

1985

/Karla Kishpaugh (Kornmayer) v. Richard Bruce Kishpaugh : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

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KARLA KISHPAUGH (KORNMEYER), :

Plaintiff/Respondent, :

VS. :

RICHARD BRUCE KISHPAUGH, : No. 20423

Defendant/
Appellant. :

---ooo0ooo---

APPELLANT'S BRIEF

Appeal from Judgment

of the Third Judicial District Court of Salt Lake County

Dated December 7, 1984

The Honorable Dean E. Conder, District Judge

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FILED

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Clerk, Supreme Court, Utah

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THE PARTIES

Richard Bruce Kishpaugh, Defendant-Appellant

Karla K. Kishpaugh, Plaintiff-Respondent

William A. Kornmayer, Petitioner-Respondent

Kathryn Kornmayer, Petitioner-Respondent

TABLE OF CONTENTS

The Parties	i
Table of Contents	ii
Table of Authorities	iii
Statement of Issues	iv
Statement of the Case	iv
A. Nature of the Case	iv
B. Course of the Proceedings	v
C. Disposition in the District Court	v
D. Statement of Material Facts	v
Summary of Argument	viii
Argument	1
A. The parental presumption may be rebutted only upon a finding that a natural parent lacks all three of the characteristics giving rise to the parental presumption	1
B. The record is devoid of evidence supporting the trial court's findings that Kishpaugh has failed to sacrifice his own interests and welfare for Brian's and that Kishpaugh lacks the sympathy for and understanding of Brian that are generally typical of parents.	5
1. Kishpaugh has sacrificed his own interests and welfare for Brian's interests and welfare	5
2. Kishpaugh possesses the sympathy for and understanding of Brian that are characteristic of parents generally	8
C. The trial court erred in failing to provide Kishpaugh with a standard of improvement by which he might later obtain custody of Brian	8
D. It is in Brian's best interests that Kishpaugh be awarded custody	10
Conclusion	14

- Appendix A: Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982)
- Appendix B: Kishpaugh v. Kishpaugh, Memorandum Decision,
dated November 26, 1982
- Appendix C: Kishpaugh v. Kishpaugh, Amended Findings of Fact
and Conclusions of Law (F.F.), dated December 28,
1982

TABLE OF AUTHORITIES

<u>Statutes</u>	<u>Cited at Page(s)</u>
§ 55-10-109, Utah Code Annotated, (1953 as amended)	9
§ 78-3a-48, Utah Code Annotated (1953 as amended)	9
 <u>Cases</u>	
Cooper v. DeLand, 652 P2d 907 (Utah 1982)	3,4
Hutchinson v. Hutchinson, 649 P2d 38 (Utah 1982)	1,2,3,5,10, 13,14
 <u>General</u>	
73 AmJur 2d, Statutes § 244 at 421	3

STATEMENT OF ISSUES

A. Under the test established in Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982), may a finding that a natural parent lacks two of the three characteristics giving rise to the presumption in favor of awarding custody to a parent over a non-parent support the conclusion that the presumption has been rebutted.

B. Does the evidence support the trial court's findings that the defendant Richard B. Kishpaugh:

1. Lacks the sympathy for and understanding of the child that is characteristic of parents generally; and
2. Has failed to sacrifice his own interest and welfare for the child's interest and welfare.

C. Did the trial court err in failing to instruct Kishpaugh what he should do in the future to obtain custody of Brian.

D. If the parental presumption has been rebutted, is it in the child's best interest that the petitioners William and Kathryn Kornmayer be awarded custody.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal by the defendant Richard B. Kishpaugh from an order awarding custody of the minor child, Brian, to his maternal grandparents, William and Kathryn Kornmayer.

B. Course of the Proceedings.

The plaintiff Karla Kishpaugh (Plaintiff) was awarded custody of Brian, born February 18, 1976, under the decree of divorce entered June 25, 1981. The defendant Richard Kishpaugh (Kishpaugh) petitioned the court on April 27, 1984 to modify the decree so that he might obtain custody of Brian. The petitioners William and Kathryn Kornmayer (Petitioners) also filed a petition for custody, after it was determined Plaintiff would be unable to care for Brian due to illness. The hearing on both petitions came on before the Honorable Dean E. Conder of the Third Judicial District Court on November 22, 1984.

C. Disposition in the District Court.

On December 7, 1984, the District Court entered an order awarding custody to Petitioners, after finding that the presumption in favor of awarding custody to a parent over a nonparent had been rebutted, and that it was in Brian's best interest that Petitioners be awarded custody .

D. Statement of Material Facts.

Brian was born February 18, 1976 and is the sole issue of the marriage of Kishpaugh and Plaintiff (F.F. 1). Although awarded custody by stipulation in the original decree of divorce in June, 1981, the Plaintiff has never assumed a custodial role (T 7,8). Since the decree of divorce, Brian has lived with his maternal great grandmother, Ona Landrum, and with the

Petitioners, alternatively (T 28,29; F.F. 2). Petitioners are the maternal grandparents of Brian (T 12). Petitioners live in a mobile home park in Chico, California (T 54, 56).

Kishpaugh has a good relationship with Brian which has been enhanced by Kishpaugh taking the child for visits during Thanksgiving and Easter recesses, together with several other weekend visits during the year and extended summer visitations, which include six weeks in 1984 and three and one-half weeks during the summer of 1983 (T 83, 93; F.F. 3). There is love between Brian and Kishpaugh which the lower court has characterized as "deep love" (T 133, 138; F.F. 11).

Shortly after the decree of divorce Kishpaugh quit his job in Salt Lake City and moved to Reno, Nevada, to be closer to Brian and to Kishpaugh's family so that his family could care for Brian during working hours when Brian was staying with Kishpaugh (T 82, 83, 98, 102, 115). In doing so, Kishpaugh quit his job of four years with the University of Utah Police (T 82). While Brian lived with Petitioners, Kishpaugh wrote him letters (T 94), visited him at least ten times (T 86), went with Brian to school (T 87, 90) and even learned sign language to help him better communicate with his son (T 87). Kishpaugh has arranged in Reno for school and church services designed for the instruction of the hearing impaired (T 89-91). Kishpaugh has also arranged with co-workers to change his work schedule to accommodate the four hundred mile drive to Chico, California, and back to visit Brian

(T 99). Kishpaugh has further sacrificed his own interests for Brian's welfare by terminating a close personal relationship with his girlfriend after she had expressed doubts about the desirability of gaining custody of Brian (T 98).

