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George M. Mecham v. Gail T. Mecham : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

30 MAR 1976

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

GEORGE M. MECHAM,)
Plaintiff and Respondent,)
vs.) Case No. 14084
GAIL T. MECHAM,)
Defendant and Appellant.)

BRIEF OF DEFENDANT AND APPELLANT

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT,
DISTRICT COURT OF SALT LAKE COUNTY,
HONORABLE EARNEST F. BALDWIN, JR.
PRESIDING

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FILED

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Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE M. MECHAM,)	
Plaintiff and Respondent,)	
vs.)	Case No. 14084
GAIL T. MECHAM,)	
Defendant and Appellant.)	

BRIEF OF DEFENDANT AND APPELLANT

NATURE OF THE CASE

This is a divorce action where Plaintiff and Respondant (hereinafter referred to as Plaintiff) alleged mental distress and physical anguish and asked for custody of the minor child, no award of alimony for defendant, division of the property, among other things. Defendant and Appellant (hereinafter referred to as Defendant) filed an Answer and Counterclaim for divorce on grounds of mental cruelty and physical anguish and asked for custody of the minor child, reasonable and adequate child support and reasonable and adequate alimony, among other things.

DISPOSITION IN THE LOWER COURT

The Court below granted Plaintiff and Defendant a divorce on grounds of mental cruelty. The Court awarded custody of the minor child to Plaintiff, retaining jurisdiction for a period of one year, subject to very liberal visitation rights.

Defendant filed a Motion for a New Trial pursuant to Rule 59 (a) U.R.C.P. and, in the Alternative, Motion to Amend Findings of Fact and Conclusions of Law and to Alter and Amend Judgment pursuant to Rules 52 (b) and 59 (c) U.R.C.P., said motions being denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the award of care, custody and control of the minor child.

STATEMENT OF FACTS

The Complaint was filed by the Plaintiff, George M. Mecham, on May 28, 1974. A Notice of Taking Deposition was set for June 6, 1974 of the Plaintiff. On June 4, 1974, a Stipulation was entered into by the parties providing for each party to be awarded a divorce on finding of grounds, temporary custody of the minor child in the Defendant for

two months and permanent custody based on her performance during the interim period, and, also, provision for conduct of the parties, child support and alimony, temporary property distribution and permanent property distribution, attorney's fees, and issues reserved for determination by the Court, namely: award of custody, child support and alimony.

Defendant filed an Answer and Counterclaim on June 24, 1974. A Preliminary Injunction was issued on July 19, 1974, restraining Plaintiff from harassing the Defendant until trial date. On October 21, 1974, an Order was issued keeping the parties from having anyone of the opposite sex, the party may be dating, present with the minor child. On August 11, 1974, Defendant's Petition for Appointment of Independent Counsel for Minor Child was heard and denied. On November 25, 1974, Plaintiff's Motion for Continuance and Motion for Pre-Trial Hearing was heard and denied.

Trial was held on November 29, 1974, December 2, 3, and 4, 1974, and March 14, 1975.

The evidence adduced at trial was as follows:

Plaintiff attended George Washington University Law School and was admitted to the Utah State Bar on May 1967.

(Tr. 130) He was previously married August 1963 (Tr. 168) but divorced on October 23, 1970. (Tr. 167, 200) He met Defendant, who was then a stewardess for Western Airlines

(Tr. 9) in September 1968 and started dating her. (Tr. 222) During the courtship, there were frequent representations by Plaintiff to Defendant regarding his marital status, (Tr. 169, 170) even to the extent of Defendant being shown by Plaintiff documents purporting to be divorce papers. (Tr. 170, 223-226) Also, there appeared to be excessive drinking (defined as "three times a week to the point where you are staggering drunk"), proffer of an engagement ring and continual misrepresentations by Plaintiff to Defendant (Tr. 12, 223-227) the culmination of which was her attempted suicide by taking an overdose of aspirins. (Tr. 11, 12, 141, 170, 227)

The parties were finally married on November 7, 1970. (Tr. 10, 222, 227)

The minor child , Andrew, was born April 26, 1971. (Tr. 227) Three months after his birth, Defendant was suffering severe depression caused by the death of her grandmother and Plaintiff's being out, drinking and lying during her pregnancy and she saw Dr. Peter Nielson, a Psychiatrist. (Tr. 19, 20, 125, 170, 227, 235, 237, 268)

