

1987

# Kirk Randall Erwin v. Valerie Ann Erwin : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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DOCKET NO. 870570-CA IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIRK RANDALL ERWIN,

:

Plaintiff-Respondent,

:

vs.

:

VALERIE ANN ERWIN,

:

APPEAL NO. 870570-CA

Defendant-Appellant.

:

:

\* \* \* \*

BRIEF OF APPELLANT

\* \* \* \*

Appeal from the Judgment from the Seventh Judicial District Court  
of Emery County, State of Utah, Honorable Boyd Bunnell,  
presiding. Argument priority 7.

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**FILED**

**AUG 04 1988**

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIRK RANDALL ERWIN,	:	
Plaintiff-Respondent,	:	
vs.	:	
VALERIE ANN ERWIN,	:	APPEAL NO. 870570-CA
Defendant-Appellant.	:	
_____	:	

\* \* \* \*

BRIEF OF APPELLANT

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Appeal from the Judgment from the Seventh Judicial District Court  
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## JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. Section 78-2a-3(2)(g) as this is an appeal from a final judgment and order in a domestic relations action. Therefore, jurisdiction is appropriate.

## STATEMENT OF THE CASE

### NATURE OF PROCEEDING

This is an appeal from an Order and Judgment of the Seventh Judicial District Court of Emery County, State of Utah, the Honorable Boyd Bunnell, presiding, entering a Decree of Divorce in favor of the Plaintiff/Respondent, awarding custody of the children to the Plaintiff/Respondent, and a division of property favoring the Plaintiff/Respondent.

### COURSE OF PROCEEDINGS

The Findings of Facts and Conclusions of Law and Decree of Divorce appealed from were entered on November 5, 1987 and mailed to the Defendant/Appellant on November 10, 1987. Defendant/Appellant filed her Notice of Appeal on the 7th day of December, 1987.

## STATEMENT OF FACTS

This action arises out a divorce action that was heard on the 30th day of September, 1987 before the Honorable Boyd Bunnell, District Court Judge. (Findings of Fact, Addendum "A", "FF", Introductory paragraph, Record on Appeal "RA" 072-080)

(a) The Appellant and Respondent were husband and wife, having been married on the 29th day of December, 1973 in

Green River, Utah. (FF paragraph 2, RA 073)

(b) The parties had four (4) children, to wit: LANCE RANDALL ERWIN (born July 16, 1976), STACEY ANN ERWIN (born July 1, 1979), KARA BROOKE ERWIN (born May 20, 1981), and NICHOLAS CHARLES ERWIN (born January 11, 1984). (FF paragraph 3, RA 073)

(c) During the marriage the parties acquired a home and real property in Green River, Utah with an approximate value of \$50,000 and liens against the home totaling approximately \$45,500. (FF paragraph 11, RA 076)

(d) The parties also acquired a one-half interest in a corporation which was valued by the Court at \$50,000. (FF paragraph 11, RA 076)

(e) The business acquired by the parties was a construction business and until March, 1986 the Respondent spent substantial time working in said business. (I Trans. 12, RA 112)

(f) In March, 1986, the Respondent obtained employment in Arizona and for a short period of time traveled back to Green River, Utah every other weekend to be with his family. (I Trans. 89, RA 189)

(g) In or about May, 1986, the family and minor children moved to Arizona. (I. Trans 89, RA 189)

(h) The parties had family difficulties while in Arizona and returned to Green River, Utah in August, 1986. Shortly thereafter, the family returned to Arizona. (I Trans. 89-92, RA 189-192)

(i) The parties were unable to work out their marital



difficulties and Respondent returned to Green River, Utah with three of the minor children, Lance, Stacey, and Nicholas. (I Trans. 96-105, RA 196-205)

(j) Appellant was left in Arizona with the minor child, Kara and Appellant remained in Arizona for approximately two months. She returned to Green River, Utah in December, 1986. (I Trans. 238-242, RA 338-342)