During the three and one-half years following the divorce, Kishpaugh paid nearly \$10,000.00 to the Plaintiff: \$6,430.00 of which was support for Brian (F.F. 15). Plaintiff never forwarded this money to Brian, but rather used it for her own needs (T 20, 107). After discovering that the payments were not being forwarded to Brian, Kishpaugh stopped making payments to Plaintiff (T 106, 107; F.F. 4). Kishpaugh attempted to continue payments by sending the amount, previously agreed upon for child support between Kishpaugh and Plaintiff (T 104), to Brian's maternal great-grandmother with whom Brian was living. She refused the payments because they were not the amount stated in the stipulated decree of divorce (T 71, 106, 107).

Due to health problems, Plaintiff will be unable to assume any custodial role (F.F. 16). At the time of the original decree of divorce Plaintiff had told Kishpaugh that Brian would be living with Petitioners for only a short time while Plaintiff finished her education (T 83). After relying upon Plaintiff's promises for some time and after discovering that Plaintiff could not assume custody, Kishpaugh sought custody, believing that Brian should be raised by his natural parent (T 83-85).

After a hearing on both Kishpaugh's and Petitioners' petitions for custody, the Honorable Dean E. Conder of the Third

Judicial District Court awarded custody of Brian to Petitioners and not to Kishpaugh, the natural father. The court found the presumption favoring the natural parent had been rebutted and that awarding custody to Petitioners was in the best interests of Brian.

SUMMARY OF ARGUMENT

A. Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982) held that a natural parent and a non-parent will be on equal footing in a custody dispute only after the presumption in favor of the natural parent has been rebutted. To rebut the parental presumption, the non-parent must show that the parent lacks all three of the attributes generally characteristic of parents. These attributes are: a strong mutual bond with the child; a willingness to sacrifice one's own interest and welfare for the child's; and the sympathy for and understanding of the child that are generally characteristic of parents. The trial court erred in concluding the parental presumption had been rebutted upon a finding that Richard Kishpaugh lacked only two of the necessary three attributes.

B. The trial court erred in finding that Richard Kishpaugh lacked two of the three necessary parental attributes. The record shows Richard Kishpaugh more than willing to sacrifice his own interests and welfare for his son's, and it is devoid of any evidence showing Kishpaugh to be lacking in the sympathy for and understanding of Brian that are generally characteristic of

parents. The trial court's conclusion that the parental presumption had been rebutted was, therefore, erroneous.

C. The trial court erred in failing to provide Kishpaugh with a standard of improvement whereby he might regain custody of his son. Even an individual whose parental rights the State wishes to terminate is given such a standard and a six-month probationary period before any permanent determination is made. The trial court's failure so to do made useless any future action by Kishpaugh to reacquire custody, since he has done all that the law previously required him to do, and he can do no better than he has done without instruction. His rights to custody and Brian's right to be raised by his parent have been rendered illusory by the trial court's error.

D. The trial court erred in finding that Brian's best interests were served by awarding custody to the Petitioners William and Kathryn Kornmayer. Hutchinson set forth the criteria found important by courts in determining the best interests of a child in custody disputes. The trial court's conclusion was not based upon any of the Hutchinson criteria. This was error.

ARGUMENT

A. THE PARENTAL PRESUMPTION MAY BE REBUTTED ONLY UPON A FINDING THAT A NATURAL PARENT LACKS ALL THREE OF THE CHARACTERISTICS GIVING RISE TO THE PARENTAL PRESUMPTION.

In Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982), this Court stated in a unanimous decision:

In a controversy over custody, the paramount consideration is the best interest of the child, but where one party to the controversy is a nonparent, there is a presumption in favor of the natural parent. [citation deleted]

Id., at 40. Hutchinson, involved a custody dispute between the appellant, the natural mother of a minor child, and the respondent, the man whom she married after the birth of the child, and whom she later divorced. The evidence showed she was a heavy drinker, would leave the children for days at a time, and otherwise neglected the children. The district court denied custody of the child to the natural parent on the grounds that it was in the best interest of the child to award custody to the nonparent. Id.

The Hutchinson court held the trial court erred in not first establishing whether the presumption in favor of the natural parent had been rebutted before making inquiry into the best interests of the child. Id. at 40-42. The Hutchinson court reasoned that

The parental presumption is not conclusive, State in re R _____ L _____, 17 Utah 2d 349, 411 P.2d 839 (1966), but it cannot be rebutted merely by demonstrating that the opposing party possesses superior qualifications, has established a deeper bond with the child, or is able to provide more desirable circumstances. If the presumption could be rebutted merely by evidence

that a nonparent would be a superior custodian, the parent's natural right to custody could be rendered illusory and with it the child's natural right to be reared, where possible, by his or her natural parent.

Consistent with its rationale, the parental presumption can be rebutted only by evidence establishing that a particular parent at a particular time generally lacks all three of the characteristics that give rise to the presumption: 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's, and that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally. The presumption does not apply to a parent who would be subject to the termination of all parental rights due to unfitness, abandonment, or substantial neglect, since such a parent is a fortiori not entitled to custody. [emphasis added]

Id. at 41.

In the instant case the District Court found the parental presumption had been successfully rebutted based on a finding that Kishpaugh (1) had failed to sacrifice his own interest and welfare for Brian (F.F. ¶ 17); and (2) lacked the sympathy for and understanding of Brian that are characteristic of parents generally (F.F. ¶ 18). The District Court did not find that no strong mutual bond exists. Indeed, it found Kishpaugh and Brian have a good relationship (F.F. ¶ ¶ 3, 14) and that there is a deep love between Kishpaugh and Brian (F.F. ¶ 11; T 133, 138-139).

Hutchinson did not state that the presumption can be rebutted by showing that two of the three characteristics are missing in a particular parent at a particular time. It stated:

. . . the parental presumption can be rebutted only by

evidence establishing that a particular parent at a particular time generally lacks all three characteristics that give rise to the presumption

Id. at 41.

