

1987

# Laura Lee Bloxham Fullmer v. Brian Keith Fullmer : Brief of Appellant

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 870499-CA

IN THE UTAH COURT OF APPEALS

LAURA LEE BLOXHAM FULLMER,	:	
Plaintiff-Appellant,	:	Case No. 870499-CA
vs.	:	
BRIAN KEITH FULLMER,	:	Category No. 7
Defendant-Respondent.	:	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH  
COUNTY, STATE OF UTAH, JUDGE BOYD L. PARK.

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Defendant-Respondent.	:	

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BRIEF OF APPELLANT

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JURISDICTION

The Court of Appeals has appellate jurisdiction over this domestic relations matter pursuant to U.C.A. Section 78-2a-3(2)(g).

NATURE OF PROCEEDING

This is an appeal from a final Order Modifying Decree of the Fourth Judicial District Court, Judge Boyd L. Park presiding, in which the lower court modified the previously entered Decree of Divorce as to child custody, child support, alimony, and federal and state tax exemptions.

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err when it ruled that there had been, since the time of the decree, substantial and material

changes in the circumstances upon which the previous custody award was based?

II. Did the trial court err when it ruled that the plaintiff's transition from part-time employment to full-time employment and the placement of the minor child in a day care center constituted a change of circumstances sufficiently substantial and material to justify reopening the question of custody?

III. Did the trial court err when it ruled that the remarriage of defendant, the non-custodial parent, to a full-time homemaker, constituted a change of circumstances sufficiently substantial and material to justify reopening the question of custody?

IV. Even had the trial court correctly found that changes of circumstance existed, did the trial court err when it awarded joint custody of the child to the parties and physical care, custody and control to defendant?

V. Did the trial court err when, in modifying the award of child custody, it ruled that defendant should pay plaintiff the sum of \$250.00 per month during the three-month summer visitation awarded to plaintiff?

VI. Did the trial court err when it set the previous award of alimony for review in one year?

VII. Did the trial court err when it awarded defendant the 1987 and 1988 federal and state income tax exemptions for the

minor child to defendant?

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Utah Code Annotated, Section 30-3-5(3):

The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final Order Modifying Decree entered after a trial on Defendant-Respondent's Amended Petition to Modify and Plaintiff-Appellant's Counter Petition to Modify in the Fourth District Court, Judge Boyd L. Park presiding, in which the lower court modified the Decree of Divorce signed by Judge David Sam on February 19, 1985.

B. Course of the Proceedings.

The Decree of Divorce in this matter was originally signed by Judge David Sam of the Fourth Judicial District Court on February 19, 1985 and became final three months later, May 19, 1985. (R. 22-23) In that decree, plaintiff-appellant (hereinafter "plaintiff") was awarded custody of the minor child, child support of \$150.00 per month, and alimony of \$200.00 per month. The issue of tax exemptions was not addressed.

Defendant-Respondent (hereinafter "defendant") filed his Petition to Modify Decree of Divorce in September, 1986,

requesting that child custody be awarded to him (R. 28), and his Amended Petition to Modify in February, 1987 (R. 62), requesting an elimination of alimony and an award to him of the state and federal tax exemptions. Plaintiff filed her Counter Petition to Modify in October, 1986, requesting an increase in the amount of child support awarded to her. (R. 49)

Trial was held on October 13, 1987 before Judge Boyd L. Park. (R. 183)

C. DISPOSITION IN THE COURT BELOW.

After the trial on October 13, 1987, Judge Boyd L. Park ruled from the bench, finding: (1) that there had been material changes of circumstance, and (2) that he was entitled to consider the matter of custody. (R. 67)

The lower court found that the following constituted a material change of circumstance:

(a) The change in plaintiff's work schedule to full-time employment, which had necessitated the placement of the minor child, Dagin, in a day care center on a full-time basis. (R. 195)

(b) The remarriage of defendant and his creation, thereby, of a stable home environment where the child could be cared for by a stepmother who was a homemaker, not working outside the home, during those times when the defendant was working. (R. 195)

Having found the necessary change of circumstances, the lower court made the following findings regarding the issue of child custody:

(a) That the minor child should dwell in a stable environment, and that the defendant could provide better stability and was in a better position to take care of the minor child at the present time. (R. 196)

(b) That the plaintiff had less time available to spend with the minor child, as she was working full-time. (R. 199)

(c) That there had been significant changes in the environment and goals of the plaintiff, and that there had been a considerable degree of stability of the environment in the defendant. (R. 199)

(d) That the day care center in which the minor is enrolled appeared to be an excellent facility, but that the stepmother had developed an excellent loving relationship with the minor child and would be available as a homemaker in the home at times needed by the child. The Court also found that the minor child had seemed to develop an excellent appropriate relationship with his stepsister. (R. 199)

(e) That the custody of the minor child should be modified to award joint custody to both parties, with the actual physical care, custody and control being awarded to the defendant, and that the issue of child custody should be reviewed in one year. (R. 195-196)

(f) That the \$200 per month alimony should not be presently discontinued, but that this issue should be reviewed in one year. (R. 196)

(g) That plaintiff should not pay child support to defendant at such times as he has custody, but that the defendant should pay to the plaintiff the sum of \$250.00 per month during the three-month summer visitation during which she shall have custody. (R. 196-197)