(k) After a Court hearing in February, 1987, two of the minor children, Kara and Nicholas, were in the temporary custody of Appellant and the other two minor children, Lance and Stacey, remained in the family home with the respondent. (RA 020-022)

(l) From that time until the hearing on September 30, 1987, the children were brought together approximately every other weekend with the exception that the minor child, Lance, refused to visit with his mother, the Appellant. (I Trans. 244-246, RA 334-346)

(m) A Custody Evaluation was performed and dated May 19, 1987 in which it was recommended that the two minor children that were currently with the Appellant remain with the Appellant and that the two minor children currently with the Respondent remain with the Respondent. (Custody Evaluation Addendum C)

(n) At the hearing on the 30th of September, 1987 the Court ordered that custody of all four minor children should be awarded to the Respondent. (FF paragraph 8, RA 075)

(o) The Trial Court also ordered that the Appellant

receive limited visitation of one weekend per month and holidays as outlined in the Findings of Fact and Conclusions of Law. (FF paragraph 8, RA 075)

(p) The Trial Court also ordered the family home awarded to the Respondent with no equity interest for the Appellant, awarded the business interest to the Respondent, and ordered all interest in the pension fund of approximately \$18,000 to the Respondent. The Appellant was awarded the sum of \$12,000 as her interest in the business and equity in the home, however, this was to be paid out at the sum of not less than \$200 per month at 6 percent interest. Appellant was also awarded the Ford Bronco, valued at \$9,500, free and clear of any indebtedness thereon. (FF paragraphs 11 and 12, RA 076-078)

(q) Appellant was not ordered to pay child support due to her unemployed status. (FF paragraph 18, RA 080)

Respondent was ordered to pay all the marital debts of the parties including the first and second mortgages on the marital home, debts in the sum of approximately \$5,000, and the indebtedness on the Ford Bronco in the sum of approximately \$10,000. (FF paragraph 12, RA 077-078)

#### ISSUES PRESENTED

(a) Whether the Trial Court abused its discretion in awarding custody of the minor children to the Respondent, based upon the testimony presented and the recommendations of the custody evaluator.

(b) Whether the Trial Court failed to make adequate

Findings of Fact and Conclusions of Law to support its decision to award custody of the minor children to the Respondent.

(c) Whether the Trial Court abused its discretion in awarding the property of the parties as follows:

(1) The Trial Court awarded the full pension benefits to the Respondent.

(2) The business interest was ordered paid over a substantial period of time at an inadequate interest rate.

(d) Whether the Trial Court failed to make adequate Findings of Fact and Conclusions of Law for its distribution of property.

(e) Whether the Trial Court abused its discretion in limiting the Appellant's visitation.

(f) Whether the Trial Court failed to make adequate Findings of Fact and Conclusions of Law as to its order limiting Appellant's visitation.

#### SUMMARY OF ARGUMENT

The Appellant in this case is contending that the Trial Court abused its discretion and/or failed to make adequate Findings of Fact in basically three separate areas: Custody, distribution of marital assets and visitation.

Appellant is questioning the determination of custody, particularly in that the Trial Court failed to make Findings of Fact regarding her ability to care for the children and failed to take into account the custody evaluation. The case law in Utah

is quite clear regarding the necessity for Findings of Fact. Appellant submits that if Findings of Fact were made by the Trial Court regarding the custody evaluation and her ability to care for her children, the Trial Court would have had to make an award of split custody with the Respondent receiving custody of the two older children and the Appellant receiving custody of the two younger children.

Appellant is contesting the Trial Court's distribution of assets. Specifically, Appellant asserts that the Trial Court abused its discretion in awarding the full pension benefits to the Respondent. There is nothing in the Trial Court's Findings of Fact to support an award of this nature. In fact, while the Court did set a value on each marital asset, it failed to show how the distribution of that asset affected the overall marital estate.

Appellant also contends that the Court allowed a payoff of \$200.00 per month on a \$12,000.00 cash settlement and that this was abuse of the Trial Court's discretion. There are no Findings regarding the necessity of an installment payoff and there are no Findings to support the dollar figure used. The Appellant claims that the Court should have awarded the statutory rate of interest of twelve percent (12%) on any installment payout rather than the six percent (6%) the Court did award.