After their marriage, the parties moved into an apartment (Tr. 280) where they resided until October 1971 (Tr. 228) or November 1972 (Tr. 281-282) when they moved into their home at 1459 Yale Avenue in Salt Lake City. (Tr. 281-282) They resided there as a family until May 24, 1974. (Tr. 164) At the time of the trial, Plaintiff was thirty-

five (35) years old (Tr. 129) and Defendant was twenty-nine (29) years old (Tr. 5), and employed in listing conversion with Mountain Bell. (Tr. 10)

The marriage has been described as "tumultuous". (Tr. 11, 133, 166, 167, 234, 235, 267) From the beginning of the courtship and during the course of the marriage, Plaintiff lied, (Tr. 12, 125, 167, 170, 223-226, 228-230, 232) drank excessively, (Tr. 12, 125, 223-228, 232-235, 238, 240, 268, 269) was involved with other women (Tr. 230-232, 309) and had extra-marital affairs (Tr. 259, 306, 308, 310, 315-316). He stayed out late at night and came home drunk, (Tr. 125, 133, 228-233, 235, 238) abused Defendant, (Tr. 234-236) used foul and abusive language in her presence (Tr. 174) and in the presence of the minor child (Tr. 251), came home drunk in the presence of the minor child, (Tr. 175, 232-233, 236) threatened to put a knife in Defendant's stomach, (Tr. 235-236) demeaned her, among other things, by saying "I hate you" in the presence of his parents (Tr. 231) and "get in the bedroom and spread your legs". (Tr. 237)

Defendant, admittedly, is not totally without fault. When provoked because of his conduct, lying, drinking, staying out late, (Tr. 305) she has physically assaulted him, (Tr. 22, 268), used foul language (Tr. 179) but not in the presence of the minor child (Tr. 270) and locked Plaintiff out of the home. (Tr. 13-14, 178) She has been under the

influence of intoxicating beverages, but mainly at social functions together with Plaintiff. (Tr. 294-301) There is no evidence she has engaged in any immoral conduct in the presence of her child, or any conduct which was detrimental to the child. (Tr. 27-28, 31-34, 34-35, 38, 118-119) She has not denied her liason with another man starting in May, 1974, the month the divorce complaint was filed, (Tr. 22-27, 31, 39-41, 46) none of the conduct between them which can be shown to have been detrimental to the minor child.

However, she always has shown herself to be a fit and proper mother during the course of the marriage. (Tr. 63) She is bright and intelligent, (Tr. 148) she learns fast, (Tr. 148, 159) she is well liked, (Tr. 160) she is hard working and industrious, (Tr. 149) and considerate of others. (Tr. 160) She is a good mother, (Tr. 29-30, 46-47, 152-154, 260-261, 270, 313) who for the first three and one-half years (Tr. 11) of her child's life fed, clothed, trained, educated and nurtured him into a stable child. (Tr. 63, 71-73, 79, 115, 120, 185) Witnesses from her employment, (Tr. 147-149, 160-163) neighbor, (Tr. 187-194) personal friend before and after marriage, (Tr. 184-187) and mutual friend of Plaintiff and Defendant (Tr. 195-197) have all testified about Defendant's qualities as a person, mother and friend. They have described the loving interaction between mother and child. (Tr. 28-29, 160-163, 184-197) She has fulfilled all of the

criteria set down by Plaintiff, Dr. C. Nielson, and Dr. Tedrow of a good parent. (Tr. 61-67, 71, 73-74, 89, 90, 142, 145, 152-157, 160-163, 185-197) No evidence was introduced showing that Defendant neglected the child, abused the child or, in her absence, left the child untended or in improper care.