(h) That defendant should be awarded the 1987 and 1988 federal and state income tax exemptions, as he was and is the primary care provider for the bulk of those tax periods. (R. 197)

Conclusions of Law consistent with the above findings were prepared and filed with the Findings of Fact. (R. 200-202) The Order Modifying Decree awarded joint custody of the minor child to the two parties, with actual physical care, custody and control awarded to defendant. Plaintiff was not ordered to pay child support at such times as the defendant had actual custody of the child; defendant was ordered to pay plaintiff \$250.00 per month during the three-month summer visitation period. The defendant was awarded the 1987 and 1988 federal and state tax exemptions. The previous award of alimony was not modified nor mentioned in the final Order, although the Findings of Fact indicated that the Court would review the alimony award in one year. (R. 204-206)

#### D. STATEMENT OF THE FACTS

Plaintiff and defendant were married on November 22, 1980 in Salt Lake City, Utah. (R. 1, 268) The only child of the parties, a son, Dagin Lester Fullmer, was born on May 19, 1983. (R. 1, 255) Plaintiff filed her divorce Complaint on September 17, 1984

in the Fourth Judicial District Court of Utah County. (R. 1, 254) The parties entered into an Amended Stipulation, which was filed with the court on February 19, 1985. (R. 10, 254) The Decree of Divorce, which incorporated the terms of the Amended Stipulation, was signed by Judge David Sam of the Fourth Judicial District Court on February 19, 1985 and became final three months later, May 19, 1985. (R. 22-23, 255-256) In that decree, plaintiff was awarded custody of the minor child, child support of \$150.00 per month, and alimony of \$200.00 per month. The issue of federal and state tax exemptions was not addressed. (R. 22-23)

Prior to the parties' divorce, plaintiff worked part-time, approximately three to four hours per day. At the time of the divorce, plaintiff began working part-time and attending school from one to four hours per day. (R. 253) Defendant remarried after the Decree of Divorce became final, and a child was born approximately four months thereafter to defendant and his new wife. (R. 257)

Defendant filed his Petition to Modify Decree of Divorce in September, 1986 requesting modification of the decree regarding child custody (R. 28), and later filed his Amended Petition to Modify in February, 1987 requesting modification of the decree regarding alimony and the state and federal tax exemptions. (R. 62) Plaintiff filed her Counter Petition to Modify in October, 1986 requesting modification of the decree regarding the amount of child support. (R. 49)

Plaintiff was served with the defendant's Petition to Modify Decree the night before she was to move to New York City with the minor child of the parties. At that time, she had moved out of her apartment in Provo and had sold or given away most of her furniture and belongings that required larger storage facilities. (R. 285) As plaintiff literally had nowhere to live, she and her child stayed temporarily with a friend in Provo, until they moved to Sunset, Utah, where plaintiff's parents took them in. (R. 285, 290) The money she had saved for the move to New York City was used to retain an attorney. When she was financially able, she moved into her own apartment in Salt Lake City. (R. 285)

At the time plaintiff was served with the Petition to Modify Decree of Divorce, she had terminated her part-time employment with the Brick Oven Restaurant in Provo in anticipation of her move to New York City. (R. 292) She then found part-time employment with Nelson Laboratories in Salt Lake City, where she made a gross monthly salary of \$444.00. (R. 292, 83) During this time period, defendant made only sporadic payments of child support and alimony. (R. 286) For example, on May 22, 1987, when plaintiff signed her Affidavit for Pretrial, defendant was three months behind on his child support and alimony, which sum would be \$1,050. (R. 75)

Because she could not adequately support herself and the child on a gross salary of \$444.00 per month, plaintiff began to work full-time, at the gross monthly salary of \$950.00, for a Salt

Lake City law firm as a legal receptionist during the summer of 1987, just a few months before the trial was held. (R. 156, 194, 286) As a necessary result of this new employment, the minor child was placed in full-time child care at a day care center, Tutor Time, in downtown Salt Lake City, not far from her new employment. Kindergarten instruction will also be available in this facility when the minor child attains the age of five years. (R. 285)

Since the time of the divorce and throughout this litigation defendant has been employed at WICAT Systems, Inc. in Orem, Utah where he receives a monthly gross salary of \$2,630.00. His wife does not work outside the home. (R. 142, 277)

Trial was held on defendant's Amended Petition and plaintiff's Counter Petition on October 13, 1987. (R. 183) Before the trial began, the attorneys met with the court in his chambers, whereupon the court informed them that he had already read the child custody evaluation report (R. 350-352). Trial went forward with proffered testimony, and Judge Park announced his decision from the bench. (R. 315-326)

Because the attorneys could not agree on the language of the Findings of Fact, Conclusions of Law, and final Order Modifying Decree, a further hearing was held on November 6, 1987, at which time the attorneys and the court went through a set of the final documents prepared by counsel for defendant. (R. 329-365) Counsel for plaintiff had marked her objections and proposed

changes in red ink on the copies given the court. (R. 229-244) Discussion was held and ultimate modifications were ordered by the court. Plaintiff's counsel moved for a Rule 62, Utah Rules of Civil Procedure, Stay of Execution of Judgment which was denied by the court. (R. 361-362)

The final Findings of Fact, Conclusions of Law and Order Modifying Decree were signed by Judge Park on November 10, 1987 and entered in the court record that same day. (R. 193, 204) Plaintiff's Notice of Appeal was also filed on November 10, 1987. (R. 208)

Transfer of custody of the minor child did not occur, as plaintiff's Motion for Stay of Judgment of District Court Pending Appeal was granted by the Court of Appeals.