The Hutchinson court established a clear test for establishing whether the parental presumption has been rebutted, and its language is clear. "All three characteristics" must be lacking. When interpreting a statute or case containing the word "all", the rule is, generally, that the plain meaning of the word will apply. Thus, "the word 'all' usually does not admit of an exception, addition or exclusion." 73 AmJur 2d, Statutes §244 at 421. "All" in such a context means "each" or "every".

The District Court, therefore, erred in awarding custody to the maternal grandparents, the Petitioners. Much as in Hutchinson,

. . . the district court addressed the question of the best interests of the child without first determining [that] the presumption in favor of the natural parent had been rebutted.

Id., at 42. This was error.

In the companion case to Hutchinson, Cooper v. DeLand, 652 P.2d 907 (1982), this Court reiterated the three-pronged Hutchinson test for overcoming the presumption in favor of a natural parent over a non-parent. Citing Hutchinson, the Court stated:

A party seeking to deprive a natural parent of

custody of a minor child can rebut the parental presumption only by evidence establishing 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's, and that the parent lacks the sympathy for and understanding of the child that is characteristic generally." Only after the parental presumption has been rebutted, will the parties compete on equal footing, and custody shall then be granted to the party who will most adequately protect and promote the best interests of the child.

Cooper, supra, at 908-909.

In Cooper, the noncustodial parent petitioned the court to obtain custody of an eight-year old child from the stepfather after the death of the custodial parent. The Honorable Dean E. Conder of the Third District held for the stepfather, finding that the natural father had not shown "by clear and convincing evidence" that it was in the child's best interests to wrest custody from the stepfather, with whom the child had lived for five years prior to the petition. Id., at 908.

On appeal, the Supreme Court held the district court had erred in not first determining whether the parental presumption had been rebutted before enquiring whether the child's best interests were served by awarding custody to either party. Id., at 908-909.

The trial court has here once again awarded custody to the nonparent without first establishing the parental presumption had been rebutted. Brian lived with Mrs. Landrum and Petitioners for 3 1/2 years. In Cooper the child had lived with his stepfather for five years. The Hutchinson and Cooper standard is not

"who has lived with the child longer," but rather, that the child should go with his natural parent unless the presumption has been rebutted by a finding that the natural parent lacks all three attributes generally typical of parents.

In Hutchinson, there was evidence to support a finding of rebuttal of the parental presumption, but the Supreme Court ordered the case remanded so the trial court could make that finding. In the instant case, there is no evidence tending to show Kishpaugh was unfit, or that he lacked the qualities typical of parents. The trial court plainly erred in failing to follow the Hutchinson standard.

B. THE RECORD IS DEVOID OF EVIDENCE SUPPORTING THE TRIAL COURT'S FINDINGS THAT KISHPAUGH HAS FAILED TO SACRIFICE HIS OWN INTERESTS AND WELFARE FOR BRIAN'S AND THAT KISHPAUGH LACKS THE SYMPATHY FOR AND UNDERSTANDING OF BRIAN THAT ARE GENERALLY TYPICAL OF PARENTS.

1. Kishpaugh has sacrificed his own interests and welfare for Brian's interests and welfare.

The District Court made a Finding of Fact that Kishpaugh has failed to sacrifice his own interests and welfare for Brian's. (F.F. ¶ 17). This Finding is not based upon the evidence.

According to the testimony heard by the District Court, Kishpaugh visited Brian in Chico, California, driving the

approximately 360 miles round trip from Reno, Nevada, ten to twelve times from 1981 - 1984. (T 86). While in Chico, Kishpaugh often visited Brian's school. (T 76).

In addition to Kishpaugh's visits to Chico to see Brian, Kishpaugh would drive to Chico, pick Brian up, and take him to Reno every Easter, Thanksgiving, and for a few weeks every summer. (T 77). In 1983 and 1984 Brian was in Reno 3 1/2 and 3 weeks, respectively (T 88 - 89). Kishpaugh also writes Brian often: 5 - 6 times in 1983 and 10 times in 1984 (T 94).

During the visits in Reno, Kishpaugh takes Brian camping and fishing, they go bike riding together, and often go to the park for picnics or just play (T 89). Although he does not want to buy his son's love, Kishpaugh often gives Brian gifts, including gifts on every birthday and every Christmas (T 94 - 95), including two bicycles: one for use in Reno and one for Chico (T 96 - 97).

Kishpaugh moved to Reno from Salt Lake City in 1981, giving up a job he had held with the University of Utah police for four years (T 82) so he could be close to Brian in Chico and so he could be near his family and have their help in Brian's care during visitation (T 102).

Kishpaugh has learned sign language so he could better communicate with Brian (T 87), and has located a church and school in Reno which provide services for the hearing impaired. (T 89 - 91).

After Kishpaugh learned that Brian would likely remain in Chico, rather than in Salt Lake City with Plaintiff, he explored the possibility with Plaintiff that he take custody of Brian. Plaintiff threatened that if Kishpaugh took any action in that regard, she would take Brian herself, put him in daycare or have babysitters take him, and warned Brian would not receive the care he needed. (T 83-84)

Prior to January, 1984, Kishpaugh paid Plaintiff \$6,430.00 in child support (F.F. ¶ 15), none of which was forwarded to Petitioners or Ona Landrum for Brian's care (F.F. ¶ 4).

Finally, Kishpaugh recently ended a deep personal relationship with his girlfriend because she was not in favor of his obtaining custody of Brian, demonstrating that his love for Brian was greater than his love for his girlfriend. (T 98)

A review of the foregoing testimony elucidates Kishpaugh's willingness to sacrifice for Brian. His frequent, long trips to Chico, his willingness to end a relationship with his girlfriend rather than jeopardize his relationship with his son, his learning to communicate through sign language and arrange for Brian's scholastic and religious instruction, his payment of support, and his giving up a job he had held for four years all show a very real willingness to sacrifice his own interests and welfare for Brian's. The District Court's finding to the contrary is plain error.