The Trial Court awarded custody of the four (4) minor children to the Respondent with visitation to the Appellant. The visitation was limited to one weekend per month, some holidays

and one month in the summer. Appellant questions this limited visitation in that there is no evidence and no Findings to support limiting her visitation with the minor children. The Appellant asserts that the Trial Court should have awarded her reasonable visitation rather than the limited visitation she has received.

## ARGUMENT

### I

THE GENERAL RULE APPLICABLE IN DIVORCE CASES IS THAT THE TRIAL COURT HAS BROAD DISCRETION, BUT THE DISCRETION IS SUBJECT TO ADEQUATE FINDINGS OF FACT SO THAT THE APPELLATE COURT CAN MAKE THE PROPER REVIEW.

In this case, the Trial Court clearly has discretion given it by law. In a myriad of cases, the courts have indicated that the Trial Court is the place to adjudicate domestic matters. This is "because the proper adjudication of custody matters 'is highly dependent upon personal equations which the Trial Court is an advantaged position to appraise'", Smith v. Smith, 726 P.2d 423,425 (Utah 1986) citing Johnson v. Johnson, 323 P.2d 16, 19 (Utah 1958). The Utah Supreme Court and Appellate Courts have indicated that they will not overturn a Trial Court's determinations in a custody matter or in any other domestic matter unless the appellant can show a misapplication of the facts of that the Trial Court misapplied principals of law, Smith, 1986 supra.

This is a heavy burden for Appellant to carry and Appellant understands the difficulty that the Appellate Court has in reviewing Trial Court decisions in these matters. However, it is incumbent upon the Appellate Court to review such decisions to determine that the actions of the Trial Court are supported by the weight of the evidence. Even further, the Appellate Court must review the Findings of Fact and Conclusions of Law of the Trial Court and determine that they do in fact support the

Court's ultimate conclusion. The Appellate Courts must determine not only that the Findings support the Conclusion, but also demonstrate why and how that conclusion was reached, Smith, supra, see also Ebbert v. Ebbert, 744 P.2d 1019 (Utah App. 1987) (regarding findings of fact, conclusions of law and visitation issues) and Smith v. Smith, 751 P.2d 1149 (Utah App. 1988) (the application of findings of fact and conclusions of law and the distribution of property).

This Court then is charged with the obligation not only of giving the Trial Court broad discretion and not infringing upon that discretion, but to do more than "a superficial exercise of judicial power", Smith, 1986, supra. The Court must review the written Findings of Fact and Conclusions of Law to determine that the factors that should be taken into account by the Trial Court Judge were (1) in fact taken into account by the Judge and (2) properly applied by the Trial Court Judge.

In the case before us, the Court exercised its discretion in believing or not believing certain witnesses and evidence. Unless the evidence clearly preponderates to the contrary, the Trial Court's interpretation of the facts must be allowed, Berger v. Berger, 713 P.2d 695 (Utah 1985). However, the Court still must examine the Findings of Fact and Conclusions of Law to determine if they logically follow from the Court's determination of the facts.

## II

IN AWARDING CUSTODY OF ALL FOUR MINOR CHILDREN  
TO THE PLAINTIFF/RESPONDENT, THE TRIAL COURT ABUSED  
ITS DISCRETION AND FAILED TO MAKE ADEQUATE FINDINGS OF  
FACT SUPPORTING THE AWARD OF CUSTODY.

In its Memorandum Decision, dated October 9, 1987 (Addendum "B", RA 056-063), and in the Findings of Fact and Conclusions of Law prepared from that Memorandum Decision, the Court indicates that both parties have the necessary physical skills to care for the children. At that time, two of the minor children were being cared for by the Plaintiff/Respondent and two of the minor children were being cared for by the Defendant/Appellant. This had been the situation since December of 1986. Prior to that time, Appellant had the youngest child in her care and Defendant had the three older children in his care from approximately October through December of 1986. In its Memorandum Decision and Findings of Fact, the Trial Court sets these facts out clearly as to the Respondent, but fails to set out any facts in regard to the Appellant.