#### SUMMARY OF ARGUMENTS

The trial court committed error when it found that (1) plaintiff's transition from part-time work and part-time school to full-time work and the minor child's resulting placement in full-time child care and (2) defendant's remarriage constituted changes of circumstance sufficiently substantial to warrant the reopening of the child custody award. The change of circumstances on the plaintiff's part was not substantial, and Utah case law clearly states that defendant's remarriage was not a change of circumstance to be considered in a custody modification proceeding.

The court compounded its error when it considered the issue

of child custody de novo and found that the same factors used as changes of circumstance were also justification for modifying the previous award of custody, giving joint custody to both parties, but awarding the physical care, custody and control to defendant. The court clearly erred when it ruled that a substitute mother, the stepmother in the instant case, would be highly preferable to any day care facility and the child's natural mother together. The court penalized the plaintiff for choosing to work full-time, even though the court acknowledged that she was forced to work full-time because of her finances.

The court committed further error by failing to adequately justify its modification of the award of child support to plaintiff, by setting the previous alimony award for review when it found no change of circumstances with respect to alimony, and by awarding the 1987 and 1988 federal and state income tax exemptions for the minor child to defendant, finding that in 1987 he was the primary care provider because he paid \$150.00 per month for child support. The court awarded him the 1988 exemptions on the assumption that the child would be living with defendant most of the year. This matter was also set for review in one year, which was not necessary, in light of the court's errors with respect to the custody award.

## ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THERE HAD BEEN, SINCE THE TIME OF THE DECREE, CHANGES IN THE CIRCUMSTANCES UPON WHICH THE PREVIOUS CUSTODY AWARD WAS BASED.

The bifurcated procedure required by Utah case law in modification of custody actions is most clearly enunciated in a line of cases commencing with Hogge v. Hogge, 649 P.2d 51 (Utah 1982). In Hogge the Utah Supreme Court determined the bifurcated procedure involves (1) an initial decision that there are changed circumstances warranting the court's reconsideration of the custody award, and then (2) a subsequent decision as to the manner in which custody should be modified, if at all. Id. at 53. Unless the petitioner for a change in custody successfully carries the burden in establishing the changed circumstances, the trial court should not move on to a consideration of the custody issue.

Step one of this bifurcated process itself becomes a two-pronged process or test:

[in] the initial step, the court will receive evidence only as to the nature and materiality of any changes in those circumstances upon which the earlier award of custody was based. In this step, the party seeking modification must demonstrate (1) that since the time of the previous decree, there have been changes in the circumstances upon which the previous award was based; and (2) that those changes are sufficiently substantial and material to justify reopening the question of custody. The trial court must make a separate finding as to whether this burden of proof has been met. If so, the court, either as a continuation of the same hearing, or in a separate hearing, will proceed to the second step. However, where that burden of proof is not met, the trial court will not reach the second step, the petition to modify will be denied, and the existing custody award will remain unchanged.

Id. at 54.

In the instant case, the attorneys for the parties attempted to lead the trial court through the bifurcated process. To that end both attorneys made "opening statements," (R. 254, 260) in which they proffered their evidence regarding the existence of changes of circumstances regarding child custody, as well as the other three issues in question, and argued the case law dealing with that requirement. Despite the attorneys' attempted division of the evidence into the two steps, the trial court did not make a finding at the end of this proffered evidence regarding changes of circumstance, but rather allowed the counsel for defendant to commence presenting his case regarding all issues. (R. 268)

After all evidence had been proffered by the attorneys, the trial court ruled from the bench regarding the necessary changes in circumstance, indicating that it was "not at all persuaded by the little nick picky things that have been brought up here and there." (sic) (R. 347) The trial court considered only two of defendant's alleged changes of circumstance: (1) "[t]he fact that the mother has obtained full time employment and is obligated as a result of that to place the child in a day care center despite how good that day care center is," further explaining the court's belief that a day care center is "not a substitute for a mother in the home," and (2) "the fact that the petitioner in this case has remarried and established a stable home." (R. 195, 317)

The trial court, however, failed (and could not have, if it

had attempted) to relate these changes in circumstances to any part of the previous award of custody in the original decree of divorce, as required by Hogge. It was only in the first stipulation filed by the parties during the original divorce action that one of the parties--the plaintiff--was designated "a fit person to care for the physical and emotional needs of said child." (R. 8) The findings, conclusions, and decree prepared by plaintiff's original attorney failed to designate either party again as a fit person to care for the minor child. According to all three final documents, the plaintiff was simply awarded custody of the child. (R. 18-23)

In order for the trial court to relate these two changes in circumstance to any part of the previous award of custody in the decree, the court would have had to find that plaintiff was originally awarded custody of the child because she only worked part-time, that the child had not been placed in a day care center and that the defendant had not yet remarried! Yet, the trial court found that plaintiff's full-time work, the child's placement in a day care center full-time, and the defendant's remarriage were changes of circumstance worthy of examining the custody issue de novo.

