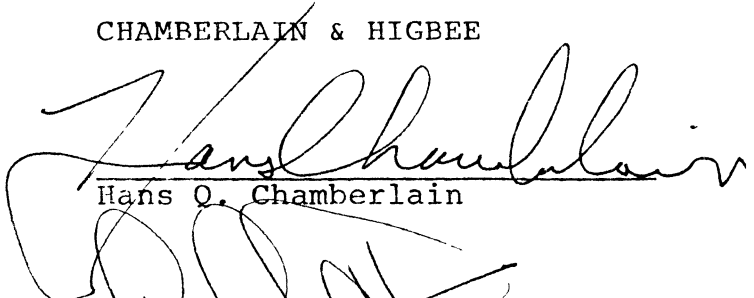
There is no fixed formula to prescribe property distributions in domestic matters. In come cases the wife has received a 40-60 split, in others a 1/3-2/3 split. Such splits are understood to be highly discretionary at the trial court level.

In the present case, Plaintiff has been awarded a 50-50 split of approximately \$86,000 of diverse real and personal property with no responsibility for any of the debt. She has been awarded 1/3 of an \$18,000 pension fund which can only be liquidated on Defendant's job termination. With this award in-hand, Plaintiff complains of inequity and charges abuse of judicial discretion in the trial court's award which denies her an additional \$3,000. Given the recognized discretion and the relative equities, Plaintiff's assertions are meritless.

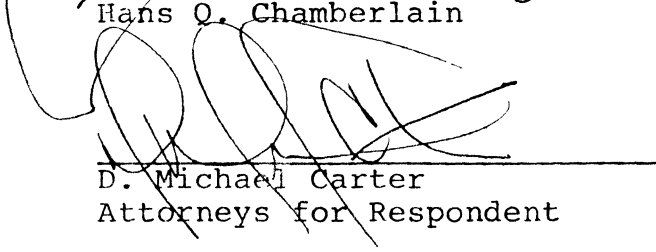
Plaintiff has failed to show any flagrant injustice. Plaintiff has likewise failed to show any material misapplication or misunderstanding of the law. There has been no showing of evidence which "preponderates against the findings," or demonstrates any abuse of the trial court's discretion. Because Plaintiff has failed in all respects to carry her burden, the trial court's decision should be affirmed.

Respectfully submitted this 2nd day of April, 1987.

CHAMBERLAIN & HIGBEE




Hans Q. Chamberlain



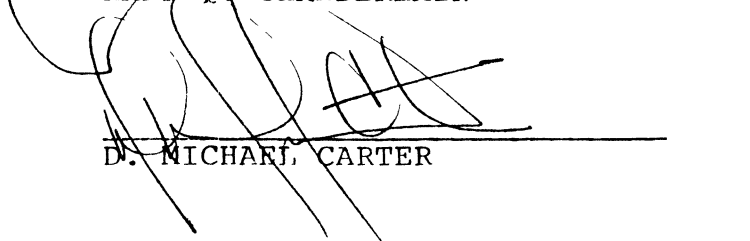
D. Michael Carter
Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of April, 1987, four (4) copies of the within and foregoing RESPONDENT'S BRIEF were mailed to Craig M. Peterson, Esq. and Paul E. Wood, Esq., LITTLEFIELD & PETERSON, 426 South 500 East, Salt Lake City, Utah 84102, first-class postage prepaid.



HANS Q. CHAMBERLAIN



D. MICHAEL CARTER

ADDENDUM

1. UCA § 30-3-5 (1985)
2. UCA § 30-3-10 (1977)
3. Decree of Divorce
4. Findings of Fact
5. Dr. Elizabeth Stewart's Custody Evaluation
6. Partial Transcript of Findings of Fact and Conclusions
of Law

30-3-5. Disposition of property - Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony. (1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties and children, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child

(2) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse shall automatically terminate upon the remarriage of that former spouse, unless that marriage is annulled and found to be void ab initio, in which case alimony shall resume, providing that the party paying alimony be made a party to the action of annulment and that party's rights are determined

(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.

30-3-10. ' Custody of children. In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise.

SEVIER COUNTY
9605
1986 SEP -3 AM 9 15
DEVON J. HIGBEE
Clerk
Anderson

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
Attorneys for Defendant
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Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SEVIER COUNTY, STATE OF UTAH

KAREN SCHUMANN MARCHANT,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
)	
vs.)	
)	
DONALD J. MARCHANT,)	Civil No. 9605
)	
Defendant.)	

The above-entitled matter was tried to the Court, sitting without a jury, on June 18th, 1986. At that time, Plaintiff appeared, together with her attorney, David L. Mower. Defendant likewise appeared, together with his attorney of record, Hans Q. Chamberlain. More than three months have elapsed since the filing of the Complaint by Plaintiff, and Plaintiff and Defendant were each called to testify concerning said matter, together with other witnesses. The matter having been submitted to the Court, and the Court having been fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That Plaintiff was a bona fide resident of Sevier County, Utah, for more than three months prior to the time

1 the Complaint was filed in this matter.

2 2. Plaintiff and Defendant were married on September 8th,
3 1967, in Salt Lake City, Utah, and ever since said time have been
4 and now are husband and wife.

5 3. The Court finds that Defendant has treated the Plaintiff
6 cruelly, both mentally and physically, and that the parties
7 simply cannot continue to maintain the marital relationship. By
8 reason of the same, Plaintiff is entitled to a Decree of Divorce,
9 final and effective upon entry, the Court, for good cause, having
10 waived the interlocutory period required by law.

11 4. Two children were adopted by the parties, namely,
12 Brandon Justice Marchant, born February 1, 1974, and Sara Marlana
13 Marchant, born April 22, 1977. Pursuant to a Stipulation
14 concerning temporary custody and subsequent Order by the Court
15 dated October 2nd, 1985, the children have been residing with
16 Plaintiff in Salt Lake City, Utah, and Defendant has been
17 visiting with the children every other weekend by traveling from
18 his home in Central, Sevier County, Utah, to Salt Lake City,
19 Utah, picking up the children, returning to his home, and
20 thereafter returning the children to the Plaintiff's home on
21 Sunday evening and then again returning to Defendant's home in
22 Central, Utah.

23 5. In determining what is in the best interests of the
24 children for purposes of determining custody, the Court makes the
25 following specific findings:

1 A. That both the Plaintiff and Defendant are good
2 parents, and that both parties could be awarded custody of
3 the minor children.

4 B. That the marriage entered into between Plaintiff
5 and Defendant was broken by the actions on the part of
6 Plaintiff, which were not justified.

7 C. That when the Plaintiff vacated the family home in
8 Central, Utah, and moved to Salt Lake City, Utah, in
9 September of 1985, she moved into an apartment and in
10 approximately November or December of 1985, her sister,
11 another woman who is divorced, moved in with her, together
12 with her minor child. That the standard of living under
13 which Plaintiff has been residing while having the temporary
14 custody of the children in Salt Lake City, Utah, is not what
15 it should have been nor was it in the best interests of the
16 children.

17 D. That during the latter part of the marriage between
18 Plaintiff and Defendant, Plaintiff became involved with
19 another man and this fact had an influence with the Court in
20 determining what is in the best interests of the minor
21 children.

22 E. That during the latter years of the marriage,
23 Plaintiff's lifestyle changed and that change was not in the
24 best interests of the family unit, but rather the change was
25 pursuant to Plaintiff's desires and for her benefit to the
exclusion of the family unit.

1 6. That by reason of the foregoing Findings of Fact, the
2 Court finds that it is in the best interests of the minor
3 children that their custody be awarded to Defendant, effective
4 July 1st, 1986, subject to reasonable rights of visitation vested
5 in the Plaintiff, including, but not limited to the following
6 specific visitation privileges:

7 A. Every other weekend commencing Friday at 6:00 p.m.
8 and ending Sunday at 7:00 p.m., provided however, that for
9 each Sunday while the children are in the care of the
10 Plaintiff, the children shall be required to attend church
11 and it can be a church of their choice.

12 B. Every other holiday, commencing with the 24th of
13 July, 1986, except Christmas at which time the children are
14 to remain in the care of the Defendant.