Then, there was the second suicide attempt on August 6, 1974. (Tr. 12, 30, 125, 140) The continuing stimulus theory mentioned by Dr. Tedrow appears to apply here. (Tr. 116, 172-174) She was going through a divorce, out of her home, (Tr. 14-16, 176, 242) without her child, without adequate funds, without a job, harassed by Plaintiff and under the pressure of making some very heavy decisions. (Tr. 13-14, 117, 134, 139, 164, 172-176, 242-244, 252, 256, 269) Finally, having her son state he did not want to stay with her (Tr. 126, 128, 139-140, 269) was the crushing blow. Andrew was present during this episode and this is the only instance where Defendant's conduct may have had a detrimental effect on him. (Tr. 140)

In addition, Dr. Cantrell Nielson and Dr. Richard Ferre, psychiatrists, after interviewing the Plaintiff, Defendant and seeing the minor child and having knowledge of Defendant's attempts at suicide, both felt the child should be placed with the mother, the Defendant. (Tr. 52, 59-60, 62-63, 334, 336, EX 6-P) The psychiatrists have considered

her suicide attempts in their evaluation and have not deemed it serious enough to hinder her ability to be a mother to Andrew. (Tr. 52, EX 6-P)

Plaintiff questions the clinical interview method used by Dr. C. Nielson, (Tr. 56-57) who was mutually agreed on by the parties. Yet, at the last moment, he secures the services of a psychiatrist, Dr. Jack Tedrow, who uses precisely the same clinical interview method, but without the benefit of seeing either the Defendant, the minor child or the paternal grandparents. (Tr. 93-95, 100) Likewise, the limitations of the personal interview method was mentioned, in questioning with Dr. C. Nielson. (Tr. 93-94) It is obvious from the testimony of Dr. Tedrow that the information provided by Plaintiff was unilateral, limited, self-serving and biased, (Tr. 87, 105, 107) points Plaintiff made about Dr. C. Nielson's interview. (Tr. 58)

Dr. Tedrow did testify, however, that a person can be under stress and depression, a cause of suicide, if going through divorce, kicked out of the home, loss of the child, threatened with no money, and no place to live. (Tr. 13, 100-102, 105, 113) He further stated there is question of stability of a person who drinks excessively, lies, uses foul and abusive language in the presence of his child. (Tr. 97-98) Finally, the Dr. testified that a mother who cares for a child for three years, as testified in this

case, (Tr. 110, 115) and the father is out of the picture, and there is sparse testimony of the father's contributions to the nurturing of the child, (Tr. 114, 142-143, 270) the mother would be the psychological parent; (Tr. 111) this, inspite of his statements of the myth of the psychological parent. (Tr. 86, 92) Dr. C. Nielson also states the detrimental effect foul and abusive language, derogatory and demeaning language, intoxicated condition of one in the presence of the child, has. (Tr. 79)

Also, it is important to observe the sequence of the psychiatrists. Dr. C. Nielson was seen during September 26, 27, October 8, 19, 1974; (Tr. 50) Dr. Tedrow during November 14, 20, 27, 1974; (Tr. 94) and Dr. Ferre during December and thereafter. (Tr. 324-325) Both before and after Dr. Tedrow, the psychiatrists have come up with the same recommendation. Dr. C. Nielson also found her relationship with Mr. Turpin not to be detrimental to her ability to care for her child. (Tr. 53, 84)

Plaintiff produced only one witness besides himself, Dr. Tedrow. His testimony has already been commented on. Defendant very charitably observed his virtues toward the child (Tr. 241) as did two other of Defendant's witnesses (Tr. 193, 198), and one of the witnesses testified since Mr. Mecham's possession of Andrew, the child is more subdued. (Tr. 199) But, nowhere else has he shown any evidence that he is better

able to care for the child. He has, only in the abstract, testified what should be done, not what has been done. (Tr. 142-145) In brief, there is little evidence brought out by Plaintiff that he can do as good or better job as a parent in raising Andrew, except for his own statement. (Tr. 114, 142-143, 270)

After the second suicide attempt, Defendant voluntarily gave possession of the child to Plaintiff on or about August 7, 1974, to avoid conflict, inspite of her recollection she asked for the child back. (Tr. 256, 257)

Plaintiff pursued the argument that because Defendant did not initiate legal action to secure custody of the child, she somehow displayed her lack of concern for the child. (Tr. 31) Nothing could be further from the truth. The record will show efforts were made. More important, Defendant testified she did not persist because she did not desire to make a "football" out of the child. (Tr. 257)