Defendant would have had the court believe that, at the time of the divorce action, he understood that plaintiff would be the primary caretaker of the child and that "she would raise the child in her own home and he would pay her child support and pay her

alimony in response to the court's order." (R. 269) This assertion by defendant flies in the face of all reality; certainly, he did not anticipate that she could adequately feed, clothe, educate and house herself and their child on \$150.00 child support and \$200.00 alimony per month. Despite defendant's proffered testimony regarding this understanding, the trial court did not refer to defendant's assertion in any way and did not make any finding regarding this testimony.

There was neither factual nor legal justification for the trial court's finding that plaintiff's full-time work, the child's placement in a day care center full-time, and the defendant's remarriage were material changes of circumstance upon which the previous award was based.

II. THE TRIAL COURT ERRED WHEN IT RULED THAT PLAINTIFF'S TRANSITION FROM PART-TIME EMPLOYMENT TO FULL-TIME EMPLOYMENT AND THE PLACEMENT OF THE MINOR CHILD IN A DAY CARE CENTER CONSTITUTED A CHANGE OF CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL AND MATERIAL TO JUSTIFY REOPENING THE QUESTION OF CUSTODY.

The second prong of step one of the Hogge analysis requires that the trial court find that the material changes of circumstance upon which the previous custody award was based are sufficiently substantial and material to justify reopening the question of custody. The facts in the instant case simply do not justify the court's finding in this matter.

Plaintiff's proffered testimony was that, prior to the parties' divorce, plaintiff worked part-time, approximately three to four hours per day. (R. 253) Therefore, the child was already

in some sort of babysitting arrangement or day care even before the parties' divorce. At the time of the divorce, plaintiff began working part-time and attending school from one to four hours per day (R. 253), a small change in lifestyle which would have required slightly more time in day care for the child than during the marriage. Of course, during both these time periods and during all time periods since the decree was entered, the defendant worked full-time at his employment with WICAT and could not have provided personal, at-home care for the child himself.

In finding that the plaintiff's full-time employment and the child's full-time enrollment in organized day care constituted a substantial and material change of circumstances sufficient to justify reopening the custody issue, the trial court failed to follow the guidelines found in Marchant v. Marchant, 66 Utah Adv. Rpt. 45 (September 18, 1987) for making adequate findings in a custody award. The Utah Supreme Court had previously held that the findings should be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987), quoted in Marchant at 47. The Court of Appeals in Marchant understood this to mean that:

a custody award must be firmly anchored on findings of fact that (1) are sufficiently detailed, (2) include enough facts to disclose the process through which the ultimate conclusion is reached, (3) indicate the process is logical and properly supported, and (4) are not clearly erroneous.

Id.

Since the trial court decided the custody issue after finding substantial changes of circumstance, specific findings regarding the changes of circumstance, as required in Marchant, should have been made by the court. However, in the instant case, the trial court did not even attempt to so substantiate its findings with regard to changes in circumstance--either from the bench or in its written findings of fact. These findings are actually simple conclusions without any basis in fact, or, are even simple assumptions made by the court. Nowhere in the transcript of either hearing can an explanation be found for the court's finding or conclusion that a transition from part-time work and part-time school to full-time work constituted a substantial change of circumstance. Neither can an explanation be found for the court's finding or conclusion that a transition from part-time babysitting or day care to full-time day care for the child constituted a substantial change of circumstance. It is obvious that there was no basis in fact for the trial court's finding regarding this change of circumstance.

III. THE TRIAL COURT ERRED WHEN IT RULED THAT THE REMARRIAGE OF DEFENDANT, THE NON-CUSTODIAL PARENT, TO A FULL-TIME HOMEMAKER, CONSTITUTED A CHANGE OF CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL AND MATERIAL TO JUSTIFY REOPENING THE QUESTION OF CUSTODY.

The Utah Supreme Court, relying on the line of cases under Hogge, recently addressed the issue of changes of circumstance on behalf of the noncustodial parent in a child custody modification procedure. In Kramer v. Kramer, 738 P.2d 624 (Utah 1987), a fact

situation existed which was remarkably similar to the instant case. The Kramers, during their divorce proceedings, had stipulated that the custody of the minor child should be awarded to Mrs. Kramer and that Mrs. Kramer was a fit and proper person to be awarded custody. Approximately 1 1/2 years later, Mr. Kramer filed a petition for modification of the award of custody, claiming that there existed the necessary changes of circumstances to warrant reopening the custody decree and transferring custody of the minor child to him. Id. at 625.

Mr. Kramer's evidence at trial included the following facts: he had obtained further education, a job with substantially increased income, a new home, and a new wife and a new child, and his wife and her two children from a previous marriage had formed good relationships with the minor child of the parties. He also alleged that Mrs. Kramer had a host of problems which made her an unsuitable mother. Mrs. Kramer's evidence contradicted Mr. Kramer's evidence regarding her suitability as a parent in almost every respect. Id. The trial court chose to believe Mrs. Kramer's evidence regarding her suitability as a parent. Id. at 628.

The Utah Supreme Court found that the trial court had correctly focused only on changes in circumstances affecting the custodial parent, rather than the noncustodial parent, when it found that Mr. Kramer had not successfully passed the first step of the Hogge two-prong test. The Court reviewed Becker v. Becker,

694 P.2d 608 (Utah 1984) wherein, in interpreting and applying Hogge, the Court held that the first step of the Hogge standard requires that "[t]he asserted change [in circumstances] ... have some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship." Id. at 626, quoting Becker, supra, at 610, with emphasis added by the Court in Kramer.