15 C. A six-week visitation with the minor children
16 during the summer months commencing in the summer of 1987,
17 at a time as may be mutually agreeable between the parties.

18 7. By reason of the fact that the care of the minor
19 children is to be awarded to Defendant, the Court does not award
20 child support to either party.

21 8. The Court finds that Plaintiff is not entitled to
22 alimony.

23 9. The assets accumulated by Plaintiff and Defendant are
24 awarded as follows:

25 A. The family home located in Central, Sevier County,
Utah, is hereby awarded to Defendant, subject to the debt

1 thereon which Defendant shall be required to pay and
2 discharge, and to indemnify and hold Plaintiff harmless from
3 the payment of the same. Plaintiff is entitled to one-half
4 of the equity owned by the parties in said home, or the sum
5 of \$17,000, and Plaintiff is hereby awarded a lien against
6 said home in that amount subject to payment as hereinafter
7 set forth. Said home is more particularly described as
8 follows:

9 Beginning at a point lying N 79°53'04"E for
10 2483.91' more or less from the SW Corner of
11 Section 14, T.24S., R3W., SLB&M and running thence
12 South along the west line of State Highway Right
13 of Way, for 104', thence West for 192.31'; thence,
14 North for 104'; thence East for 192.31' to the
15 point of beginning and containing 0.47 acres, more
16 or less.

17 B. The Court finds that the farm owned by the parties
18 located in Sevier County has a total net equity in the sum
19 of \$43,500 and Plaintiff and Defendant are each entitled to
20 one-half of said equity, or the sum of \$21,750 each. The
21 farm, consisting of approximately 43.5 acres shall be sold
22 on or before June 18th, 1987, with the proceeds to be
23 distributed as hereinafter set forth. The remaining 43.5
24 acres of the farm to be sold is more particularly described
25 as follows:

26 PARCEL 1:

27 Commencing 1.55 chains North and 2.25 chains West
28 of the Southeast corner of Section 15, Township 24
29 South, Range 3 West, of the Salt Lake Meridian,
30 thence West 12.00 chains; thence South 1.55
31 chains; thence West 15.77 chains; thence North

1 10.00 chains; thence East 10.00 chains; thence
2 South 0.80 of a chain; thence East 6.95 chains;
3 thence South 2.13 chains; thence East 13.05 chains
4 to West line of Rio Grande & Western Railway;
5 thence Southwesterly along the West line of said
6 railway to the place of beginning, containing
7 20.74 acres, more or less, situate in the South
8 half of the Southeast quarter of aforesaid Section
9 15.

10 PARCEL 2:

11 Commencing at a point 14.10 chains East and 86
12 links North of the Southwest corner of Section 14,
13 Township 24 South, Range 3 West, SLB&M; running
14 thence East 17.95 chains; thence North 2.88
15 chains; thence East 184 feet; thence North 85.42
16 feet; thence East 146 feet, more or less, to West
17 line of State Hwy. right-of-way; thence North,
18 along the same 104 feet; thence West 11.00 chains;
19 thence North 3.89 chains; thence West 10.50
20 chains; more or less, to the Canal; thence
21 Southwesterly along the canal 10.00 chains, more
22 or less, to the place of beginning, cont. approx.
23 15.61 acres.

24 Excluding therefrom:

25 Beginning at a point lying N 79°53'04"E for
26 2483.91' more or less from the SW Corner of
27 Section 14, T.24S., R3W., SLB&M and running
28 thence South along the west line of State
29 Highway Right of Way, for 104', thence West
30 for 192.31'; thence, North for 104'; thence
31 East for 192.31' to the point of beginning
32 and containing 0.47 acres, more or less.

33 PARCEL 3:

34 Commencing 1.55 chains North of the Southwest
35 corner of Section 14, Township 24 South, Range 3
36 West, Salt Lake Base and Meridian; thence North
37 1.50 chains; thence North 12° 14' East along East
38 Line of Rio Grande & Western Railway 4.10 chains,
39 more or less, to a point 7.05 chains North and
40 1.60 chains East of the Southwest corner of
41 aforesaid Section 14; thence East 13.35 chains to
42 Canal; thence Southwesterly along canal to Section
43 line; thence West 1.80 chains; thence North 9° 35'
44 East 1.55 chains; thence West 11.77 chains, more
45 or less, to the place of beginning.
Containing 7.83 acres, more or less.

1 C. The farm equipment owned by the parties is hereby
2 awarded to Defendant, provided, however, that Defendant
3 shall pay to Plaintiff the sum of \$1,500 for her interest in
4 said equipment.

5 D. Plaintiff is therefore awarded the total sum of
6 \$40,250 for her interest in the above-described property.
7 To secure payment of the same, Plaintiff is hereby awarded a
8 lien against the farm property above-described in said
9 amount and when the farm is sold as ordered herein,
10 Plaintiff shall be entitled to receive the first \$40,250,
11 and the excess, if any, is hereby awarded to Defendant. If
12 the sale of the farm property fails to produce \$40,250 to
13 satisfy Plaintiff's lien, Plaintiff shall be entitled to all
14 of the proceeds available for distribution at the time of
15 the sale, and the difference between that amount and the sum
16 of \$40,250 shall constitute a Judgment against Defendant and
17 shall be payable by the Defendant to the Plaintiff over a
18 five year period, in yearly installments, together with
19 interest on said amount at the rate of 8% per annum.

20 E. The proceeds that will be available for
21 distribution between Plaintiff and Defendant arising from
22 the sale of 15 acres of the farm property due and payable in
23 August of 1986, consisting of approximately \$8,000 shall be
24 equally divided between Plaintiff and Defendant.
25

1 F. The 21.53 shares of water owned by the parties that
2 is surplus water over and above that which is needed to
3 irrigate the farm, having an estimated value of \$1,000 per
4 share, shall be sold by the Defendant on or before June
5 18th, 1987, and the proceeds therefrom, shall be divided
6 equally between the Plaintiff and Defendant.

7 G. Plaintiff and Defendant are each awarded all of the
8 personal property now in their possession.

9 H. The photographs and family albums now in the
10 possession of the Plaintiff are to be delivered by the
11 Plaintiff to the Defendant and he shall be entitled to
12 reproduce any of said photographs within thirty days
13 thereafter. At the end of thirty days, said photographs and
14 family albums are to be returned to the Plaintiff in the
15 same condition as when they were delivered by the Plaintiff
16 to the Defendant.

17 10. The Court finds that as of June 18th, 1986, Plaintiff
18 receives as net income the sum of \$1,321.00 per month, and
19 Defendant receives net income in the sum of \$2,114.00 per month.

20 11. The Court finds that Defendant has a vested interest in
21 his retirement by reason of his U.S. Government employment in the
22 approximate sum of \$18,000, as of June 18th, 1986, and that
23 Defendant should be awarded all of the right, title and interest
24 in said retirement, provided, however, that Plaintiff is entitled
25 to \$6,000 by reason of said vested interest. Said sum shall be

1 payable by the Defendant to the Plaintiff over a ten year period,
2 together with interest at the rate of 8% per annum, payable at
3 the rate of \$600.00 per year, together with accrued interest,
4 with the first annual payment of principal and interest to be
5 paid by the Defendant to the Plaintiff on June 1st, 1987, and
6 continuing thereafter on said day of each succeeding year until
7 the entire principal in the sum of \$6,000, together with accrued
8 interest is paid in full. Defendant shall be entitled to prepay
9 said amount at any time without penalty.

10 12. Defendant shall be required to maintain health and
11 accident insurance on behalf of said minor children, and for any
12 medical or dental costs which are not paid for by said insurance,
13 Defendant shall be required to pay and discharge the same.

14 13. The debts accumulated between Plaintiff and Defendant
15 after October 2nd, 1985, shall be paid by the party incurring the
16 same, with the exception of the medical and dental bills which
17 have been incurred by the Plaintiff and the minor children, which
18 shall be paid by Defendant as per the Temporary Order of the
19 Court dated October 2nd, 1985. In connection with said medical
20 bills to be paid by Defendant, the parties are each required to
21 first submit the same to their respective carrier for payment and
22 in the event payment is not made, Defendant shall thereafter pay
23 and discharge said medical and dental expenses.