Throughout its Memorandum Decision and Findings of Fact, the Trial Court sets forth the efforts made by the Respondent, but fails to indicate any efforts made by the Appellant in caring for the children. This is contrary to the evidence that was presented. It is impossible to refer the Court to every place in the transcript which would indicate testimony regarding the care for the children; however, Appellant would submit that testimony is contained in Volume 1, Day 1, Pages 98-



250 (RA 198-350) and almost the entire text of the transcript of Volume 2, Day 2 (RA 351-468). Much of this testimony regarding Appellant's care for the children is uncontradicted and unrebutted; however, the Trial Court failed to even make mention of it.

The Trial Court also indicates that the Appellant left the minor child unsupervised or with limited supervision. This testimony is controverted. However, Appellant recognizes that the Trial Court has the discretion to determine which witnesses are credible. There is no indication either in the Findings of Fact or Memorandum Decision that this concern about the child carried over into the time period from December, 1986 until the decision of the Trial Court. The Trial Court also set forth numerous factors that it took into account regarding the two minor children that were residing with the Respondent, its determination regarding the Respondent's ability to care for the children and the care that he had provided. Again, there is simply no mention as to the two minor children in the custody of the Appellant.

Appellant asserts that the failure of the Trial Court to take into account the care received by the two children in her custody and her ability to care for them during the time period in question is a clear abuse of discretion. Obviously, if the Trial Court had determined that the children were not properly cared for, well adjusted or for some other reason were not appropriately cared for by the Appellant during this time period,

it would be within the Trial Court's discretion to make said determination based upon suitable Findings of Fact and Conclusions of Law. However, the Court simply ignored this and made no mention of these two children, either in its Memorandum Decision or its Findings of Fact. To fail to make a decision and then simply transfer custody based on the care received by the other two children is an abuse of discretion and shows no reliance upon the evidence presented.

It is difficult not to interweave the argument regarding Findings of Fact with abuse of discretion since, due to the way this matter was decided, they are inextricably interwoven. The judgments made by the Trial Court as stated above are contained in its Findings of Fact and in its Memorandum Decision. The Appellate Courts have given the Trial Courts a great deal of discretion in determining what evidence is credible and, therefore, absent the clear preponderance as cited in Berger, supra, the Appellant cannot challenge the Court's determination as to the credibility of witnesses. However, as set forth in Section I, it is incumbent upon the Trial Court to set forth adequate Findings of Fact to support its conclusion. Appellant asserts that that is not the case in this decision.

The Appellant does, however, attack one finding of the Court as being unsupported by the evidence. In its Finding of Fact number 4, the Court finds that Appellant "had affairs with other men while the parties were living with the children in the State of Arizona." Appellant asserts that there was no testimony

based upon personal knowledge at the trial and, therefore, in the transcript which supports this conclusion. There was speculative evidence, innuendo and heresay, but no admissible evidence was presented regarding this finding. The Court's determination of custody may or may not turn on that single item, but Appellant must bring this to the attention of the Appellate Court.

In its Findings, in paragraphs 4 and 6, the Court apparently relies on certain factors to make a determination of custody. The Court reiterated Respondent's testimony regarding the Appellant's activities in Arizona. However, there was no showing that the instability the Court was concerned about continued after December of 1986 when the Appellant was awarded temporary custody of the two younger children. There was no testimony presented regarding lack of supervision or limited supervision of these two children. Rather, the Court sets forth the activities in Arizona as an example of the Appellant's previous poor judgment, but sets forth no Findings as to any continued poor judgment or lack of care of the minor children. The Court does indicate that the Appellant "moved in with and began to live with another man and that she continues to this time to live with him with said two children and does so openly." (Findings of Fact, paragraph 4).