The Court further noted that, although in Hogge the noncustodial parent established a change of circumstance on her part in order to pass the first step of the two-prong test, the facts of Hogge did not apply to Mr. Kramer. In Hogge, the father was originally awarded the custody of the children primarily because of the mother's temporary inability to care for the children due to an "emotional illness." Therefore, the award was subject to a possible improvement of her emotional health. In Mr. Kramer's case, the Court found that the original award of the custody of the minor child to the mother was not conditioned upon any temporary circumstances on Mr. Kramer's part. Kramer at 626.

Kramer firmly establishes that "ordinarily the change-of-circumstances prong of the Hogge test must focus only on the custodial parent," unless an exceptional fact situation, as in Hogge, exists. Such an exceptional fact situation does not exist in the instant case. Id. at 627.

As in Kramer, the parties in the instant case originally stipulated that the custody of the minor child should be awarded

to plaintiff and that plaintiff was a fit and proper person to be awarded custody. Approximately 16 months after the decree became final, defendant filed a petition for modification of the award of custody, claiming among other changes of circumstances, that, because of his remarriage to a full-time homemaker, there existed the necessary changes of circumstances to warrant reopening the custody decree and transfer custody of the minor child to him. (R. 19, 26)

Defendant's evidence at trial included the following: his income had substantially increased, he had a new wife and a new child, his new wife would provide full-time babysitting at home for the child of the parties, and his new wife and her child from a previous relationship (born after the defendant's remarriage) had formed a good relationship with the minor child of the parties. (R. 258, 276-277, 291) Defendant also alleged that plaintiff had some problems which made her an unsuitable mother, including allegations of instability, concern about the location of her apartment in Salt Lake City, her full-time work, the child's placement in a day-care facility, and alleged cohabitation. (R. 275-276) As in Kramer, plaintiff's evidence contradicted defendant's evidence regarding her suitability as a parent in every respect. The trial court in the instant case specifically limited its changes of circumstances to plaintiff's full-time employment, the child's full-time enrollment in day care, and defendant's remarriage. It did not consider the "nit-

picky" accusations of the defendant regarding plaintiff's suitability as a parent. (R. 317)

Defendant's remarriage can only constitute a change of circumstances under Kramer if it fits the narrow factual exception found in Hogge--that the defendant was not awarded custody because he was temporarily incapable of caring for the child and that the award of custody was subject to or apparently conditioned upon an improvement in his circumstances. Kramer at 626. However, in the instant case, there is no evidence in the stipulation, findings of fact, conclusions of law or the decree of divorce that, at the time of the stipulation of the parties, the award of custody to plaintiff was subject to or conditioned upon an improvement in defendant's circumstances. To argue that the Hogge exception applies to defendant would be to argue that, because defendant had not remarried and found a new wife before the divorce action was concluded, he temporarily could not care for the child and the award of custody was conditionally given to plaintiff. Obviously, such reasoning is ludicrous and inapplicable. The parties simply stipulated that custody should be awarded to plaintiff and that she was a fit parent. Defendant clearly does not fall into the Hogge exception.

Therefore, under Hogge, Becker, and Kramer, the trial court should not have considered defendant's remarriage a change of circumstance sufficient to warrant reopening the custody decree for consideration by the trial court. There was no evidence

presented that the remarriage of the defendant had a material relationship to and substantial effect on the plaintiff's parenting ability or the functioning of the existing custodial relationship. Becker at 610. The trial court erred in relying upon defendant's remarriage as a change of circumstance, and the trial court should have never moved on to the second step of the Hogge analysis: the reconsideration of the custody award.

IV. EVEN HAD THE TRIAL COURT CORRECTLY FOUND THAT CHANGES OF CIRCUMSTANCE EXISTED, THE TRIAL COURT CLEARLY ERRED WHEN IT AWARDED JOINT CUSTODY OF THE CHILD TO THE PARTIES AND PHYSICAL CARE, CUSTODY AND CONTROL TO DEFENDANT.

Hogge dictates that, if the trial court does find that the moving party has successfully carried the burden of establishing the necessary changes of circumstance, the court

must consider the changes in circumstance along with all other evidence relevant to the welfare or best interests of the child, including the advantage of stability in custody arrangements that will always weigh against changes in the party awarded custody. The court must determine de novo which custody arrangement will serve the welfare or best interests of the child, and modify, or refuse to modify, the decree accordingly.

Hogge at 54.