24 14. The Court finds that neither party is entitled to an
25 award of attorney's fees.

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CONCLUSIONS OF LAW

1. That Plaintiff is entitled to a Decree of Divorce from the Defendant, final upon entry, upon the grounds of physical and mental cruelty.

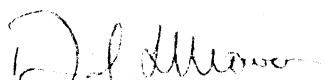
2. The care, custody and control of the minor children is hereby awarded to the Defendant, effective July 1st, 1986, upon the terms and conditions as set forth above.

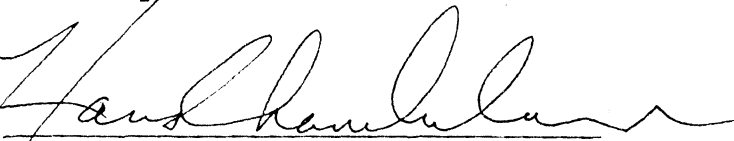
3. That the Decree of Divorce include and be consistent with the Findings of Fact as above set forth.

DATED this 22nd day of August, 1986.


DON V. TIBBS
District Judge

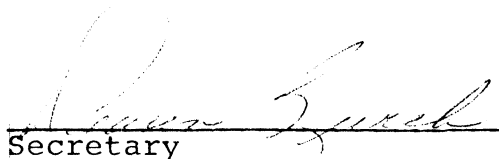
APPROVED AS TO FORM:

 8/18/86
DAVID L. MOWER
Attorney for Plaintiff


HANS Q. CHAMBERLAIN
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the within and foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to Mr. David L. Mower, JACKSON, McIFF & MOWER, 151 North Main, Richfield, Utah 84701, first-class postage prepaid, on this 2nd day of September, 1986.


Secretary

SEVIER COUNTY
FILED IN 9605

1986 SEP -3 AM 9:15

DEVOICED BY COURT
BY *Merrill* JURY
Anderson

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
Attorneys for Defendant
250 South Main
P. O. Box 726
Cedar City, Utah 84720
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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
SEVIER COUNTY, STATE OF UTAH

KAREN SCHUMANN MARCHANT,)	
)	
Plaintiff,)	DECREE OF DIVORCE
)	
vs.)	
)	
DONALD J. MARCHANT,)	Civil No. 9605
)	
Defendant.)	

This matter having been tried to the Court, sitting without a jury, on June 18th, 1986. On said date, Plaintiff having appeared, together with her attorney of record, David L. Mower, and Defendant having appeared, together with his attorney, Hans Q. Chamberlain, and Plaintiff and Defendant having been sworn to testify concerning said matter together with other witnesses, and the Court having been fully advised in the matter and having made its Findings of Fact and Conclusions of Law, now therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Plaintiff be granted a Decree of Divorce from Defendant providing as follows:

1. The Decree of Divorce shall become final upon the filing of the same in the office of the Sevier County Clerk.

CHAMBERLAIN
HIGBEE
ATTORNEYS AT LAW
250 SOUTH MAIN
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1 2. That two children were adopted by the parties, namely,
2 Brandon Justice Marchant, born February 1, 1974, and Sara Marlana
3 Marchant, born April 22, 1977. Pursuant to a Stipulation
4 concerning temporary custody and subsequent Order by the Court
5 dated October 2nd, 1985, the children have been residing with
6 Plaintiff in Salt Lake City, Utah, and Defendant has been
7 visiting with the children every other weekend by traveling from
8 his home in Central, Sevier County, Utah, to Salt Lake City,
9 Utah, picking up the children, returning to his home, and
10 thereafter returning the children to the Plaintiff's home on
11 Sunday evening and then again returning to Defendant's home in
12 Central, Utah.

13 3. That pursuant to the Finding of Fact made herein, the
14 Court finds that it is in the best interests of the minor
15 children that their custody be awarded to Defendant, effective
16 July 1st, 1986, subject to reasonable rights of visitation vested
17 in the Plaintiff, including, but not limited to the following
18 specific visitation privileges:

19 A. Every other weekend commencing Friday at 6:00 p.m.
20 and ending Sunday at 7:00 p.m., provided, however, that for
21 each Sunday while the children are in the care of the
22 Plaintiff, the children shall be required to attend church
23 and it can be a church of their choice.

24 B. Every other holiday, commencing with the 24th of
25 July, 1986, except Christmas at which time the children are
 to remain in the care of the Defendant.

1 C. A six-week visitation with the minor children
2 during the summer months commencing in the summer of 1987,
3 at a time as may be mutually agreeable between the parties.
4 4. That by reason of the fact that the care of the minor
5 children is to be awarded to Defendant, the Court does not award
6 child support to either party.
7 5. That the Court finds that Plaintiff is not entitled to
8 alimony.
9 6. That the assets accumulated by Plaintiff and Defendant
10 are awarded as follows:
11 A. The family home located in Central, Sevier County,
12 Utah, is hereby awarded to Defendant, subject to the debt
13 thereon which Defendant shall be required to pay and
14 discharge, and to indemnify and hold Plaintiff harmless from
15 the payment of the same. Plaintiff is entitled to one-half
16 of the equity owned by the parties in said home, or the sum
17 of \$17,000, and Plaintiff is hereby awarded a lien against
18 said home in that amount subject to payment as hereinafter
19 set forth. Said home is more particularly described as
20 follows:
21 Beginning at a point lying N 79°53'04"E for
22 2483.91' more or less from the SW Corner of
23 Section 14, T.24S., R3W., SLB&M and running thence
24 South along the west line of State Highway Right
25 of Way, for 104', thence West for 192.31'; thence,
North for 104'; thence East for 192.31' to the
point of beginning and containing 0.47 acres, more
or less.

1 B. The Court finds that the farm owned by the parties
2 located in Sevier County has a total net equity in the sum
3 of \$43,500 and Plaintiff and Defendant are each entitled to
4 one-half of said equity, or the sum of \$21,750 each. The
5 farm, consisting of approximately 43.5 acres shall be sold
6 on or before June 18th, 1987, with the proceeds to be
7 distributed as hereinafter set forth. The remaining 43.5
8 acres of the farm to be sold is more particularly described
9 as follows:

10 PARCEL 1:

11 Commencing 1.55 chains North and 2.25 chains West
12 of the Southeast corner of Section 15, Township 24
13 South, Range 3 West, of the Salt Lake Meridian,
14 thence West 12.00 chains; thence South 1.55
15 chains; thence West 15.77 chains; thence North
16 10.00 chains; thence East 10.00 chains; thence
17 South 0.80 of a chain; thence East 6.95 chains;
18 thence South 2.13 chains; thence East 13.05 chains
19 to West line of Rio Grande & Western Railway;
20 thence Southwesterly along the West line of said
21 railway to the place of beginning, containing
22 20.74 acres, more or less, situate in the South
23 half of the Southeast quarter of aforesaid Section
24 15.

18 PARCEL 2:

19 Commencing at a point 14.10 chains East and 86
20 links North of the Southwest corner of Section 14,
21 Township 24 South, Range 3 West, SLB&M; running
22 thence East 17.95 chains; thence North 2.88
23 chains; thence East 184 feet; thence North 85.42
24 feet; thence East 146 feet, more or less, to West
25 line of State Hwy. right-of-way; thence North,
along the same 104 feet; thence West 11.00 chains;
thence North 3.89 chains; thence West 10.50
chains; more or less, to the Canal; thence
Southwesterly along the canal 10.00 chains, more
or less, to the place of beginning, cont. approx.
15.61 acres.

1 Excluding therefrom:

2 Beginning at a point lying N 79°53'04"E for
3 2483.91' more or less from the SW Corner of
4 Section 14, T.24S., R3W., SLB&M and running
5 thence South along the west line of State
6 Highway Right of Way, for 104', thence West
7 for 192.31'; thence, North for 104'; thence
8 East for 192.31' to the point of beginning
9 and containing 0.47 acres, more or less.