It would seem that, even though the Court does not set forth the reasons in its Findings, that Appellant's relationship with this individual is a substantial basis for the Court's failure to continue the existing custodial relationship. In

Sanderson v. Tyron, 739 P.2d 623, 625 (Utah 1987), the Utah Supreme Court determined that "an extra marital sexual relationship is insufficient to justify a change in custody." In this case, the Court goes so far as to rule that a polygamist relationship alone is not a sufficient basis to take custody from the individual living in the polygamist relationship. The Court determined that an individual sexual relationship, absent some showing of adverse effect upon the children, was not sufficient as a factor for an award of custody. This position is further supported in case law in Fontenot v. Fontenot, 714 P.2d 1131 (Utah 1986); Shioji v. Shioji, 712 P.2d 197 (Utah 1985) and Stuber v. Stuber, 244 P.2d 650 (Utah 1952).

The Court really doesn't set forth its reasons for making these Findings and the effect that these Findings had on its determination of custody. However, based upon the language of the Memorandum Decision and the Findings of Fact and Conclusions of Law, one has to assume that it had a substantial effect. As set forth above, this is inappropriate.

In making its Findings of Fact, the Court also failed to indicate what, if any, effect the custody evaluation (Addendum "C") had upon its determination. While it's true that the Court, in its sound discretion, need not consider certain evidence, in this case, the Court clearly had the custody evaluation before it and under consideration, see Transcript, Volume 1, Day 1, Page 3 (RA 103). This custody evaluation was ordered by the Trial Court (Para 7, RA 022), prepared in May of 1987 and submitted to the

Court, yet nowhere in its Findings of Fact and Conclusions of Law does the Court indicate that the evaluation was inappropriate or that the Court found the recommendation by the evaluator to be somehow not worthy of consideration. Again, as in other testimony and facts presented, the Court has simply ignored the custody evaluation.

The Respondent did present testimony of one Rebecca Semken regarding her opinion about the custody evaluation that had been performed by another individual. There was a substantial amount of testimony presented beginning on Page 173 of Volume 1, Day 1 of the Trial Transcript (RA 273). This testimony goes through page 192 (RA 292). Throughout the testimony, the witness basically contradicts the custody evaluator's recommendation of splitting custody of the children and placing the older child with Mr. Erwin and the three younger children with Mrs. Erwin, the Appellant. However, it is also clear from the testimony that Ms. Semken never interviewed the Appellant or the two minor children in the care of the Appellant, Transcript Volume 1, Day 1, Page 178, 184 (RA 278, 284).

In Walker v. Walker, 707 P.2d 110 (Utah 1985), the Court determined that the use of an evaluator or the testimony of an evaluator who did not interview the whole family was an abuse of discretion. Again, the Court's Findings of Fact are incomplete in regard to the Court's use of either custody evaluator. In that the Court followed the recommendation of Ms.

Semken and apparently ignored the recommendations of Mrs. Scartezini, one can only assume that the Court relied upon the testimony of Ms. Semken in disregarding the written evaluation. Based on the test in Walker, supra, this would clearly be an abusive discretion.

This is further supported by the Court's finding that the children should be kept together. (Paragraph 7 Findings of Fact). At a previous hearing the Court awarded temporary custody of two of the children to each of the parties. Mrs. Scartezini in her evaluation recommended continuing that arrangement while Ms. Semken discouraged it. Again, because of the inadequate findings, this Court is left to guess as to the Trial Court's reasoning in ignoring the custody evaluation.

The Appellant does not contend that the Trial Court has no discretion in using or not using a custody evaluator's recommendations, see Fletcher v. Fletcher, 616 P.2d 1218 (Utah 1980), but the Plaintiff does believe that, if a custody evaluation is performed, the Court should make a finding as to its effect, if any. If the custody determination is so complex that the evaluation is ignored or only becomes a part of that determination, the Trial Court is required to issue specific findings to that effect.

While it may not be the best of all situations, split custody is often more favorable than other alternatives. In this case, the two older children had resided with the Respondent since December of 1986 and the younger children had resided with

the Appellant for the same period of time. Based upon this, the custody evaluator recommended split custody. The Utah Supreme Court has, on several occasions, approved a split custody determination. In Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979) the Court said:

"While it is true that a child custody award that keeps all the children of the marriage united is generally preferred to one which divides them between the parents, that preference is not binding in the face of considerations dictating a contrary course of action", at 512.