After finding that material and substantial changes of circumstances existed, the lower court made the following findings regarding the issue of child custody:

(a) That the minor child should dwell in a stable environment, and that the defendant could provide better stability and was in a better position to take care of the minor child at the present time. (R. 196)

(b) That the plaintiff had less time available to spend with the minor child, as she was working full-time. (R. 199)

(c) That there had been significant changes in the environment and goals of the plaintiff, and that there had been a considerable degree of stability of the environment in the defendant. (R. 199)

(d) That the day care center in which the minor was enrolled appeared to be an excellent facility, but that the stepmother had developed an excellent loving relationship with the minor child and would be available as a homemaker in the home at times needed by the child. The Court also found that the minor child had seemed to develop an excellent appropriate relationship with his stepsister. (R. 199)

(e) That the custody of the minor child should be modified to award joint custody to both parties, with the actual physical care, custody and control being awarded to the defendant, and that the issue of child custody should be reviewed in one year. (R. 195-196)

The trial court appeared to place great emphasis on factors (2) and (4) of the four factors set forth in Pusey v. Pusey, 728 P.2d 117, (Utah 1986):

(1) identity of the primary caretaker during the marriage, (2) the identity of the parent with greater flexibility to provide personal care for the child, (3) the identity of the parent with whom the child has spent more of his or her time pending custody determination if that period has been lengthy, and (4) the stability of the environment provided by each parent.

Id. at 120.

Again, the trial court failed to follow the rules of Marchant v. Marchant, supra, in making its findings in a custody award. The court's findings are not sufficiently detailed and do not include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issue were reached. However, the trial court's comments at the end of the trial clearly indicate that its reasons for awarding the physical care, custody and control of the child to defendant were exactly the same as its reasons for finding the changes of circumstance: (1) the change in plaintiff's work schedule to full-time employment, which had necessitated the placement of the minor child, Dagin, in a day care center on a full-time basis, and (2) the remarriage of defendant and his creation, thereby, of a stable home environment where the child could be cared for by a stepmother who was not a homemaker, not working outside the home, during those times when the defendant was working. (R. 195) Each finding listed above is "part and parcel" of the changes of circumstance found by the trial court and relates to factors (2) and (4) from Pusey: (2) the identity of the parent with greater flexibility to provide personal care for the child, and (4) the stability of the environment provided by each parent.

In Marchant v. Marchant, supra, the Utah Court of Appeals dealt specifically with child custody awards and women who must work. In Marchant the trial court found that it was in the best

interests of the children for custody to be awarded to the defendant (the father). The court found that the standard of living under which the mother had been residing with the children in Salt Lake City, Utah, was "not what it should have been nor was it in the best interests of the children." Marchant at 46. In addition, the court found that the mother's lifestyle had changed, pursuant to her desires "and for her benefit to the exclusion of the family unit." This was a reference to her employment in Salt Lake City. Id.

The Utah Court of Appeals held that the trial court's findings were "flavored with bias against divorced women, an urban environment, and women who pursue other than the traditional role of homemaker." Id. The Court also noted that the trial court appeared, when it referred to the mother's standard of living in Salt Lake City and her change in her lifestyle, to apply a "nebulous, higher standard ... to mothers seeking custody of their children in a divorce action." Id. The Court specifically addressed the mother's interest in "improving her ability to earn a living," stating that "this Court will not condone any finding of fact which might be interpreted as penalizing a woman for acquiring skills in other than the most fundamental and traditional areas necessary for functioning as a wife and mother." Id. at 48.

The trial court in the instant case did, indeed, apply a "nebulous, higher standard" to the plaintiff/mother in this case.

In its comments following the announcement that the court had found changes of circumstance, the court noted that no day care center could be a substitute for a mother in the home--in this case, the mother in the home being the stepmother. In the same breath, the court "gave" plaintiff credit for "wanting to and having to virtually go out and find full time employment." (R. 347, emphasis added) Under this reasoning, plaintiff could have never successfully retained custody of her child in this lower court. She was forced, due to her minimal salary of \$444.00 and the defendant's sporadic child support and alimony payments, to find a full-time job and place her child in full-time day care. Yet, because defendant had remarried (thereby obtaining full-time, at-home day care) and had refused to timely pay his obligations to his former wife, thereby forcing her into full-time work, he successfully sought and won the physical care, custody and control of the parties' minor child! It did not matter that he was not available full-time in the home to care for the child. Apparently, plaintiff's only salvation would have been speedy remarriage to a man capable of supporting her and her child on his salary alone.

It readily appears that the trial court did, indeed, penalize the plaintiff "for acquiring skills in other than the most fundamental and traditional areas necessary for functioning as a wife and mother." Id. at 48. Because she could not afford financially to stay at home with her child, and she was forced to

step out of the fundamental and traditional areas of a wife and mother to join the full-time work force, the trial court awarded the child to defendant; however, the court's award was, in all actuality, an award of custody to defendant's new wife, the stepmother of the child in question, who would actually be spending far more time with the child than would the defendant, who travels as part of his employment. Further, the Utah Supreme Court noted in Hogge that the "extent to which each contesting parent could care for the child personally is an appropriate consideration for the court." Hogge at 56, referring to Lembach v. Cox, 639 P.2d 197, 200 (Utah 1981) (emphasis added). The Court did not include stepparents as parties to be considered in awarding custody, as did the trial court in the instant case. Plaintiff lost physical custody of her child, not because defendant could personally spend more time with the child, but because defendant provided a full-time substitute mother who, in the trial court's opinion, would be better than any day care center and the child's natural mother added together.