10 PARCEL 3:

11 Commencing 1.55 chains North of the Southwest
12 corner of Section 14, Township 24 South, Range 3
13 West, Salt Lake Base and Meridian; thence North
14 1.50 chains; thence North 12° 14' East along East
15 Line of Rio Grande & Western Railway 4.10 chains,
16 more or less, to a point 7.05 chains North and
17 1.60 chains East of the Southwest corner of
18 aforesaid Section 14; thence East 13.35 chains to
19 Canal; thence Southwesterly along canal to Section
20 line; thence West 1.80 chains; thence North 9° 35'
21 East 1.55 chains; thence West 11.77 chains, more
22 or less, to the place of beginning.
23 Containing 7.83 acres, more or less.

24 C. The farm equipment owned by the parties is hereby
25 awarded to Defendant, provided, however, that Defendant
26 shall pay to Plaintiff the sum of \$1,500 for her interest in
27 said equipment.

28 D. Plaintiff is therefore awarded the total sum of
29 \$40,250 for her interest in the above-described property.
30 To secure payment of the same, Plaintiff is hereby awarded a
31 lien against the farm property above-described in said
32 amount and when the farm is sold as ordered herein,
33 Plaintiff shall be entitled to receive the first \$40,250,
34 and the excess, if any, is hereby awarded to Defendant. If

1 the sale of the farm property fails to produce \$40,250 to
2 satisfy Plaintiff's lien, Plaintiff shall be entitled to all
3 of the proceeds available for distribution at the time of
4 the sale, and the difference between that amount and the sum
5 of \$40,250 shall constitute a Judgment against Defendant and
6 shall be payable by the Defendant to the Plaintiff over a
7 five year period, in yearly installments, together with
8 interest on said amount at the rate of 8% per annum.

9 E. The proceeds that will be available for
10 distribution between Plaintiff and Defendant arising from
11 the sale of 15 acres of the farm property due and payable in
12 August of 1986, consisting of approximately \$8,000 shall be
13 equally divided between Plaintiff and Defendant.

14 F. The 21.53 shares of water owned by the parties that
15 is surplus water over and above that which is needed to
16 irrigate the farm, having an estimated value of \$1,000 per
17 share, shall be sold by the Defendant on or before June
18 18th, 1987, and the proceeds therefrom, shall be divided
19 equally between the Plaintiff and Defendant.

20 G. Plaintiff and Defendant are each awarded all of the
21 personal property now in their possession.

22 H. The photographs and family albums now in the
23 possession of the Plaintiff are to be delivered by the
24 Plaintiff to the Defendant and he shall be entitled to
25 reproduce any of said photographs within thirty days

1 thereafter. At the end of thirty days, said photographs and
2 family albums are to be returned to the Plaintiff in the
3 same condition as when they were delivered by the Plaintiff
4 to the Defendant.

5 7. That Defendant should be awarded all of the right, title
6 and interest in his retirement account with the U.S. Government,
7 said retirement, provided, however, that Plaintiff is entitled to
8 \$6,000 by reason of said vested interest. Said sum shall be
9 payable by the Defendant to the Plaintiff over a ten year period,
10 together with interest, payable at the rate of \$600.00 per year,
11 together with accrued interest at the rate of 8% per annum, with
12 the first annual payment of principal and interest to be paid by
13 the Defendant to the Plaintiff on June 1st, 1987, and continuing
14 thereafter on said day of each succeeding year until the entire
15 principal in the sum of \$6,000, together with accrued interest is
16 paid in full. Defendant shall be entitled to prepay said amount
17 at any time without penalty.

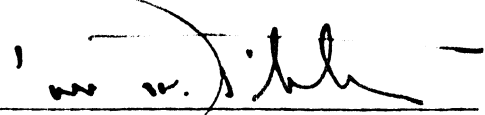
18 8. That Defendant shall be required to maintain health and
19 accident insurance on behalf of said minor children, and for any
20 medical or dental costs which are not paid for by said insurance,
21 Defendant shall be required to pay and discharge the same.

22 9. That the debts accumulated between Plaintiff and
23 Defendant after October 2nd, 1985, shall be paid by the party
24 incurring the same, with the exception of the medical and dental
25 bills which have been incurred by the Plaintiff and the minor

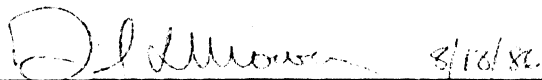
1 children, which shall be paid by Defendant. In connection with
2 said medical bills to be paid by Defendant, the parties are each
3 required to first submit the same to their respective carrier for
4 payment and in the event payment is not made, Defendant shall
5 thereafter pay and discharge said medical and dental expenses.

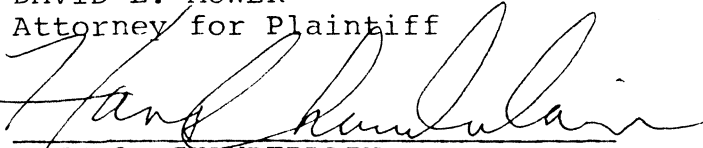
6 10. That neither party is entitled to an award of attorney's
7 fees.

8 DATED this 22nd day of August, 1986.

9
10 
11 DON V. TIBBS
12 District Judge
13
14
15
16

17 APPROVED AS TO FORM:


18  8/18/86.
19 DAVID L. MOWER
20 Attorney for Plaintiff

21 
22 HANS Q. CHAMBERLAIN
23 Attorney for Defendant
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the within and foregoing DECREE OF DIVORCE to Mr. David L. Mower, JACKSON, McIFF & MOWER, 151 North Main, Richfield, Utah 84701, first-class postage prepaid, on this 2nd day of September, 1986.


Secretary

PSYCHOLOGICAL ASSOCIATES

77 SOUTH 700 EAST - SALT LAKE CITY, UTAH 84102 - (801) 532-5675

Marchant v. Marchant
Civil Number 9605
Sevier Co., Utah
Psychological Evaluation of
Donald Marchant

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MARK ZURIG, PH.D.

Background

Mr. Marchant was raised in Kamas, Utah where he met Mrs. Marchant. He was a graduate of BYU and has worked as a civil engineer for the Forest Service for about fifteen years.

Mr. Marchant met Mrs. Marchant after he returned from a LDS mission. They dated for about nine months and were married in September of 1967. He was attracted to her because she was cute, intelligent, and lively.

He felt the marriage went quite well and did not recognize signals that the marriage was drifting apart. He recognized that after she suffered a whiplash injury in a car accident she became depressed and was severely restricted in her activities. This was shortly before Sara was born. At about that time they bought a farm near Richfield, Utah which took quite a bit of Mr. Marchant's time. As he looks back, he recognizes that Mrs. Marchant felt neglected. He recalls that she asked him to talk to her and to do things with her. He did not feel that those things were very important until much later on.

Mrs. Marchant suffered another injury to her neck about three years after the first injury. She continued to have periods of depression and the marriage did not seem to be as happy for her as it was satisfying for him. When Sara was about six-years-old Mrs. Marchant decided to go to work and Mr. Marchant did not object. However, he felt that the marriage deteriorated after that point because Mrs. Marchant seemed to be more interested in working. He was critical of her friends and felt that she was being flirtatious with male workers. He was particularly annoyed that she was so flattered by the attention of other men. He was also self-conscious because he had a prominent position in the Church and was concerned about how other people in the community might view them. While she denied having any interest in other men, Mr. Marchant really could not shake that conviction. When Mrs. Marchant made some business trips to Salt Lake she apparently met her boss on at least one occasion, which only added to Mr. Marchant's suspiciousness and jealousy. They went to counseling in

late 1984. It appears that each of them had suggested counseling to the other and each had felt unimpressed with the other's suggestion. By the time they went to counseling in late 1984 Mrs. Marchant did not like to be touched physically and was beginning to show a great deal of hostility toward his physical advances. He recognized that the marriage was permanently doomed when he lost control and hit her. He moved out of the home on March of 1985 when she made it clear that she needed some breathing space. He had a hard time understanding that their separation was going to be permanent, and he still has a great deal of difficulty letting go of her. Apparently Mrs. Marchant has never made it really clear to him what her complaints were. This may have undoubtedly contributed to his anger toward her.