Plaintiff asserts a novel theory about one-to-one relationship regarding Defendant and her child; (Tr. 31, 42, 55, 75) he propounds the thesis that she is incapable of being with her son alone, but must be in the company of others and therefore has not sustained a one-to-one relationship. (Tr. 34-42, 55, 75) Plaintiff fails to recognize defendant was with her child constantly. (Tr. 37, 160-163, 184, 187) It may be inferred the stability of the child at the present time is

because she saw to it he was able to play with other children on a peer group relationship and widen his horizons with people other than his parents and grandparents. (Tr. 51, 61, 71, 73-74, 152, 155-156) Plaintiff on the other hand, has scant evidence of any relationship with the child whether it be one-to-one or otherwise except for his own statement. (Tr. 114, 142-143)

There is testimony of Plaintiff's harassment of Defendant while she had custody of the child, (Tr. 251-252, 257, 331) but there is no testimony of Defendant's harassment of Plaintiff while he had the child. Was the fact the child was relatively free from symptoms normally caused by divorce (Tr. 51, 60, 71, 328-329) because Defendant nurtured and raised the child for the first three years and four months of his life and did not make a "football" out of him, (Tr. 257) or because Plaintiff had the child for four months out of the child's life, particularly with no harassment from the Defendant? There is testimony the child is now more subdued, (Tr. 199) and may be experiencing increasing confusion and insecurity. (Tr. 330)

The paternal grandparents have made their presence felt both during the marriage (Tr. 164, 241) and after the separation. (Tr. 251-252, 257, 329) Both psychiatrists have considered their presence and yet, felt the child should be given to the Defendant. (Tr. 83-84, 328, 336)

The Court ruled it was going to leave custody as is subject to very liberal visitation. (Tr. 340) The Court then found in its conclusion that the grandparents were willing to assume the major responsibility for the minor child and the child was with the grandparents. (Tr. 340-341) The Court further stated, "I don't want to twist the child up, that's my endeavor and problem." (Tr. 342) And, finally, the Court found both parents fit (Tr. 344), and then stated the custody would be split (Tr. 341) as it was before.

The Decree of Divorce was entered and became final on the 28th day of March, 1975. Neither party appealed the divorce. Notice of Appeal was filed by the Defendant on the 17th day of April, 1975, on the award of custody to the Plaintiff.

ISSUE

The issue present on this appeal is whether the Lower Court erred in its ruling granting the care, custody and control of the minor child to the Plaintiff.

ARGUMENT

As stated in the Brief of Plaintiff and Appellant in Cox v. Cox., Ut.2d, 532 P.2d 994 (1975) No. 13242 on pp. 12 and 13 relat-

ing to the discretion of the trial court in divorce matters:

In divorce cases the trial court has considerable discretion in determining what is equitable, and upon appeal, the decision of the court as to child custody will not be reversed unless it is clear that there was an abuse of discretion. Graziano v. Graziano, 7 Ut 2d 187, 321 P.2d 931, (1958); Sartain v. Sartain, 15 Ut 2d 198, 389 P.2d 1023 (1964); Sampsell v. Holt, 115 Ut 73, 202 P.2d 550, (1949). The reason most often expressed for this rule is that the trial court is in an advantaged position to observe the witnesses and draw conclusions. As was said in Sampsell v. Holt, at 202 P.2d 554:

"We are not disposed to upset the finding. The trial court had the opportunity, as we do not, of seeing the parties and the witnesses, of observing their demeanor, and of forming opinions."

Therefore, unless it can be shown that the mother is unfit, it is proper to leave the children in her custody.

A. The plaintiff has not been shown to be unfit as a mother.

The evidence clearly shows and the Court has found the Defendant to be a fit mother (Tr. 51, 71, 344, Ex.6-P).

The weight of the evidence abundantly shows Defendant is not only a fit mother, she apparently is an extra-ordinary mother. She is bright, intelligent, industrious, congenial and considerate (Tr. 148, 149, 159, 160). For 3-1/2 years of Andrew's life, she has more than adequately, fed, clothed, trained educated and nurtured him into a stable, well-adjusted child (Tr. 63, 71, 79, 115, 120, 160-163, 184-187, 187-194, 195-197). The two psychiatrists, Dr. Cantrell Nielson and Dr. Richard Ferre,

who evaluated her, have found she has adequately met the needs of Andrew (Tr. 52, 59, 60, 62, 63, 334, 336, Ex. 6-P).