In this case, the Court found both parents to be fit custodial parents. A split custody arrangement was also approved by the Court in Pusey v. Pusey, 728 P.2d 117 (Utah 1986). In Pusey, supra, there was a preference expressed by one child. In this case, the two younger children are too young to have expressed such a preference; however, the Court in Pusey indicated other factors to take into account, these being the identity of the primary caretaker during the marriage, identity of the parent with greater flexibility to provide personal care, identity of the parent with whom the child has spent most of his or her time during the pending custody determination, if that period has been lengthy, and the stability of the environment provided by each parent. There is no indication from the Findings of Fact or the Memorandum Decision that the Trial Court applied these factors to the two children in the custody of the Appellant during the pendency of this action.

The Trial Court has the obligation in its findings not

only to indicate its ultimate conclusion, but also must "show why the ultimate conclusion it reaches is justified", Smith (1986), supra, citing Milne Truck Lines v. Public Service Commission, 636 P.2d 1047 (Utah 1981); Elwel v. Board of Education, 626 P.2d 460 (Utah 1981). In custody determinations, these findings are critical in that "proper findings of fact ensure that the ultimate custody award follows logically from and is supported by the evidence and the controlling legal principals," Painter v. Painter, 80 UAR 14 at 15 (utah App. 1988) citing Smith v. Smith, 726 P.2d 423, 426 (Utah 1986). Therefore, it is not necessary, or it should not be necessary, for an Appellate Court to try and guess the basis for the Trial Court's Findings of Fact. In this situation, there are no Findings of Fact in regard to the ability or lack thereof of the Appellant to care for the children. In making such a determination, the Court should look to "the particular needs of the child and the ability of each parent to meet those needs," Martinez v. Martinez, 728 P.2d 996 (Utah 1986), citing Smith, supra and Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1983) and that was not done in this case.



### III

#### THE TRIAL COURT ABUSED ITS DISCRETION AND FAILED TO MAKE ADEQUATE FINDINGS OF FACT IN THE DIVISION OF MARITAL PROPERTY.

As stated above, the Trial Court is granted a great deal of discretion "in adjusting the financial interest of parties to a divorce . . . [and] absent some clear abuse of discretion, the Trial Court's distribution of marital assets and liabilities will not be disturbed, Painter v. Painter, supra at 14, citing Cook v. Cook, 739 P.2d 90, 93 (Utah App. 1987). The Appellant realizes that the burden in disputing the distribution of marital assets is upon the Appellant, but believes that the Court abused its discretion in the awarding of assets.

Appellant contest two specific portions of the Trial Court's awarding of assets. The Trial Court abused its discretion and failed to make proper Findings of Fact in awarding the entire pension fund to the Respondent and in allowing the Respondent to pay the \$12,000.00 awarded to Appellant at the rate of \$200.00 per month and six percent (6%) interest.

In order to adequately review a distribution of property in a divorce proceeding, the Appellate Court must not only review the issues complained of, but must also review all other issues. "It would be inappropriate for this Court to reverse on an isolated item of property or debt distribution, rather this Court must examine the entire distribution to determine if the Trial Court abused its discretion", Boyle v. Boyle, 735 P.2d 669, 671 (Utah App. 1987). Therefore, in

reviewing the Court's Findings of Fact, the Appellate Court must look to each issue of the distribution. Further, in Jones v. Jones, 700 P.2d 1072 (Utah 1985), the Court stated that the Findings of Fact had to include a value placed upon each asset or debt in order for the Court to properly review the distribution. In the present case, while the Trial Court set a value on each aspect of the distribution, it made no Findings of Fact as to how those valuations fit together in the entire scheme of the distribution. For example, Appellant was awarded \$12,000.00 as her interest in the business and in the home, together with the Bronco, with a value of approximately \$9,500.00. Respondent was ordered to pay the encumbrance on the Bronco in the sum of approximately \$10,000.00, but was awarded the full rights in the pension fund. Taking Jones, supra, only slightly further, the Trial Court should set forth the basis for the award of each item in order to properly allow the Appellate Court to review.