Personal Qualities

Mr. Marchant is a very bright, well-informed person whose reasoning is thoughtful and incisive. He is an intense, high energy person who is efficient and productive and who expects others to be the same. He has good self-control most of the time. His personality is basically a passive-aggressive one in which hostility is not frequently expressed directly; it is modified and channeled by his education, social expectations, and self-control so that it appears in the form of competition, dominance, and in more oblique forms such as uncooperativeness, insistence, argumentativeness, and an inclination to retaliate when slighted. His rather proper social manner and well-defined sense of personal identity, as well as his self-control, contribute to efficiency and stable lifestyle.

Mr. Marchant is socially somewhat extroverted in the sense of being poised and confident. He is also optimistic and rather trusting in that he assumes his ideals and expectations will be honored by others. He is not gregarious nor dependent upon social interactions for personal satisfaction but he does get along well with people in well defined situations. He has definite ideas about right and wrong, stands up for what he believes, and is not much influenced by what other people think. He may discount other people's opinions or needs and may not negotiate well with others who differ with him on issues.

Mr. Marchant has a strong need for affection which is not easily met because he is such an independent and somewhat demanding person.

Relationship with Brandon and Sara

Mr. Marchant has a very close parent-child bond with both children. The relationship is a close and trusting one. He is genuinely concerned about their welfare and has a great affection for the children. He is aware of their individual differences and their needs for individual attention. He has strong moral standards and is attentive to their intellectual and social development.

Mr. Marchant is very concerned that the children have someone with them after school during the school year as well as during the summer months. He recognizes that both he and Mrs. Marchant will have to work but he feels that he is better able to provide for suitable care than is Mrs. Marchant. His interest in doing well and being responsible in a small community is a distinct asset. While he has passive-aggressive personality and some tendencies to be hostile, this side of his personality is not frequently shown to the children and probably would not create much of a problem. He seems to recognize that his teasing did not go over very well with Mrs. Marchant and that it may have a negative effect on the children if he were to treat them in the same manner.

Mr. Marchant feels that the children would be better off with him because of what he perceives as Mrs. Marchant's drift from family responsibilities into a more active personal and social life where moral values may be sacrificed. He is also convinced that the children will have a healthier lifestyle in a small town where they are well-known and where there are healthy activities in addition to adequate schools.

Mr. Marchant's motivation for custody is sincere and is based upon good values. His present interest is with the welfare of the children; he is not using the custody dispute as any type of retaliatory gesture toward Mrs. Marchant.

Attitude Toward Mrs. Marchant


Mr. Marchant has an uneasy relationship with Mrs. Marchant. He recognizes that the marriage is not salvageable although he very much wishes that were not so. In spite of feeling that her personal and social activities will be detrimental to the children by decreasing her time with them, he is not inclined to sabotage the mother-child relationship. His interest in the welfare of the children is too strong to engage in any kind of retaliation. He recognizes the children's affection for their mother, her love for them, and the fact that she has been a good mother even though he is critical of the amount of time that she chose to be away from the children at a time in their life where this was a discretionary matter. If Mrs. Marchant were awarded custody, he would cooperate in honoring visitation arrangements.

Capacity for Custody

Mr. Marchant is a very responsible adult who is very much aware of the need for stability, guidance, nurturing in the home. Mr. Marchant's desire for custody is certainly genuine and realistic, and he would be an adequate custodial parent.

Procedures Used

MMPI
16 PF Test
Rotter Sentence Completion
Subtests from the WAIS-R
Custody Questionnaire
Individual interview
Joint interview with Mrs. Marchant
Observations with the children


Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychology

EBS/esw

PSYCHOLOGICAL ASSOCIATES

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Marchant v. Marchant
Civil Number 9605
Sevier County, Utah
Psychological Evaluation of
Karen Marchant

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Background

Mrs. Marchant is a thirty-seven-year-old woman born in Elko, Nevada, and raised in Clover Valley (close to Wells, Nevada), and later in Peoa, Utah. Her father died when she was twelve years old in an accident on the farm. When she was sixteen years old her mother moved the family of five girls and three boys to Peoa where she bought a beef and dairy operation.

Mrs. Marchant was very close to her family and especially to her twin sister, Kathy. Because she was a twin and also because the family lived in very small towns there was a lot of reliance on each other.

Mrs. Marchant attended the Brigham Young University for two years prior to her marriage to Mr. Marchant when she was eighteen years old. The marriage was fine at first but she felt that it began to deteriorate after about five years because of what she perceived to be Mr. Marchant's demands, particularly in sexual matters. She felt that he was a controlling person who needed her to conform. She was accustomed to pleasing other people and enjoyed pleasing him until she felt that the relationship was one-sided because he expected too much from her.

The marriage relationship was also strained following a whiplash injury which resulted in a great deal of pain and depression. This injury was followed by another whiplash injury about three years later. Pain, depression, and dissatisfaction with her marital relationship continued. She recognized that her depression and long periods of sleep in the daytime were no way to live and that her life was getting out of control. She decided that working would be an opportunity to get out of the home and to become more productive. At first she felt that Mr. Marchant approved of her working because the income helped them in the purchase of their farm. However, she felt that later he became jealous and suspicious of the men with whom she worked. She dismissed his suspicions of her relationships as being obsessive and unjustified. Her

experience at work gave her confidence as well as a new dimension to her life. There were frequent arguments, usually about her work and work relationships. Apparently he hit her on two different occasions, one of which knocked her down and caused bruises on her face. This was particularly painful because she was having a lot of pain with the soft tissue injury around her neck from the previous automobile accidents.

Hitting had not been a pattern in their marriage. Mr. and Mrs. Marchant both had some counseling following that occasion. The counseling was especially helpful to her in sorting out some things and being less fearful of what other people would say if it were generally known that she and Mr. Marchant were having marriage problems. There had been no history of divorce in the families and she felt quite uneasy about disappointing other people and their expectations.

The Marchant's were in therapy about October of 1984. They separated during March of 1985. Mrs. Marchant remained in the family home with the children. When the position she held in Richfield was terminated in the Summer of 1985 she moved to Salt Lake City where she was able to continue her employment with Intermountain Health Care.

Personal Qualities

Mrs. Marchant is a very bright, well-informed, quick-thinking person. She learns quickly, adapts well, and appears to be a very efficient as well as sociable individual. Mrs. Marchant is an optimistic and self-confident person who has high standards for herself and others. She is outgoing and deals well with other people because of her poise and ability. Her interests are traditionally feminine and she is somewhat passive in her relationships. She has a strong need for affection; pleasing other people and being accepted contribute to her strong motivation to do well. She is an ambitious person with a lot of resources whose success comes from a cooperative rather than competitive style. She is relatively inpeturbable and can function under quite a bit of stress. She is sensitive to other people's feelings as

well as to her own. Empathy and sympathy come naturally to her.

It appears that Mrs. Marchant may be embarking on the divorce with more confidence and optimism about the future than may be justified. Her mannerisms and appearance draw other people to her but she may mistake attention and interest for genuine affection and dependable long-term relationships. Her very dutiful behavior during the early part of her marriage resulted from her passive tendencies and her acceptance of church sanctioned role expectations. Her success in the work force subsequently demonstrated that she can find satisfaction without being submissive. It appears that she is rebelling in this divorce as much as she is removing herself from a subtly hostile and demanding marital relationship..

Relationship with Brandon and Sara

Mrs. Marchant has a close parent-child bond with each child. She had been the primary caretaker until she began work and since that time has maintained that role albeit with much less time with the children. They have become accustomed to sitters for after school and summer hours. She relates well to them and they to her.

Attitude Toward Mr. Marchant

Mrs. Marchant feels she could no longer live with Mr. Marchant because his interest in sex was so demanding that he did not respect her need for less intimacy. In addition, she would not risk any further physical assaults. She resents his blaming her "being so cute" as the reason for his attraction to and need for her. She felt valueless to him outside their physical relationship. The separation and divorce allow her to feel good about herself.

Mrs. Marchant acknowledges Mr. Marchant's positive effect on the children, his love for them, and their need for him. She would cooperate in visitation if she had custody. She would be very surprised if she did not get

custody and had to deal with him and arrange her own visits with the children.