2. Kishpaugh possesses the sympathy for and understanding of Brian that are characteristic of parents generally.

The record is devoid of evidence supporting the District Court's finding that Kishpaugh lacks the sympathy for and understanding of Brian that are generally characteristic of parents (F.F. ¶ 18).

It is uncontroverted that Brian and Kishpaugh enjoy one another's company (T 77-78), that Kishpaugh has made provision for Brian's care and instruction in Reno (T 87, 89-91), and that Kishpaugh is willing to terminate a relationship with his girlfriend because of her reluctance to support his love for Brian (T 98). These are not the attributes or acts of a man lacking a parent's sympathy and understanding. The District Court plainly erred in finding Kishpaugh was so lacking: his sympathy and understanding are as strong as any parent's.

C. THE TRIAL COURT ERRED IN FAILING TO PROVIDE KISHPAUGH WITH A STANDARD OF IMPROVEMENT BY WHICH HE MIGHT LATER OBTAIN CUSTODY OF BRIAN.

The trial court did not give Kishpaugh any instructions for improving himself so that he might later overcome whatever deficiencies he might have and reacquire custody of Brian. This was error. The only direction the court gave was to "double your efforts and your love for this little boy." (T 140).

Even a person whose parenthood the State wishes to terminate is given some direction. In an involuntary termination

proceeding under § 78-3A-48, Utah Code Annotated (1953 as amended) and its predecessor, § 55-1-109, Utah Code Annotated (1953 as amended), the parent is given specific improvement criteria and a six-month probationary period. Thus, if the parent makes the necessary changes in his or her life, the child will be returned and the involuntary termination proceeding dropped.

In the instant case, Kishpaugh has worked diligently to provide an economically and emotionally stable environment for himself and Brian. He has maintained a good relationship with his son despite the distance between Chico and Reno. He has even made provision for Brian's special needs by locating schooling and church services for the hearing impaired in Reno. In short, Kishpaugh has demonstrated his willingness to do everything necessary to provide for Brian's physical, spiritual, and emotional needs.

It is fundamentally unfair to deny Kishpaugh custody and then to give him no standard for improvement. It appears the trial court made its decision based largely on the fact that Brian had lived with Ona Landrum and the Petitioners for 3 1/2 years. (T 135). This circumstance was not under Kishpaugh's control: Plaintiff had legal custody, but chose to have Brian raised elsewhere.

It is plain error to base a determination of one's worthiness as a parent on a circumstance like the length of time the child lived with someone else. Worse still, this cir-

cumstance remains outside Kishpaugh's control. It would seem the longer Brian lives with Petitioners, the less likely it is that Kishpaugh will ever reacquire custody.

Even assuming arguendo that the parental presumption has been rebutted and Brian's best interests dictate Petitioners should have custody, the trial court still failed to follow the Hutchinson standard in failing to give Kishpaugh a standard of improvement. Much as a failure to find rebuttal of the parental presumption, the failure to instruct has effectively precluded Kishpaugh ever from obtaining custody, thereby rendering illusory "the parent's right to custody . . . [and] the child's natural right to be reared, when possible, by his or her natural parent." Hutchinson, supra, 649. P.2d at 41.

D. IT IS IN BRIAN'S BEST INTERESTS THAT KISHPAUGH BE AWARDED CUSTODY.

The Hutchinson case stated that once the parental presumption is rebutted, the parties will compete on equal footing, and custody awarded solely in the best interests of the child. Hutchinson 649 P.2d at 41. Although the Hutchinson Court stated an appellate court should interpose its own judgment for that of the trial court only when the trial court's decision is flagrantly unjust, the following factors were considered determinative of the child's best interests:

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 custodians' character or status or to 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, stepparent status; and financial condition. (These factors are not necessarily listed in order of importance) [Citations deleted]

Id. These factors will be considered in the order presented above.

1. Preference of the child. Brian indicated he would prefer to live with Petitioners and Ona Landrum, with whom he has lived the past 3 1/2 years (F.F. ¶ 9)

2. Siblings. Brian is an only child, but has young cousins who live in Reno with whom he has established a good relationship. (T 116).

3. Bond. The Court found there is a strong bond between Brian and all the parties. (T 133, 138-139)

4. Continuing Previous Custody. Plaintiff has had custody, but took no role in Brian's rearing or support: sending Brian to Chico to stay with her parents and grandmother while she remained in Salt Lake City. Plaintiff ultimately gave up her

custodial rights, allowing Kishpaugh to assume custody by default. (F.F. ¶ ¶ 2, 4, 5, 8, 16).

5. Kishpaugh's moral character and emotional stability. These were never at issue in this matter.

6. Duration and depth of Kishpaugh's desire for custody. Kishpaugh wanted custody from the beginning when Brian first went to live in Chico. Plaintiff's threats intimidated him, however, and he took no formal steps until he learned of Plaintiff's ill health. (T 83-84)

7. Ability to provide personal care. Kishpaugh will be able to care for Brian every day: he works a regular shift (7:30 - 3:30), and would have his parents' aid in the early morning and afternoon, immediately before and after school (T 92, 115). Petitioners have had Brian only on the weekends. Ona Landrum has cared for Brian during the week (T 28).

8. Impairment through drugs, alcohol. None of the parties drinks heavily or uses drugs, although Petitioner William Kornmayer does use alcohol (T 57).

9. Kishpaugh's reasons for relinquishing custody. Plaintiff, Brian's mother, was awarded custody by agreement. At that time, Kishpaugh felt Brian should be with his mother. When it became clear plaintiff would not care for Brian, Kishpaugh first explored the possibility of obtaining custody. (T 83-84).

10. Religious compatability. When Brian was born, both Kishpaugh and Plaintiff were members of the LDS faith (Mormon). Petitioners are Episcopalian. Further, Kishpaugh has expressed the desire to raise Brian in the LDS faith: Petitioners have expressed no opinion as to Brian's religious instruction. (T 56, 57).

11. Kinship. Kishpaugh is Brian's natural father, whereas Petitioners and Ona Landrum are his grandparents and great-grandmother, respectively.