In Colman v. Colman, 67 UAR 7, 12 (Utah App. 1987), the Court, in quoting Jones, supra and Boyle, supra, states "However, to determine if equity was done we must have before us specific findings of fact pertinent to that issue." That was not done in this case. As stated above, there were no Findings of Fact to support the pay out over a period of time and at the interest rate indicated. There was also no indication by the Trial Court of how each portion of the property distribution fit into the overall scheme of the distribution of marital assets.

Since Dogu v. Dogu, 652 P.2d 1308 (Utah 1982) and

Woodward v. Woodward, 656 P.2d 431 (Utah 1982), the Utah Supreme Court has recognized that both spouses have a share in either spouse's retirement fund. This retirement fund, based on the previously cited cases, is an asset of the marriage and, therefore, any distribution, future or present, of the asset must be accounted for. In the present case, the Court awarded the entire pension fund to the Respondent. As stated above, the Court made no findings as to how each share of the marital estate was distributed. The Court did include the value of each asset and, based upon testimony given, the Court may determine that value, however improper it may seem. As to the retirement fund, the Court made no determination regarding the time of distribution of the fund, the method of distribution, the future value versus the present value and how this retirement fund affected the overall distribution.

In Bailey v. Bailey, 745 P.2d 830 (Utah App. 1987), the Court discussed in detail the procedure in determining the distribution of a pension fund. In this case, the Court found that the pension fund had little or no present value and, therefore, awarded it to the Respondent. In the Bailey case, the Court indicated the importance of findings in the Court's exercise of its discretion. Again, this Trial Court has failed to make specific findings regarding the distribution of the pension fund, other than it apparently has no immediate value, see Findings of Fact, paragraph 11(d). There is no indication in the Court's findings as to why the fund is not readily available.

In paragraph 12(f) the Trial Court found that the Respondent should have the sole retirement fund "in order to provide for himself and the children." If the retirement fund truly had no readily available value then it would certainly not be available for the Respondent to use to provide for himself and the children. These two findings seem to be contradictory and, therefore, an abuse of discretion.

The Trial Court awarded Appellant \$12,000.00 as her cash settlement for her interest in the business and any equity interest she might have in the parties' home. While the Appellant doesn't agree with the value the Court placed on the assets, Appellant recognizes that the Court does have the discretion to determine that valuation based upon the testimony presented. Rather, the Appellant questions the Court's order that that amount be paid at the rate of \$200.00 per month at six percent (6%) interest.

In Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987), the court found that it was reversible error for the Trial Court to not award the statutory interest rate. In the Marchant case, the Trial Court ordered that any sums to be paid on the retirement account would accrue interest at the rate of eight percent (8%) per annum. The Court of Appeals reversed and held that the Trial Judge had erred in not awarding interest on the property award in an amount of twelve percent (12%) per annum. Appellant submits that the same factors involved in the Marchant decision are involved in this case and that it is reversible

error for the Trial Court to allow the payment of the property settlement at \$200.00 per month and six percent (6%) interest.

There is no specific finding by the Trial Court to justify the payment sum of \$200.00 per month. Appellant submits that the Marchant decision deals with the Court's award of six percent (6%) interest and, therefore, this distribution should be set aside and a more equitable distribution ordered.

#### IV

#### THE TRIAL COURT ABUSED ITS DISCRETION AND FAILED TO MAKE ADEQUATE FINDINGS OF FACT IN LIMITING APPELLANT'S VISITATION WITH THE MINOR CHILDREN.

In this case, the Trial Court awarded custody of all four minor children to the Respondent. The Appellant has set forth her contentions regarding that custody award. Nonetheless, the issue of visitation is significant since this matter may go on for a lengthy period of time or the custody award may be upheld.