Sexual indiscretion bears on the fitness of a parent only when the child is affected or damaged thereby. Further, a good mother may exercise poor judgment as a wife. In Sparks v. Sparks, 29 Ut 2d 263, 508 P. 2d 531 (1973), while having custody of minor children from a former marriage, the mother cohabited with a man, not her husband. The court held that where a mother's indiscretions have not been found to affect or damage the child that the mother is not unfit, even though she is living with a man. See also, Dearden v. Dearden, 15 Ut 2d 105, 388 P. 2d 230 (1964), Stuber v Stuber, 121 Ut 632, 244 P. 2d 650 (1952), Cooke v. Cooke, 67 Ut 371 (1926) where adultery was actually proven.

On balance, the evidence shows both parents to have been sexually indiscreet (Tr. 22-27, 31, 39-41, 46, 230-232, 259, 306, 308-310, 315 316). Consequently, the Defendant should no more than the Plaintiff be penalized for such conduct, particularly since Andrew was unaware of and unaffected by the indiscretions.

In weighing other conduct of the parties, the Plaintiff appears to have disregarded the proper marital decorum befitting a parent. With consistent regularity he drank excessively, stayed out late, lied and caused considerable grief for the Defendant (Tr. 12, 117, 125, 133, 167, 170, 174, 223-240, 259,

268, 269, 310, 315, 316). In addition, detrimental conduct affecting Andrew included use of foul and abusive language in the presence of Andrew, and state of intoxication in the presence of Andrew (Tr. 175, 232, 233, 236, 251). On provocation, Defendant retaliated in kind by her language, and behavior (Tr. 13, 14, 22, 178, 179, 268, 270, 294-301), but not in the presence of Andrew (Tr. 22-38, 118-119).

There is some question about the stability of the Defendant. The two suicide gestures on the part of Defendant were considered by the two psychiatrists who clinically evaluated her and determined it did not affect her ability to care for Andrew (Tr. 52, 59-63, 334-366, Ex 6-P). Likewise, the stability of the Plaintiff must also be questioned. As Dr. Tedrow testified, there is concern about the emotional stability of a person who drinks excessively, lies, uses foul and abusive language in the presence of his child (Tr. 97, 98), this in addition to his other bizzare conduct. This aspect is particularly important because there was no testimony by Plaintiff he has reduced or quit his drinking or modified, in any way, his other behavior nor is he seeking any professional help for his problems. Plaintiff, on the other hand, has continued seeing Dr. Robert Mohr for professional advice and assistance (Tr. 20-21).

The paternal grandparents availability bears no significance in cases where both parents are fit. As Dr. Cantrell Nielson

stated, "grandparents should be grandparents and not substitute parents, period." (Tr. 84). At 35 years of age (Tr. 129), it is presumed Plaintiff is capable of being a parent.

As pointed out in the Cox Brief, supra, page 15, unfitness depriving a parent of custody must be a positive and not a contemplative or comparative matter. As pointed out above, the two psychiatrists who had the opportunity to give a clinical evaluation of both parents were clear and precise in their recommendation to the court. The third psychiatrist, Dr. Jack Tedrow, interviewing the Plaintiff and based on inadequate information, suggested a comparative evaluation without seeing the Plaintiff or Andrew (Tr. 93-95, 100). There appeared to be relative agreement by even Dr. Tedrow there is such a thing as a psychological parent (Tr. 111). In this case, the psychological parent was and is the Defendant.

Based on Wisconsin cases, it was stated in the article "Custody - To Which Parent?", Podell, Ralph J; Peck, Harry F.; and First, Curry; Marq. L. Rev, 56:51 Winter '73:

In conclusion it seems clear that the trend particularly among the more enlightened courts is to ignore the rigid absolutes and legalisms of the past and adhere with increasing frequency to the trend toward reliance on the social scientists and expert testimony of psychologists, psychiatrists, social investigators and other experts in the field of human behavior.

It has further been stated that the psychiatric experts have knowledge which can be helpful and beyond the reach of the attorney, thus, law and psychiatry should work jointly. "Family

Law and Psychoanalysis - Some Observations on Interdisciplinary Collaboration," Katz, Jay, M.D., Fam. L. Q. 1:69 Je. '67. In the landmark case of Painter v. Bannister, 258 Iowa 1390, 140 N.W. 2d 152 (1966), the Court relied heavily on the testimony of a psychiatrist and child psychologist to place the child in a case where neither party was declared to be unfit.