The trial court, although clearly indicating its distaste for day care centers or preschools, never found that the child had been adversely affected in any way by his time spent at the day care center. There was no expert finding that the child had been harmed by enrollment in full-time day care, nor was there any expert testimony that day care centers are harmful, per se. Instead, the trial court testified itself as to the lack of

stability for children in day care centers during its comments after the presentation of the proffered evidence:

I appreciate day care centers. I appreciate preschools. My daughter runs one, she has her own. I know how she loves those kids, but I don't think she is a substitute for the mother in any fashion, no matter how caring she is. I think that is true of any that I have been acquainted with and any that are in existence. They are primarily a money making situation. They do care and they do love. It cannot radiate the stability that is necessary in a child's life. (R. 319-320)

The classic irony of the court's statement regarding day care centers as "money-making situations" is that plaintiff's un rebutted proffered testimony was that, before the current court action began, when defendant and his new wife took care of the parties' minor child, they required plaintiff to pay them the normal babysitting fees she would have paid any other babysitter. (R. 264-265) When plaintiff babysat for defendant during his summer visitation with the child immediately prior to his remarriage, plaintiff charged him nothing for her babysitting services. (R. 263-264)

In the second hearing held November 6, 1987, the court further stated his opinion regarding day care centers:

What I am concerned with and still am concerned about is stability of an environment I just don't think that if mother has to work eight hours a day and put the child in a day care center then we have an alternative to have the father take care of the child that is where it ought to be. If there is no problem with the father and there is no problem with the father. He is a good provider a good caretaker and has a stable environment. (sic) (R. 357)

Again, the trial court ignored the fact that it would be the

stepmother who would be providing the care for the child, not the defendant, the father of the child. It was not the trial court's task to decide custody between the natural mother and the stepmother; yet, that is what the court actually accomplished. It, for all intents and purposes, awarded custody of the minor child to the stepmother of the child, not the father of the child, thereby penalizing the mother of the child for entering the work force on full-time basis and finding that it is not possible for any mother and day care center to provide a stable environment.

The Utah Supreme Court has consistently held that custody awards should not be disturbed unless there appears to be a substantial reason for doing so. In Trego v. Trego, 565 P.2d 74, (Utah 1977), the Utah Supreme Court held:

Notwithstanding the desires and contentions of the parties, the welfare of the children is the paramount consideration of the courts, and where custody has been determined, and the children appear to be comparatively well adjusted and happy, they should not be compelled to change their home unless there appears some substantial reason for doing so.

There was no substantial reason for changing the award of custody in the instant case. The trial court relied upon changes of circumstance which are not valid and then used those same changes of circumstance as justifications for awarding the physical care, custody and control of the minor child to the defendant. The trial court failed to find that the child was harmed or affected in any way by his enrollment in full-time day care, failed to demonstrate why the day care center environment

was unstable, and, by awarding the child to the defendant, actually awarded the child to the stepmother and penalized the plaintiff for her decision to enter the work force full-time. The trial court's award of physical care, custody, and control of the child to defendant was clearly erroneous and should be reversed.

V. THE TRIAL COURT ERRED WHEN, IN MODIFYING THE AWARD OF CHILD CUSTODY, IT RULED THAT DEFENDANT SHOULD PAY PLAINTIFF THE SUM OF \$250.00 PER MONTH DURING THE THREE-MONTH SUMMER VISITATION AWARDED TO PLAINTIFF.

Because the trial court should not have disturbed the previous award of child custody to the plaintiff, it should have more fully considered plaintiff's counter petition for an increase in child support and awarded the plaintiff a substantially increased amount of child support on a twelve-month basis. The trial court made no finding as to why it chose the sum of \$250.00 for child support to be paid to plaintiff during the three-month summer visitation, failing to relate this sum to the defendant's income, as found in his financial declaration. The court merely indicated that this sum

may seem a little exorbitant, but it is certainly not exorbitant. When you consider the difference in the earning capacity, when you consider the fact that where she is going to have that kind of visitation, plus weekend visitations, and she is going to need a little extra money to provide some of the needs for the child during those three month periods and for weekend visitations, this is not exorbitant. (sic) (R. 321)

The court also noted that it "sort of took" the federal and state tax exemptions into consideration when it raised the child support to \$250.00 for the three summer months of visitation. (R.

324)

The trial court again failed to adequately substantiate its findings in this case. The financial declaration filed by defendant at the time of trial indicated a gross monthly income of \$2,630.00. (R. 142) Defendant could certainly afford to pay more than \$150.00 per month, or even \$250.00 per month, for the support of his child. The trial court failed to make any finding regarding the comparative incomes of the parties, only noting, as above, that there was a difference in the earning capacity of the parties.

Upon remand and reconsideration, which is the plaintiff's requested relief regarding this issue, the trial court should be instructed to fully consider the plaintiff's Counter Petition to Modify and to enter complete findings of fact as to its award of increased child support to be paid by defendant.

VI. THE TRIAL COURT ERRED WHEN IT SET THE PREVIOUS  
AWARD OF ALIMONY FOR REVIEW IN ONE YEAR.

The trial court, although it did not alter the award of alimony, set the issue of alimony for review in one year, indicating that

[a]fter one year I will give consideration to cutting alimony off because I don't think this is a situation that requires alimony to go on forever. As a matter of fact the trend is away from alimony and only in 20 per cent of the cases across the nation is alimony ever awarded anymore. I suppose it is getting less. Utah is no different than the national trend I am advised.