Capacity for Custody

Mrs. Marchant is a sensitive person who is capable of providing a home and nurturance to the children but who may have difficulty meeting their needs, her work schedule, and her personal agenda for a more rewarding personal social life. At present her shared home costs and responsibilities reduce the burden so that life is a lot easier than it will be when, and if, Helen moves out. The children will not be so well cared for eventually if they have to shift for themselves after school and in the summer in a neighborhood that is not as close and caring as the one they know in Monroe and Central, Utah. Mrs. Marchant's desire for a better life for herself very probably will be a disadvantage for the children who may be exposed to a less desirable lifestyle.

Procedures Used

MMPI
16 PF Test
Rotter Sentence Completion
Individual interview
Joint interview with Mr. Marchant
Interviews with the children



Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychology

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Marchant v. Marchant
Civil Number 9605
Sevier County, Utah
Psychological Evaluation of
Brandon Marchant

Brandon is a twelve-year-old, sixth-grade student at the William Penn Elementary School which he has attended since the Fall of 1985. He reports that he likes school and that he usually gets good grades, which is a sign of good adjustment.

Brandon lives with his mother and sister in a four bedroom apartment which is shared with his mother's sister, Helen, and her eight-year-old son. Helen is also in the process of divorce. The two mothers are sharing quarters while they get settled as single parent families. Brandon likes the arrangement and gets along with his cousin.

Brandon is an alert, personable child who is outgoing and quite good in sizing-up situations. He seems to make friends easily because he is confident of himself and interested in other people.

While Brandon misses his friends in Monroe and Central, Utah as well as the opportunity to ride horses, he also has enjoyed doing things in Salt Lake which were not available to him in the rural area. He mentioned attending the Pirates of Penzance, Sleeping Beauty, and three symphony concerts this year with his Mom and Sara. Although he recognizes that there are many things to do in Salt Lake he is careful not to show any preference for living in Salt Lake. He is looking forward to playing Little League Baseball in Central, Utah as soon as he gets out of school in early June. He has managed to maintain his relationships with neighbors in Monroe and Central during his visits with his father on weekends.

Brandon has a very good relationship with both parents and he feels secure with both. The divorce is very hard on him because of split in his family. Nevertheless, he understands that his parents will not be living together and he has adjusted as well as can be expected to that situation. He is very careful about not expressing any preference for either parent and, indeed, he probably has none. He does not want to be responsible for deciding where he lives.

Brandon Marchant
Page 2

Procedures Used

Joint interview with Sara and his parents
Individual interview
Kovac's Emotional Inventory

Elizabeth B. Stewart, Ph.D.
Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychologist

EBS/esw
3/86

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Marchant v. Marchant
Civil Number 9605
Sevier County, Utah
Psychological Evaluation of
Sara Marchant

Sara is nearly nine-years-old and is in third grade at William Penn Elementary School. She transferred from Monroe Elementary School which is near Central, Utah when her mother moved to Salt Lake early in the Fall of 1985.

Sara is an alert, affectionate child who makes friends easily. She is observant, thoughtful, and adept at interpersonal relationships. She misses her friends in Monroe and Central, Utah although she has made friends here. At the present time she and her brother, Brandon, are living with their mother in an apartment which is shared with her Aunt Helen (who is in the process of a divorce), and an eight-year-old cousin. Aunt Helen is usually home after school, but may not continue to be available if she finds employment during the coming months.

Sara has been included in a "Lunch Bunch" at school which is composed of new transfer students. They meet weekly. She also has had some exposure to a counselor for children of divorce which she also enjoys. These support groups will be helpful and should be encouraged since she shows some signs of depression, sadness, and loneliness.


Sara has a good relationship with both parents and gets along very well with them although she sees her mother as being more easily aroused to anger and more inclined to yell than is her father. She expresses no preference for living with one parent or the other, and does not want to be responsible for such a decision. Her desire is clearly to live with both parents although she recognizes that this will not occur. Sara, like Brandon, wants the decision about where she will live to be made by other people.

Sara will adapt well to either home. She may find more stability in her father's home, however, since her mother is renting and may have difficulty in maintaining the comfortable apartment when her sister, Helen, is economically able to establish her own living situation.

Sara Marchant
Page 2

Procedures Used

Kovac's Emotional Inventory
Draw Family Test


Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychology

EBS/esw
3/86

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Marchant v. Marchant
Civil Number 9605
Sevier Co., Utah
Recommendations

Custody

The many factors to be considered in custody can be grouped into three categories: (1) Parent related factors; (2) Child related factors; and (3) Situational factors. The parent-related factors and their applicability to the Marchant case are as follows:

1. Willingness to sacrifice for the welfare of the children. Mrs. Marchant has not been inclined to subordinate her need for autonomy, success, and personal satisfaction in favor of the children's need for her time and attention at a period in her life when working was a personal choice and not an economic necessity. Even so, the children apparently fared quite well because of her warm and nurturing relationship when she was with them, and also because the children had a strong sense of belonging and happiness in the home, school, and community. Now that the divorce is imminent, neither parent has the option of discretionary employment. However, Mr. Marchant does not need nor value his job to provide himself or establish a new social life as much as Mrs. Marchant. He is established and stable. For this reason he may have less anxiety and conflict about the division of time and concern between home and work. He is more likely to use his after work hours in home and family-related activities while Mrs. Marchant is still establishing her vocation and personal identity. She may not have the same stable community recognition that would put her at ease during after work hours, but her personal happiness may make her obligations less burdensome.

2. Emotional Stability. Mr. Marchant is stable in the sense of being a dominant and rigid personality as well as being well-established in his job. Mrs. Marchant is more flexible, seeks to please others, and is in the process of developing an identity as a single parent by choice rather than by necessity. The difference between the two people is not one of best-worst, but is a qualitative difference. The children have gotten along well with each parent so far and could adjust to either adult, not because the adults are the same in the personalities and emotional stability but because of the strong parent-child bond that exists.

3. Moral Character. This factor is difficult to address in a time of changing social and personal values and standards. Mr. Marchant is more staid and traditional in his values. His conduct has not raised the issue of moral character. Mrs. Marchant is more inclined to experiment with her new-found freedom. Whether her choices will create moral conflicts in the future is uncertain but not improbable.

4. Sympathy for and understanding of the children. Both parents have this quality although Mrs. Marchant is more demonstrative. However, she has not been so empathetic and understanding of the children's needs as to sacrifice her own need for freedom for the children's need for a two-parent family.

5. Religious Compatibility. There are no religious conflicts in this family, but Mrs. Marchant seems to have some reservations that would make it uncomfortable as well as unrewarding for her to accompany the children to church. Mr. Marchant has no such reservations.

5. Financial Ability. Mr. Marchant's training and experience as a civil engineer commands a higher salary and better job opportunities than does Mrs. Marchant's training and experience. She is less likely to have the same level of income potential or job opportunities so that her standard of living will not be as great unless her household is substantially subsidized by child support or she remarries someone who is not being drained by his child-support obligations.

6. Sincerity and Desire for Custody. Both parents' desire for custody is sincere and not based upon retaliation or any intent to manipulate the other.

7. Personal rather than surrogate care. Neither parent has any advantage in providing personal rather than surrogate care. At present Mrs. Marchant's sister provides a family connection in the afterschool care but this may not last long if she finds employment for herself. Mr. Marchant's situation in a small, close community provides more neighborly support by people who have known the Marchant children and who may be able to provide a more personal care than would neighbors in the Salt Lake area who do not know the Marchants so well.

8. Alcohol or Drug Usage. Neither parent has any problems with alcohol or drug usages and there is no reason to think that custody would be effected by this factor.

The child-related factors are the following:

1. The childrens' feelings, special needs, preference, and bond with the parents. None of these factors show any clear preference for either Mr. or Mrs. Marchant. The children are basically quite well adjusted and choose to state no preference for either parent. Both children have very strong feelings of love for both parents and the parent-child bond is very strong.