The failure of the court below to rely on the recommendations of the psychiatrists and take into consideration the testimony of the witnesses was an abuse of discretion of great magnitude.

B. Preference for the mother during tender years doctrine prevails in Utah.

The traditional policy of Utah law, despite statutory language, all things being comparatively equal, is a child of tender years should be placed in the custody of the mother. Cox v Cox, Ut. 2d 532 P.2d 994 (1975), Hyde v Hyde, 22 Ut.2d 429, 454 P.2d 884, McBroom v McBroom, 14 Ut. 2d 392, 384 P. 2d 961 (1963), Steiger v Steiger, 4 Ut.2d 273, 293 P. 2d 418 (1956), Hulse v Hulse 111 Ut. 193, 176 P. 2d 875 (1947), and Holm v. Holm, 44 Ut. 242, 139 P. 937 (1914).

Reflecting judicial wisdom and experience, the court in Cox v Cox, supra, stated that in considering the long-term welfare and adjustment of children:

...we think there is wisdom in the traditional pattern of thought that the roles of the mother and father in the family are such that, all other things being comparatively equal, the children should be in the care of their mother,

especially so children of younger years; and this may be true even when the divorce is granted to the father.

In the instant case, both parties were granted the divorce. Further support for the above proposition is found in other jurisdictions: Wilson v Wilson, 199 Or. 263, 260 P.2d 952 (1955), State ex rel Hale v. Long, 36 Wash. 2d 432, 218 P. 2d 884 (1950), Kuykendall v. Kuykendall, 290 P2d 128 (Okla) (1955), Grimditch v Grimditch, 71 Az. 198, 225 P. 2d 489, (1950), Hayes v Hayes 134 Colo. 315, 303 P.2d 238 (1956), Bierce v. Hansen, 171 Kan. 422, 233 P. 2d 520 (1951), Trudgen v Trudgen, 134 Mont. 174, 329 P. 2d 225 (1958), Stuart v Stuart, Cal. Rptr. (1973), Cooke v Cooke ___M.D. APPL___, 319 A.2d 841 (1974) Erickson v Erickson, ___Minn. ___ 220 N.W. 2d 487 (1974).

Although evidence of a father's role in the development of a child is generally inconsistent and meager, the same cannot be said of maternal deprivation. It has been said:

"Despite these methodological problems and weaknesses caused by difficulties of execution, the sheer weight of confirmatory and corroborative evidence regarding adverse effects of maternal deprivation reveals the undeniable importance of the role of the mother in the development of her offspring." "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Dispute," Adrian Bradbrook, J. Fam. L. 11:557, '72.

The article further states that the "boldest justifiable conclusion: is that a child of less than 7 years should be

placed in the custody of the mother. There is some evidence that a male child should be transferred to the father at age 7, but, in view of undesirable results of changing custody, the better choice would be to have all children remain with their mother throughout childhood.

In the instant case, Andrew is of the tender age of 3-1/2 (Tr. 11). The testimony shows his closeness to his mother (Tr. 48-84, 115, 120, 160-163, 184-187, 187-194, 195-197, Ex 6-P). The testimony further shows he is in the nuturing stage where the mother's influence is indispensable (Tr. 48-84, Ex 6-P). Thus, according to the traditional policy of the Courts of this state, preference should be given to the mother, she being a fit and proper person to raise Andrew.

C. In awarding custody of minor children, the best interests of the child is the cardinal principle.

The universally accepted principle regarding custody of minor children is that the best interest of the child is the controlling factor in every case. Walton v Coffman, 110 Ut. 1, 169 P. 2d 97 (1946).

From the evidence presented, there is no substantial indication that Plaintiff can better serve Andrew's needs than can the Defendant. Andrew is not in need of any specialized care. The only difference may be economic. Plaintiff's potential and capacity to earn more money than Defendant is

not disputed (Tr. 201-208, 264-265, Ex 5-D). In making a custody determination, however, financial status is to be considered, but it is not determinative of the quality of care a child will receive and, thus, should not be the basis for a decision.

White v. White, 29 Ut 2 148, 506 P. 2d 69 (1973).

The quality of care Andrew will receive is of concern to all. There is nothing to indicate Defendant has not been a good mother, there is nothing to indicate Defendant has mistreated Andrew physically or otherwise, there is nothing to indicate she has not fed, clothed, trained, educated and nurtured him properly and adequately, there is nothing to indicate she has subjected him to any unwholesome or immoral environment, and there is nothing to indicate she shall do any of the above in the future. She has been a sincere, concerned and loving mother at all times.