12. Financial Condition. The financial condition of the parties was never at issue in this matter.

The only factor clearly not in Kishpaugh's favor is Brian's wish to remain where he has been the last 3 1/2 years. For all the remaining factors, there is no real difference between the parties, as with "impairment through drugs or alcohol" or the matter is clearly in Kishpaugh's favor, as with "kinship".

The District Court plainly erred in finding it in Brian's best interests that Petitioners be awarded custody. The custody evaluation done in both Kishpaugh's and the Petitioners' homes showed that Brian would do equally well in either environment. (T 5-7). The most superficial of analyses of the relevant factors set forth in Hutchinson, supra, however, shows it would be in Brian's best interest that Brian be raised by his father and not by the Petitioners. The trial court's contrary conclusion was error.

CONCLUSION

The trial court erred in concluding the parental presumption had been rebutted upon a finding that Kishpaugh lacks two of the three attributes generally characteristic of parents. The standard set out in Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1983) requires that all three characteristics be lacking before the presumption favoring a parent over a nonparent could be rebutted.

In addition, the trial court erred in finding Kishpaugh lacked two of the three attributes generally characteristic of parents. Such findings were not based upon the evidence. The trial court also erred in failing to apply the standard set out in Hutchinson for determining whether it was in Brian's best interest that Kishpaugh be awarded custody. An analysis of the Hutchinson factors make clear it is in Brian's best interests that Kishpaugh reassume Brian's care.

Finally, the trial court erred in failing to provide Kishpaugh with a standard of conduct, which, by following, Kishpaugh could obtain custody of his son. The trial court's failure so to do has rendered Kishpaugh's natural right to custody and Brian's right to be raised by his natural parent

illusory.

Respectully submitted this 5 day of April,

1985.

LARSEN, MAZURAN & VERHAAREN P.C.
Attorneys for Appellant

By Ronald L. Dunn

until a contributor fails to pay. The Commission members' salaries are not affected by their judicial decisions and they have no pecuniary reason to penalize delinquent contributors. Although, pursuant to § 35-4-15, the Commission is responsible for the administration of the Special Administrative Expense Fund where all interest and penalties are deposited, this interest is too remote to establish any reasonable likelihood of bias.

Affirmed. No costs.

HALL, C. J., and OAKS, HOWE and DURHAM, JJ., concur.



Rosemary HUTCHISON, Plaintiff
and Appellant,

v.

Dale Harry HUTCHISON, Defendant
and Respondent.

No. 17439.

Supreme Court of Utah.

June 14, 1982.

In a dispute between former spouses over the custody of a child born to the wife before the marriage, the Fourth District Court, Utah County, George E. Ballif, J., awarded custody to the former husband of a child born to the wife before the parties' marriage. Former wife appealed. The Supreme Court, Oaks, J., held that the district court improperly awarded custody to the former husband without a determination of whether the former wife was entitled to the parental presumption.

Vacated and remanded.

1. Divorce \Rightarrow 298(1)

Standard governing actions for involuntary and permanent termination of all parental rights to child, which requires showing of parental unfitness, abandonment or substantial neglect, is not applicable to disputes between parent and nonparent over custody after parent and nonparent divorce. U.C.A.1953, 78-3a-48(a).

2. Parent and Child \Rightarrow 2(10)

Parent may be deprived of custody on less compelling showing than is required for termination of all parental rights. U.C.A. 1953, 78-3a-2(10), 78-3a-48(a).

3. Divorce \Rightarrow 298(1)

When controversy over custody arises in divorce proceeding, paramount consideration is best interest of child, but where one party to controversy is nonparent, there is presumption in favor of natural parent. U.C.A.1953, 78-3a-2(10), 78-3a-48(a).

4. Parent and Child \Rightarrow 2(2, 8)

It is rooted in common experience of mankind, which teaches that parent and child normally share strong attachment or bond for each other, that natural parent will normally sacrifice personal interest and welfare for child's benefit, and that natural parent is normally more sympathetic and understanding and better able to win confidence and love of child than anyone else; therefore, in custody disputes between parent and nonparent, presumption arises in favor of natural parent.

5. Parent and Child \Rightarrow 2(8)

In custody disputes between parent and nonparent, presumption in favor of natural parent is not conclusive, but it cannot be rebutted merely by demonstrating that opposing party possesses superior qualifications, has established deeper bond with child or is able to provide more desirable circumstances.

6. Parent and Child \Rightarrow 2(8)

In custody disputes between parent and nonparent, if presumption in favor of natural parent could be rebutted merely by evidence that nonparent would be superior custodian, parent's natural right to custody

would be rendered child's natural right possible, by his or her

7. Parent and Child

In custody dispute between parent and nonparent, parental presumption is rebutted only by evidence of particular parent's superior ability to care for child. If parent actually lacks all three elements, presumption rises to presumption of best interest. If bond exists, that parent's demonstrated willingness to act in child's own interest and that parent lacks standing of child's best interest, parents generally.

8. Parent and Child

In custody dispute between parent and nonparent, presumption in favor of natural parent does not exist. Child is not to be subject to termination of rights due to a parent's substantial neglect. *Fortiori* not entitled to custody.

9. Parent and Child

In custody dispute between parent and nonparent, if parent is not the natural parent, no presumption exists. No party can compete on basis of natural parent's award should be given precedence to best interest.

10. Parent and Child

In custody dispute between parent and nonparent, after natural parent's death, court must determine child's best interest in light of child's feelings of child; keeping in mind strength of child's prospective custody cases, general presumption is that parent's custody is determined where child's best interest is primarily to protect child's status or position as parent.

would be rendered illusory and with it child's natural right to be reared, where possible, by his or her natural parent.

7. Parent and Child ⇨2(8)

In custody disputes between parent and nonparent, parental presumption can be rebutted only by evidence establishing that particular parent at particular time generally lacks all three characteristics that give rise to presumption: that no strong mutual bond exists, that parent has not demonstrated willingness to sacrifice his or her own interest and welfare for child's and that parent lacks sympathy for and understanding of child that is characteristic of parents generally.

8. Parent and Child ⇨2(8)

In custody dispute between parent and nonparent, presumption in favor of natural parent does not apply to parent who would be subject to termination of all parental rights due to unfitness, abandonment or substantial neglect, since such parent is a fortiori not entitled to custody.