Situational factors:

1. Maintaining a satisfactory custody arrangement when the children are happy and well-adjusted. There is a preference for leaving a custody arrangement in place where it is clear that they have made a reasonably good adjustment, and there is no reason to think that they are not doing well or that a different custody arrangement would be clearly better for them. In this respect, both of the Marchant children have adjusted well although it is quite clear in observing them with their father that they miss him a great deal. It also seems likely that Sara's depression and feelings of loneliness are related to her father's absence. However, if she were living with her father she may well feel as sad and lonely because of her mother's absence.

2. The least disruptive placement. Since the children are doing well in their mother's custody at the present time the least disruptive placement would be to leave them in her custody.

3. Primary Caretaker. Although Mrs. Marchant has worked full-time in recent years, she has been the primary caretaker. Mr. Marchant, however, has provided direct care also although the division of parental responsibilities has been quite traditional in this family. Mrs. Marchant could continue as she has; Mr. Marchant could adapt to being the primary caretaker.

Recommendations

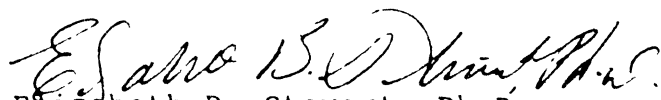
Page 4

The custodial decision will clearly have to be made in view of other factors which are not covered by the custody evaluation. Both parents truly have the best interest of the children at heart and the children clearly need continuing relationships with both parents.

Visitation

Visitation was discussed with Mr. and Mrs. Marchant. Currently Mr. Marchant sees the children on alternate weekends by driving the children to and from Monroe. He has also tried using bus services from Salt Lake to Richfield and the return trip by auto. While this is quite a financial and time burden on Mr. Marchant, he prefers to keep that arrangement rather than simplifying visits by seeing the children only on three-day weekends during those months that have Monday holidays, i.e., January, February, March or April (when Spring break occurs), and in May, September, October, and November. If Mr. Marchant had custody, Mrs. Marchant would arrange to go to Richfield to visit the children where she would visit with an aunt and uncle from whose home she could manage visits with the children. Both of the parents will probably be able to work out an agreeable visitation schedule after the custody decision is made. Each is mindful of the other's burden in traveling.

It would be advisable to have a definite visitation schedule in writing even if the parents agreed informally to deviate from that schedule. Each parent is likely to begin dating and perhaps remarry within the next year or two during which time there will be some pressure to vary the visitation schedule, often at the inconvenience of the other parent. In order to avoid disputes about visitation a written schedule would enable the visiting parent to maintain contact and would prevent the custodial parent from acting as a gate keeper for his or her own convenience.


Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychology

EBS/esw

1 IN THE SIXTH JUDICIAL DISTRICT COURT OF SEVIER COUNTY

2 STATE OF UTAH

3 * * * * *

4 KAREN SHUMANN MARCHANT, : CIVIL NO. 9605

5 Plaintiff, : PARTIAL TRANSCRIPT

6 VS. : COURT FINDINGS & RULINGS

7 DONALD J. MARCHANT, :

8 Defendant. : NON-JURY TRIAL

9 * * * * *

10 BE IT REMEMBERED that commencing on the 18th day o

11 June 1984 at 2:00 p.m. the above entitled matter came o

12 regularly before the Honorable Don V. Tibbs, Judge for th

13 Sixth Judicial District Court, State of Utah, Sevier County

14 in the Sevier County Courthouse District Courtroom, Rich

15 field, Utah;

16 That on the 11th of August, 1986, Hans Q. Chamber

17 lain, Attorney for the Defendant in this action, requested

18 copy of the PARTIAL TRANSCRIPT of the above entitled matter'

19 COURT FINDINGS & RULINGS,

20 That the PARTIAL TRANSCRIPT requested by th

21 Defendant's Attorney is as follows herein as COURT FINDINGS

22 RULINGS.

23 --ooOoo--

APPEARANCES

For the Plaintiff:

DAVID L. MOWER
JACKSON, McIFF & MOWER
P.O. Box 605
151 North Main Street
Richfield, UT 84701

For the Defendant:

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
P.O. Box 726
Cedar City, UT 84720

--c.o.o--

5:30 P.M.
18 JUNE 1986

COURT FINDINGS & RULINGS

THE COURT: These are very difficult cases for the Court, in all honesty. You know I just know that you folks have sat here all day and when I handle criminal matters the whole morning, one after another where I sent four young men to prison, where probably a lot more are going to go, things you didn't see. You didn't see the presentence reports that I examined, and on each one of them they came from separated families, every one of them.

I don't justify their conduct, but I'm just saying that's what it comes from. I see in those cases the same pattern, over and over again. They give nothing of themselves to anyone else, total and complete living for their own benefits, broken homes, problems in school, and then it's alcohol and drugs, petty crime, and then all of a sudden it's graduated into the criminal system and I've got them.

And then I sit and grant divorces the rest of the day on Law & Motion days. Think of the number of divorces I granted today. Most of them are stipulations. They just come in and I approve the stipulations. They go out and then every once in awhile I get one like this where the parties are obviously good people, but things have gone wrong and all of a sudden I've got to start trying to make a decision from the mess that they're in. And frankly, it's traumatic to me. You

1 don't think it is, but it's my responsibility to hear it and
2 make the best decision I can make and I obviously am not
3 going to make people happy in that job from what I find. But
4 that's what I do as I see it.

5 As I see it, this case basically, it's for the best
6 interest of those children and I have heard the evidence and
7 I have to do what I think is right at this point and regard-
8 less of where the problems fall. And I appreciate the way
9 Counsel have submitted the exhibits and the evidence and
10 everything else. And be that as it may, this is my decision
11 and I'm making it at this time. Frankly, I'm having a very
12 difficult time finding grounds for a divorce.

13 I'll be honest. I have difficulty with what the Plaintiff
14 sues, alleges grounds. I have difficulty finding where
15 this Defendant's done anything wrong, other than slapping
16 her. Maybe that was justified. I don't believe in it. I
17 don't believe anyone should use force and violence. But I'm
18 having difficulty. However, under the circumstances I don't
19 see where I can force them to live together. So based on
20 that I'm going to find that the Defendant did treat the
21 Plaintiff cruelly, causing her physical and mental anguish,
22 physical anguish because he struck her on the one occasion
23 when he was what appeared to me highly provoked. Based upon
24 that fact, the Plaintiff is awarded the decree of divorce,
25 which under the circumstances I think these parties have to

1 be divorced.

2 Normally, I'll leave the interlocutory period in exis-
3 tence, but I'm going to terminate it. This decree shall
4 become absolute and final upon the date of this entry, the
5 interlocutory period being waived because I think they must
6 be divorced and I see no advantage to anyone to have that
7 continued.

8 The Court awards the parcel of real property with the
9 corrals and the 1 1/2 acres of land with home located thereon
10 to Mr. Marchant, the Defendant in this action. He shall
11 assume the debt and hold the Plaintiff harmless from those
12 debts and obligations. The Court finds that she has a
13 \$17,000 equity in that house as of this date and I'm just
14 going to hold that off for a moment.

15 The Court finds that the parties have a home with
16 approximately 43 acres of land that's now disposable, which
17 the Court finds is valued at \$2,000 an acre and has a debt on
18 it of approximately \$1,000 an acre, so that the Court finds
19 there is a \$43,500 value of that property.

20 Now let me just make sure I'm not missing this. There's
21 43.5 acres valued at \$2,000 an acre with debt on it of
22 approximately \$1,000 per acre; that's right, isn't it?

23 MR. CHAMBERLAIN: Yes.

24 THE COURT: So that the Court finds there's \$43,500
25 equity in that property that the parties have. The Court

1 finds that the Plaintiff has consequently half interest in
2 that \$43,500. or she has \$21,750 equity in that property.
3 The Court finds that there's another \$8,000 due and each of
4 the parties are entitled to \$4,000 of that money.

5 The Court finds that they have assets in water stock.
6 The Court orders that water stock sold at this time. It
7 shall be sold by the Defendant within a period of one year
8 and the proceeds 50 percent to each of the parties.

9 The Court finds that they have \$5,000 worth of farm
10 equipment and the Court finds that there was some division of
11 a household furniture and a mistake on it. I'm going to say
12 that the Defendant should pay to the Plaintiff for the
13 parties interest in the farm equipment the sum of \$1,500 and
14 he's awarded the farm equipment.