The quality of a mother's love cannot be measured by the difficulties of the parents. The difficulties of the parents, however, should not prevent the Court from measuring the quality of the mother's love in this instance. In spite of all the emotional strain for both parties, the Defendant has strained most for the best interests of the child. Her willingness to voluntarily permit Plaintiff to have possession of the child during the pendency of the divorce is only but one measure of her willingness to put the child's interest first and not make him the proverbial football (Tr. 257). She should

not be penalized for this.

Perhaps, Dr. Ferre's comments can capsulize why, in the long term interest of Andrew, he should be awarded to Defendant;

Looking, however, toward his long term needs, he clearly is attached to his mother. She seems capable of continuing to provide the maternal care but (sic) he needs. If she remarries, there is no indication that this would adversely effect her ability to adequately care for Andrew.

Mr. Mecham's hostility and vindictiveness in this case is of real concern. I would anticipate this will cause continued conflict. If Andrew were left in his custody, I would be concerned how Mr. Mecham's emotional problems, in this area, would effect Andrew's future development.

Clearly a decision in this case is difficult, but from my examination there is presently no major reason why Mrs. Mecham should be deprived of custody of Andrew.... (EX 6-P).

The Lower Court had concern for Defendant's emotional stability. Obviously, the psychiatrists were more concerned, with Plaintiff's emotional stability.

The introduction of the paternal grandparents into the disposition of custody was, indeed, unfortunate. Neither grandparent was in Court to testify nor was any direct evidence relating to their fitness given except for a comment by Dr. Ferre who detected problems (EX 6-P). Otherwise, there is no evidence of the age, ability, environment, relationship and rapport concerning the grandparents. The most disturbing aspect of the Court's rationale was its conclusion that the grandparents were willing to assume the major responsibility for

the child (there is no evidence of this in the record) and that the child was with the the grandparents (there is no evidence of this in the record). Where there are two fit parents (Tr. 51, 71, 344), how the Court makes the leap from the Plaintiff, about whom the evidence is sparse regarding his performance to care for the child, to the grandparents, for whom there is even less evidence, is difficult to comprehend.

Furthermore, the Court's statement, "I don't want to twist the child up, that's my endeavor and problem...." is generous, but confusing (Tr. 342). And, the Court's statement about the split custody of the child (Tr. 341) as it was before, remains a mystery, particularly a three way split between the grandparents, the Plaintiff and Defendant. The psychiatrists have also stated that stability is important. How, placing the child with the major responsibility in the grandparents provides stability is an enigma. The child will now be placed in a four way routine between the grandparents, the father, the nursery school or baby-sitter, and the mother (Tr. 88, 144, 145, 146, 329, 334, 336). This certainly is not stability nor in the best interest of the child.

If the child were awarded to the Defendant, Andrew would have the most comparable stability he experienced prior to the divorce, the whole attention of the mother (Tr. 338, 339) and the liberal visitation rights of the father.

SUMMARY

Based on the record, the evidence shows the lower Court abused its discretion and erred in its ruling granting the care, custody and control of the minor child to the Plaintiff.


The Lower Court has found and the evidence clearly proves the mother is a fit and stable mother. During the period Defendant had Andrew, he was stable and relatively free from symptoms emanating from vibrations of a divorce. Defendant was a good, loving and concerned mother to Andrew.

The policy of the law in this state is to award custody of children of tender years to the mother, all things being comparatively equal. The evidence shows the parties are at least equal and, in Plaintiff's best light, he has problems with which he must cope.

The best interest of the child should be the primary consideration of this Court. Based on the evidence elicited, the facts adduced, and the policy of the law, it is in the best interest of the child, now, and for the future, to award custody of the child to the Defendant.

Thus, the Defendant respectfully requests that the decision of the Lower Court be reversed, and that custody of the minor child be awarded to Defendant subject to liberal visitation rights to the Plaintiff and further remand this case for determination of a proper and adequate amount to be paid by Plaintiff for the support of the child.

Respectfully submitted

A handwritten signature in cursive script, appearing to read "Raymond S. Uno", is written over a horizontal line.

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