9. Parent and Child ⇨2(3.1)

In custody disputes between parent and nonparent, if presumption in favor of natural parent is rebutted, contestants for custody compete on equal footing, and custody award should be determined solely by reference to best interests of child.

10. Parent and Child ⇨2(3.1, 3.3, 3.4, 3.6)

In custody dispute between parent and nonparent, after presumption in favor of natural parent has been rebutted, some factors court may consider in determining child's best interests related primarily to child's feelings or special needs: preference of child; keeping siblings together; relative strength of child's bond with one or more of prospective custodians; and, in appropriate cases, general interest in continuing previously determined custody arrangements where child is happy and well adjusted; other factors to be considered relate primarily to prospective custodians' character or status or ability or willingness to function as parents.

11. Parent and Child ⇨2(15)

In custody dispute between parent and nonparent, assessments of applicability and relative weight of various factors in particular case lie within discretion of trial court.

12. Parent and Child ⇨2(14)

In custody dispute between parent and nonparent, trial court must enter specific findings on factors relied upon in awarding custody.

13. Divorce ⇨301

In dispute between former spouses over custody of child born to wife before marriage, district court improperly awarded custody of child born to wife before marriage to former husband without first determining whether former wife was entitled to benefit of parental presumption.

Richard B. Johnson, Provo, for plaintiff and appellant.

Wayne B. Watson, Orem, for defendant and respondent.

OAKS, Justice:

This controversy between former spouses over the custody of a child born to the wife before their marriage requires us to clarify the legal standard governing a child-custody dispute between a parent and a nonparent.

Appellant, Rosemary, gave birth to Lacey Hutchison in February, 1975. In September, 1975, Rosemary married respondent, Dale Hutchison. Two more children were born during the course of their marriage. In February, 1980, the parties were divorced. Trial evidence showed that Dale had damaged property, struck Rosemary, and harshly disciplined the children. Other evidence showed that Rosemary was a heavy drinker, had left home for days at a time without explanation, and had neglected the children. Dale was granted temporary custody of all three children, but the resolution of permanent custody was deferred pending a blood test on Lacey's paternity and home evaluations by the Department of Family Services (DFS). The blood test excluded Dale as Lacey's father.

Thereafter, on November 12, 1980, the district court granted Dale permanent custody of all three children, subject to reasonable visitation rights in Rosemary. The order was not accompanied by formal findings of fact and conclusions of law. In a memorandum decision, the district court stated that Dale's name appears on Lacey's birth certificate; that he has "in every way" treated the child as his own; and that, although the blood test excluded him as Lacey's natural father, she considers him her father both psychologically and biologically.¹ Based on trial testimony and on reports of a psychiatrist and a DFS social worker, the court determined "that the best interests of the minor children would be served by their placement with the defendant [Dale] and that all three children should remain together for their mutual benefit and well-being." The memorandum decision further stated:

[I]n weighing the interests of the minor children in this situation the welfare of the three is paramount over any superior right the plaintiff [Rosemary] may have to the custody of the child where it is determined that the defendant [Dale] is the better custodial parent for his two natural children by the plaintiff, as well as the child in question [Lacey].

Rosemary challenges only that portion of the order granting Lacey's custody to Dale. Specifically, she contends that the mother of an illegitimate child cannot be deprived of custody of her child absent a showing of unfitness or abandonment.

[1] We cannot agree with either the district court's or Rosemary's characterization of the standard governing custody disputes between a parent and a nonparent. The court's standard was solely the best interests of the child. The standard Rosemary advocates is, in effect, the standard govern-

ing actions for involuntary and permanent termination of all parental rights to a child, which requires a showing of parental unfitness, abandonment, or substantial neglect. U.C.A., 1953, § 78-3a-48(a) (1965); *In re J. P.*, 648 P.2d 1364 (Utah 1982).

[2] Loss of custody is less drastic than the permanent termination of parental rights. The custody determination is not permanent, since it expires automatically when the child comes of age, and it is reversible prior to that time. Most importantly, loss of custody does not deprive the noncustodial parent of all rights in relation to the child. See U.C.A., 1953, § 78-3a-2(10); *In re J. P.*, *supra*, n. 1. For these reasons, a parent may be deprived of custody on a less compelling showing than is required for termination of all parental rights.

[3, 4] In a controversy over custody, the paramount consideration is the best interest of the child, but where one party to the controversy is a nonparent, there is a presumption in favor of the natural parent. *Walton v. Coffman*, 110 Utah 1, 169 P.2d 97 (1946).² This presumption recognizes "the natural right and authority of the parent to the child's custody" *State in re Jennings*, 20 Utah 2d 50, 52, 432 P.2d 879, 880 (1967). It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else. *Walton v. Coffman*, 110 Utah at 13, 169 P.2d at 103.

1. However, Dale states in his brief that he "does not here seek custody as one who has allegedly adopted the child by acknowledgment" but rather "as a third party with whom the child should be placed in the best interest of the child."

2. This statement of the standard is typical of many American jurisdictions. For a survey of jurisdictions, see Comment, "Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution," 17 J. of Fam.L. 545, 552-74 (1979). See also Annot., 31 A.L.R.3d 1187 (1970).

[5,6] The parental presumption is not conclusive, *State in re R_____ L_____*, 17 Utah 2d 349, 411 P.2d 839 (1966), but it cannot be rebutted merely by demonstrating that the opposing party possesses superior qualifications, has established a deeper bond with the child, or is able to provide more desirable circumstances. If the presumption could be rebutted merely by evidence that a nonparent would be a superior custodian, the parent's natural right to custody could be rendered illusory and with it the child's natural right to be reared, where possible, by his or her natural parent.

[7,8] Consistent with its rationale, the parental presumption can be rebutted only by evidence establishing that a particular parent at a particular time generally lacks all three of the characteristics that give rise to the presumption: 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's, and that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally. The presumption does not apply to a parent who would be subject to the termination of all parental rights due to unfitness, abandonment, or substantial neglect, since such a parent is a *fortiori* not entitled to custody.

[9] If the presumption in favor of the natural parent is rebutted, the contestants for custody compete on equal footing, and the custody award should be determined

solely by reference to the best interests of the child.