15 If my mathematics are right, I'm adding \$17,000, \$21,750,
16 and \$4,000, and if my mathematics are correct it comes out to
17 \$42,750; do you agree with that, gentlemen? Check it. Well,
18 that's what it is. The Plaintiff is awarded the Judgement
19 against the Defendant for that \$42,750.

20 The farm shall be sold within a period of one year and
21 all of the proceeds of that farm shall be applied against the
22 \$42,750. The balance will go to the Defendant. If the farm
23 doesn't bring the \$42,750, then the Plaintiff will have a
24 judgement against the Defendant for the balance, which will
25 be payable with interest at the rate of 8 percent per annum

1 over a 5-year period on an annual basis.

2 MR. CHAMBERLAIN: I'm sorry, five years?

3 THE COURT: Five years.

4 The Court makes the specific finding that the Plaintiff
5 has a net take home of \$1,321 per month, the Defendant has a
6 net of \$2,114 a month.

7 All of the Defendant's right to title and interest in and
8 to his retirement shall be awarded to the Defendant, subject,
9 however, that he shall pay to the Plaintiff the sum of
10 \$6,000, which \$6,000 shall be payable over a 10-year period
11 at \$600 per year for 10 years together with interest at 8
12 percent per annum on the unpaid balance. So he can pay it
13 earlier, if he wants to, but it shall be payable in that
14 direction.

15 MR. MOWER: Excuse me, Your Honor. That means that
16 he will pay \$600 plus.

17 THE COURT: Plus interest. And I'll make it on an
18 annual basis, any particular time you want to. We'll make it
19 on September 1st of each year. Well, this year we'll make it
20 on June 1st, starting on June 1st, 1987.

21 No Attorneys fees are awarded to either party.

22 The Court specifically finds that no alimony should be
23 awarded to either party in this matter.

24 The Court finds that both parties are good parents, and
25 both parties could be awarded custody of the minor children.

1 The Court does, however, find that this marriage has been
2 broken up by actions of the Plaintiff, and the Court finds
3 that they are not justified. And even though these children
4 have been in the Plaintiff's custody since this action was
5 commenced, by prior order of the Court, the Court is of the
6 opinion that in the best interest of the children the custody
7 should be awarded to the Defendant.

8 The Plaintiff is awarded the right of reasonable visita-
9 tion at reasonable times and places. So that there is no
10 question on visitation rights, the Plaintiff is awarded every
11 other holiday, commencing with the 4th of July, except for
12 Christmas where the children shall stay in the home of the
13 custodial parent.

14 The Court finds that the Plaintiff shall be awarded for
15 six weeks visitation in this summer at a six-week period,
16 that time when she desires.

17 [PLAINTIFF began crying and collapsed to the floor
18 at her Counsel's table in the Courtroom.]

19 THE COURT: No Attorneys fees are awarded to either
20 party. You better call in the EMT's

21 [WHEREUPON the Bailiff responded, along with family
22 members of the Plaintiff and her Counsel, Mr. Mower, to help
23 the Plaintiff out of the Courtroom and to give aid and
24 assistance to her.]

25 THE COURT: Do you want me to go forward, Counsel,

1 or do you want me to wait?

2 MR. MOWER: I think you ought to go forward.
3 think it will be some time for her to gain her composure.

4 THE COURT: All right. It's the order of the Court
5 that the Defendant shall find findings of fact, conclusion
6 of law and decree for the conformity of this record. For the
7 purpose of the record I think that I should make a record
8 that the Plaintiff is very emotional because of this order
9 and has collapsed in the Courtroom.

10 The Court makes specific findings that the Plaintiff has
11 taken these children to Salt Lake while she has had the
12 under Court order, that they have been living in an apart-
13 ment, jointly with her sister who is a divorced woman havin
14 a minor child in that apartment, and the Court is of the
15 opinion that the change of the custody since this divorce
16 action was had has not been in compliance with the norma
17 standard of living and standards these parties had befor
18 this action was filed.

19 The Court makes a specific finding that the Plaintiff has
20 become involved with another man and that was a factor in th
21 Court's decision.

22 The Court makes a specific finding that the Plaintiff's
23 lifestyle has changed and that her concern is basically n
24 longer for the family unit, but for the purpose of accom
25 plishing her own desires.

1 Now gentlemen, I want to make any findings that you feel
2 you would like me to make for the purpose of the record, and
3 Mr. Mower, if you have something you'd like me to find, you
4 state it now, please.

5 MR. MOWER: I think it would be important for the
6 Court to schedule a transfer based on the Court's order.
7 There's going to be need for a change on the custody.

8 THE COURT: Has school terminated?

9 MR. CHAMBERLAIN: On the 14th, it terminated in Salt
10 Lake, Your Honor.

11 THE COURT: Transfer will be made on July 1st. I
12 believe I better make these rights of reasonable visitation.
13 I'm going to make specific visitation, she shall be able to
14 take the children every other Friday until Sunday night when
15 they shall be returned by 7:00 o'clock. So she can take them
16 by Friday at 6:00 p.m., return them by 7:00 p.m. Sunday. But
17 the children shall attend church of their choice so that they
18 shall be in church in view of the lifestyle of these parties.

19 MR. CHAMBERLAIN: Your Honor, just one question on
20 the date of change. The Court awarded her visitation
21 continuing with the 4th of July and I'm wondering about the
22 effect that might have on the children to change and I just
23 raise that for discussion.

24 THE COURT: Well, maybe we better make it on the
25 following holiday.

1 MR. MOWER: The 24th.

2 THE COURT: All right. They'll have visitation on
3 the 24th.

4 MR. CHAMBERLAIN: Instead of the 4th?

5 THE COURT: Instead of the 4th. Now, is there
6 anything else, Mr. Mower?

7 MR. MOWER: I don't have anything further.

8 THE COURT: I'd like to, if you can think of
9 anything I missed, I want to make a complete record.

10 MR. MOWER: Nothing else I can think of.

11 THE COURT: Mr. Chamberlain?

12 MR. CHAMBERLAIN: No. I think not, Your Honor.

13 THE COURT: Thank you. I appreciate your courtesy,
14 gentlemen. I'm sorry it's been so traumatic, but I can't
15 help that. This Court will be in recess. Thank you.

16 If you'll prepare your findings of fact, conclusions of
17 law and submit them to opposing Counsel at least five days
18 before you send them to me, I'll assume that they're correct
19 when I get them. So make your findings.

20 MR. CHAMBERLAIN: I will submit them and ask him to
21 sign them because of the time.

22 MR. MOWER: I appreciate that.

23 THE COURT: Thank you. This Court will be in
24 recess.

25 [WHEREUPON Proceedings were completed in the matter

1 herein.]

2 --ooOoo--

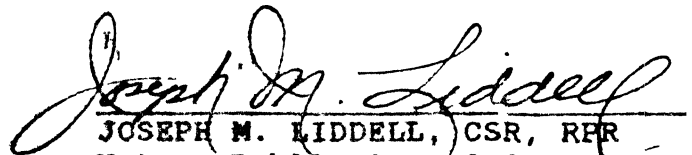
3 **REPORTER'S CERTIFICATE**

4 STATE OF UTAH)
5) SS.
6 COUNTY OF SEVIER)

7 I, JOSEPH M. LIDDELL, do hereby certify

8 That I am the Official Reporter for Sixth Judicial
9 District Court, County of Sevier, State of Utah, that I am
10 licensed by the State of Utah; that I attended the proceed-
11 ings had herein; that thereafter I caused to have transcribed
12 my said stenographic notes into typewritten script, and that
13 the foregoing pages, numbered 1 to 11, both inclusive,
14 constitute a true and correct report of the same.

15 Dated at Richfield, Sevier County, Utah this 16th
16 day of August, 1986.

17 
18 JOSEPH M. LIDDELL, CSR, RPR
19 Notary Public in and for the
20 State of Utah
21 (License No. 219-1801-1)

22 My Commission Expires
23 5-6-90

24 --ooOoo--