Yet again, the trial court failed to make any specific findings regarding this issue. Specifically, the court found no

change of circumstances, other than alleged national trends, which would justify a reconsideration of the previous alimony award. Defendant also failed in his proffered testimony to offer any change of circumstances which would justify the reduction of alimony; an allusion to the defendant's financial declaration was his only attempt to establish any changes of circumstances worthy of eliminating the award of alimony to plaintiff. (R. 313) There was clearly no reason to set a review regarding the award of alimony and this review should be stricken.

VII. THE TRIAL COURT ERRED WHEN IT  
AWARDED THE 1987 AND 1988 FEDERAL AND STATE  
INCOME TAX EXEMPTIONS FOR THE MINOR CHILD TO  
DEFENDANT.

The trial court ruled that the defendant should be allowed both the 1987 and 1988 federal and state income tax exemptions for the minor child, finding that defendant would be "in primary custody at the end of 1987 and for the bulk of 1988." (R. 321) When questioned several minutes later by plaintiff's counsel, who reminded the court that plaintiff had been the primary custodian for most of the present year (1987) and that the defendant had only been paying \$150.00 per month (which would be a total of \$1,800.00 for a twelve-month year), the court, nevertheless, noted that defendant "had the child a good deal of the time during 1987 and from a tax standpoint it is going to make considerable difference with him as he would be in a much higher tax bracket than she is." (R. 323-324) This is contrary to the defendant's own proffered testimony, which indicated that during 1987

defendant had only his normal visitation with the child, as well as several other miscellaneous weeks. (R. 273) By no stretch of the imagination did the defendant have the child a good deal of the time during 1987. Of course, as 1988 progresses, the child is currently residing with plaintiff and would only reside with defendant on a full-time basis if this Court were to uphold the trial court's custody decision.

In the November 6, 1987 hearing the trial court gave new meaning to the term "primary care provider." Plaintiff's attorney attempted again to clarify with the court which party should receive the 1987 tax exemptions. When the court stated that defendant "still was the primary care provider in 1987," plaintiff's counsel asked, "Time-wise?" to which the court replied, "Dollar-wise." (R. 348) Even under this new "primary care provider" standard, at \$150.00 per month, defendant could not have possibly provided the primary financial support for the minor child of the parties. The trial court provided him with an almost dollar-for-dollar tax benefit.

Clearly, the trial court erred in making this determination of the award of the 1987 tax exemptions and these exemptions should have been awarded to plaintiff. The 1988 tax exemptions should, as clearly, be awarded to plaintiff if this Court reverses the trial court's custody decision, as she would then be providing the majority of the minor child's support.

### CONCLUSION AND STATEMENT OF THE RELIEF SOUGHT

The individual aspects of the relief sought are by-products of the requested reversal of the trial court's award of joint custody to the two parties, with actual physical care, custody and control to the defendant. More specifically, plaintiff seeks the following:

1. Child Custody: a reversal of the Order modifying the child custody arrangement. Plaintiff seeks a return to the original award of care, custody and control of the minor child to herself, which would be a reversal of the trial court's award of joint custody to both parties, with actual physical care, custody and control awarded to defendant.

2. Review: a reversal of the Order scheduling a review for October 13, 1988 before the trial court regarding the issues of child custody and alimony. If care, custody and control of the minor child are returned to plaintiff, no review would be necessary. As there was no evidence offered regarding a change of circumstances with respect to alimony, and there was not, indeed, any such change of circumstances, no review of the original alimony award would be necessary.

3. Child Support: a reversal of the Order modifying the previous child support award. Plaintiff seeks a return to the original award of year-round child support and an increase in child support based upon defendant's ability to pay. This would be a reversal of the trial court's award of child support in the

increased amount of \$250.00 for only the three summer months when plaintiff has the actual physical care, custody, and control of the minor child. Defendant can certainly afford to pay \$250.00 per month year-round and can, most likely, pay substantially more.

4. Visitation: a reversal of the Order modifying the original visitation schedule. Plaintiff seeks a return to the original visitation schedule, in which defendant was the non custodial parent and had the same visitation privileges that plaintiff has now been awarded by the trial court.

5. Tax Exemptions: a reversal of the Order modifying the decree of divorce. Plaintiff should be awarded the 1987 and 1988 federal and state tax exemptions for the minor child, as well as all future exemptions. No one-year review should be necessary on this issue.

6. Attorney's Fees: an award of attorney's fees and costs to plaintiff to be paid by defendant for plaintiff's attorney's benefit. Plaintiff does not have the financial resources to pay her attorney's fees and costs in this appeal, yet she has been forced to incur such fees and costs to pursue her rights in this matter. Plaintiff respectfully urges this Court to find the trial court's award of joint custody to the parties, with physical care, custody and control to the defendant, erroneous, as well as the court's other rulings regarding child support, alimony, and federal and state income tax exemptions. Plaintiff also respectfully urges this Court to award her reasonable attorney's

fees which she has incurred in this appeal process.

DATED this 12th day of February, 1988.

  
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CLAUDIA LAYCOCK  
Attorney for Plaintiff-Appellant

CERTIFICATE OF MAILING

I hereby certify that I have mailed eight true and accurate copies of the above Appellant's Brief to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, UT 84102 and four true and accurate copies to Wayne B. Watson, Attorney at Law, 2696 North University, Suite 220, Provo, UT 84604, postage prepaid, this 12th day of February, 1988.

  
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CLAUDIA LAYCOCK  
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