[10] 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;³ keeping siblings together;⁴ the relative strength of the child's bond with one or both of the prospective custodians;⁵ and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted.⁶ Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability;⁷ duration and depth of desire for custody;⁸ ability to provide personal rather than surrogate care;⁹ significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause;¹⁰ reasons for having relinquished custody in the past;¹¹ religious compatibility with the child;¹² kinship,¹³ including, in extraordinary circumstances, stepparent status;¹⁴ and financial condition.¹⁵ (These factors are not necessarily listed in order of importance.)

[11] 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."

3. *Henderson v. Henderson*, Utah, 576 P.2d 1289 (1978).

4. *Jorgensen v. Jorgensen*, Utah, 599 P.2d 510 (1979) (Crockett, C. J., concurring); *Walton v. Coffman*, 110 Utah 1, 169 P.2d 97 (1946).

5. *Walton v. Coffman*, note 4, *supra*.

6. *Nielsen v. Nielsen*, Utah, 620 P.2d 511, 512 (1980); *In re Cooper*, 17 Utah 2d 296, 410 P.2d 475 (1966); *Application of Conde*, 10 Utah 2d 25, 347 P.2d 859 (1959).

7. *Kallas v. Kallas*, Utah, 614 P.2d 641 (1980); *Knapp v. Knapp*, 73 Utah 268, 273 P. 512 (1928); *Jorgensen v. Jorgensen*; note 4, *supra*.

8. *State in re R_____ L_____*, 17 Utah 2d 349, 411 P.2d 839 (1966); *Walton v. Coffman*, note 4, *supra*.

9. *Lembach v. Cox*, Utah, 639 P.2d 197 (1981).

10. *Kallas v. Kallas*, note 7, *supra*; *Walton v. Coffman*, note 4, *supra*.

11. *Application of Conde*, note 6, *supra*; *Baldwin v. Nielson*, 110 Utah 172, 170 P.2d 179 (1946).

12. See U.C.A., 1953, § 78-3a-39(12).

13. *In re Cooper*, note 6, *supra*.

14. *Gribble v. Gribble*, Utah, 583 P.2d 64 (1978).

15. *Walton v. Coffman*, note 4, *supra*.

Jorgensen v. Jorgensen, Utah, 599 P.2d 510, 512 (1979).

[12] The trial court must enter specific findings on the factors relied upon in awarding custody. In *Chandler v. West*, Utah, 610 P.2d 1299, 1301 (1980), we set aside an order that refused to modify a property settlement provision in a divorce decree but did not enter written findings. In remanding, we stated: "For this Court to be in a position to review the propriety of the trial court's order, it is necessary that proper findings of fact and conclusions of law be made pursuant to Rule 52(a), Utah Rules of Civil Procedure." In *Stoddard v. Stoddard*, Utah, 642 P.2d 743 (1982), we required written findings to accompany an order modifying a child support provision in a divorce decree. This requirement of written findings applies with even greater force to orders awarding or modifying the custody of a child.

[13] In this case, the district court addressed the question of the best interests of the child without first determining whether the presumption in favor of the natural parent had been rebutted. On the present record—especially in the absence of findings of fact—we are unable to determine whether, under the standard discussed in this opinion, Rosemary is entitled to the benefit of the parental presumption. We therefore vacate the court's order and remand for further proceedings (including the taking of additional evidence, if necessary) consistent with this opinion. No costs awarded.

HALL, C. J., and STEWART, HOWE and DURHAM, JJ., concur.

Harry J. CHRISTIANSEN, Plaintiff
and Appellant,

v.

UTAH TRANSIT AUTHORITY and John
G. Miller, Defendants and
Respondents.

No. 17250.

Supreme Court of Utah.

June 15, 1982.

Action was filed arising from traffic accident. Upon jury finding that plaintiff was 70 percent negligent and the defendants 30 percent negligent, the Third District Court, Salt Lake County, G. Hal Taylor, J., entered judgment of "no cause of action" in favor of the defendants, and the plaintiff appealed. The Supreme Court, Howe, J., held that: (1) trial court did not err in refusing to give plaintiff a default judgment against one defendant when that defendant failed to appear at trial; (2) giving of sudden peril instruction was proper; and (3) trial court did not abuse its discretion in refusing to amend complaint to allow plaintiff to plead willful and wanton negligence on part of one defendant and to seek punitive damages.

Affirmed.

1. Appeal and Error ⇐1001(1)

Jury finding in suit arising from traffic accident that plaintiff was 70 percent negligent and defendants were 30 percent negligent, thereby precluding recovery of damages by the plaintiff, was supported by competent evidence, and thus jury verdict would not be disturbed by the Supreme Court. Const.Art. 8, § 9.

2. Negligence ⇐142

Jury verdict in suit arising from traffic accident that plaintiff was 70 percent negligent and defendants were 30 percent negligent, thereby precluding recovery of damages by the plaintiff, was not the result of sympathy, bias, passion and prejudice.



APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KARLA KISHPAUGH,	:	
	:	
Plaintiff,	:	MEMORANDUM DECISION
	:	
vs.	:	CIVIL NO. D 80-1577
	:	
RICHARD BRUCE KISHPAUGH,	:	
	:	
Defendant.	:	
	:	

This case presents one of the most difficult decisions this court has had to make. Not that the facts are that difficult nor is the law that complicated, but the emotional concern for the subject of this case presents the gravest of concern.

Plaintiff and defendant were divorced on June 25, 1981. The plaintiff was awarded custody of their minor child Brian Kishpaugh (Brian). Brian was a handicapped child being afflicted with cerebral palsy. Immediately after the divorce the plaintiff placed Brian with her parents who have cared and raised him since the divorce. His maternal great-grandmother has also been involved in his care and rearage.

The defendant lives in Reno Nevada, and the maternal grandparents live in Chico, California. The defendant has enjoyed a good relationship with Brian during the past three and one-half years by taking him during Thanksgiving holidays and for a week or two in the summer of each year. However,


it is also true that the defendant has failed to pay his support payments for Brian's care. Essentially, Brian has been reared by his maternal grandparents and great-grandmother. His mother (plaintiff) is a medical doctor but has suffered serious health problems which she admits make it impossible for her to assume the custodial role.

This court had the pleasure of interviewing Brian in chambers. Brian is mute but has mastered the sign language and is able to communicate by this means. An interpreter was present and assisted the court in communicating with Brian. Brian expressed his love for his father (defendant) and for his grandparents. He told me about his school and friends and what he does during his visits with the defendant as well as what he does in his spare time which he has with the grandparents. At the conclusion of the interview I asked Brian where he preferred to live and he responded that he preferred to live with Papa and Mummie (his grandparents). Obviously, a deep bond of love exists between Brian and his grandparents. He also has a love for his father.

The real issue in this case is what is for the best interest of Brian (see *Cooper v. DeLand*, 652 P2d 907 and *Hutchinson v. Hutchison*, 649 P2d 38). After much consideration, this court concludes that it is for the best interest of Brian

that Mr. and Mrs. William Kornmayer be granted the custody of Brian for the present time. Defendant is to have liberal visitation with Brian and the court urges him to create an even greater bond between himself and Brian.

Dated this 26 day of November, 1984.



DEAN E. CONDER
DISTRICT JUDGE

APPENDIX C

JANE ALLEN (Bar #45)
Attorney for Plaintiff
261 East 300 South, Suite 150
Salt Lake City, Utah 84111
Telephone: (801) 355-1300

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

KARLA KISHPAUGH (KORNMEYER),	:	
	:	AMENDED
Plaintiff,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
vs.	:	(Judge Dean E. Conder)
	:	
RICHARD BRUCE KISHPAUGH,	:	Civil No. D80-1577
	:	
Defendant.	:	

This matter came on for trial the 22nd day of November, 1984, before the Honorable Dean E. Conder. The natural mother, above-named Plaintiff, was present, along with her parents, Mr. and Mrs. William Kornmayer, who are the Petitioners for guardianship of the minor child, in Case No. P84-1046 which has been joined with this action, as was their counsel, Jane Allen, Esq. The Defendant was present with his attorney, Michael Z. Hayes, Esq.

William Kornmayer, Karla Kornmayer, Ona Landrum, Richard Kishpaugh, and Mr. and Mrs. Dean Kishpaugh were called as witnesses. Mrs. Kornmayer's testimony was accepted by proffer, as was part of Mrs. Kishpaugh's testimony. The minor child, Brian Kishpaugh, was interviewed by the Court in chambers along with an interpreter for the minor child who is hearing impaired.

After hearing testimony of the witnesses and arguments of counsel at the trial in this matter, and after a hearing regarding Defendant's Objections to Proposed Findings of Fact and Conclusions of Law was held on the 18th day of December, 1984 at which counsel for both parties was present, with the Court's changes in the Proposed Findings of Fact and Conclusions of Law included herein, the Court now makes the following:

FINDINGS OF FACT

1. The minor child was born February 18, 1976 and is handicapped with cerebral palsy and a hearing impairment.

2. The minor child has resided with Petitioners, Mr. and Mrs. Kornmayer, and his maternal great-grandmother, Ona Landrum since June of 1981, which was when the Plaintiff and Defendant were divorced.

3. The minor child and the Defendant have a good relationship one with another which has been enhanced by the Defendant taking the child for visits during the Thanksgiving and Easter recesses, together with several other weekend visits during the year and extended summer visitation, which included six weeks in 1984 and approximately three weeks during the summer of 1983.

4. The child support payments made by Defendant to Plaintiff were not forwarded by Plaintiff to either her grandmother or her parents.

5. The child's behavior and ability to communicate have improved greatly since he went to live with Petitioners.

6. Petitioners and the child's great-grandmother have hired tutors and arranged for the child to attend summer school and camp.

7. The child's maternal great-grandmother has been involved with Brian's care and rearage since June of 1981.

8. The child has been reared by his maternal grandparents and great-grandmother, and they have provided a fit and proper home for the child.

9. The minor child wishes to live with Petitioners, Mr. and Mrs. Kornmayer.

10. A deep bond of love exists between the minor child and his grandparents.

11. There is love between the Defendant and his son.

12. There is a stronger bond between the minor child and the Petitioners than with the defendant.

13. The Petitioners have done a fantastic job of caring for this child.

14. The Defendant has had a good relationship with the minor child and has taken the child for visits during Thanksgiving and a week or two in the summer of each year.

15. Defendant has failed to make all of his support payments for Brian's care and has paid a total of approximately \$9,837.00 to the Plaintiff for child support and alimony, \$6,430.00 of which should be allocated to child support.

16. The Plaintiff has health problems which make it

impossible for her to assume a custodial role at this time.

17. Defendant has failed to sacrifice his own interest and welfare for the child's interest and welfare.

18. Defendant lacks the sympathy for and understanding of the child that is characteristic of parents generally.

Having made the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

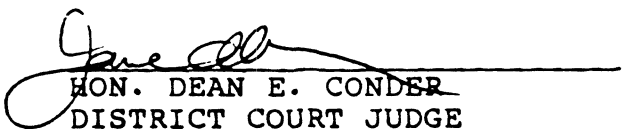
1. Petitioners have overcome the presumption in favor of the natural parent.

2. It is in the best interests of the minor child that Petitioners be granted custody of the minor child at the present time.

3. Defendant is granted liberal visitation with the minor child.

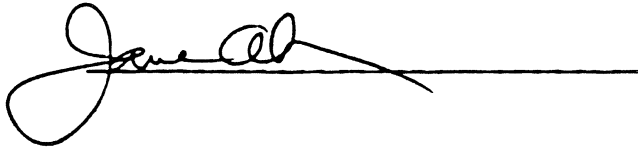
DATED this 28th day of December, 1984.

BY THE COURT:


HON. DEAN E. CONDER
DISTRICT COURT JUDGE

MAILING CERTIFICATE

This is to certify that I mailed a true and correct copy of the foregoing AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, this 28ⁿ day of December, 1984, to Michael Z. Hayes, Esq., at LARSEN, MAZURAN & VERHAAREN, 100 Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111.

A handwritten signature, appearing to be "Janeal", is written over a horizontal line.

JA-10/KORN/FIN