Without some basis, the Trial Court should grant the non-custodial spouse reasonable visitation. Any visitation granted to a non-custodial parent should be "realistic and reasonable and provide an adequate basis for preserving the child's relationship with the non-custodial parent", Ebbert v. Ebbert, 744 P.2d 1019, 1021 (Utah App. 1987). The general rule in Utah is that reasonable visitation includes every other weekend, alternate holidays and an extended summer visitation. In this case, the Trial Court granted the Appellant one weekend per month, some holiday visitation as outlined in the Findings, and only one month of extended summer visitation. There are no Findings to support the limit the Court imposed on Appellant's visits.

Clearly, in determining the visitation, the Court must look to the best interests of the children. However, absent Findings to the contrary, the Court should grant the non-

custodial spouse reasonable visitation. There is no apparent reason for the Court to limit Appellant's visitation. Again, the inadequate Findings of Fact by the Trial Court must leave the Appellate Court guessing as to the reason for limited visitation. This Court should remand the issue of visitation for further hearing with instructions regarding reasonable visitation for the non-custodial parent.

## V

### CONCLUSION

The Appellant seeks relief from the Trial Court's decision in this matter. In all issues presented, the Appellant seeks reversal of the Trial Court's decision with remand for further hearing with instructions from the Appellate Court regarding the issues presented.

Regarding custody, the Trial Court gave no indication in its Findings of Fact as to how its Conclusions were reached. It appears that substantial testimony was not discounted or found to be not credible, but rather was plainly ignored. This constitutes an abuse of discretion in the decision made by the Trial Court. In addition, this case requires remand for the Court to issue proper Findings of Fact in regard to the custody determination.

Based upon existing case law, it is clear that the interest rate attached to the cash property settlement is inappropriate. The Court should reverse that aspect of the Decree and impose the statutory twelve percent (12%) interest rate. However, the question of the payout at \$200.00 per month must still be resolved. The issue should be remanded to the Trial Court for further hearing with instruction from this Court on the payout amount over time.

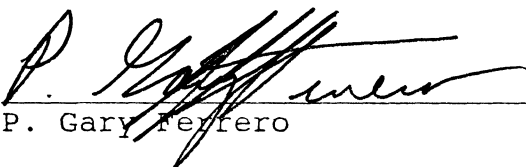
There is absolutely no reason for the Trial Court to have limited Appellant's visitation with the minor children. It



may well be that the Trial Court did not want to impose upon the Respondent and require him to transfer the children to Salt Lake more than once per month. However, the Trial Court can deal with that problem and at the same time not limit Appellant's visitation. There is absolutely nothing in the Trial Court's Findings which support the limitation on visitation. One can only guess at the reasons why the Trial Court imposed this limitation, but guessing is not the function of the Appellate Court.

As can be seen, there are numerous issues in this case that need to be resolved. The Appellant requests that the Appellate Court reverse the issues presented and remand the case back to the Trial Court with specific instructions regarding the necessary Findings for custody, the distribution of property and removing the restrictions on Appellant's visitation.

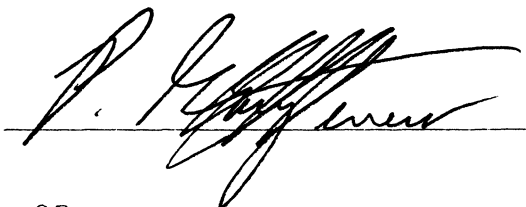
Respectfully Submitted this 4 day of August, 1988.

  
P. Gary Ferrero

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Appellant to Joane P. White, Attorney for Respondent, 5th Street Plaza, 475 East Main, Suite 1, Price, Utah 84501, postage prepaid, this 4<sup>th</sup> day of August, 1988.

ld erwierwi.bri



## ADDENDA

ADDENDUM "A" Findings of Fact and Conclusions  
of Law



2. That the Plaintiff and the Defendant were married on the 29th day of December, 1973 at Green River, Emery County, Utah and have been husband and wife since that time.

3. That there have been four children born as the issue of this marriage, namely, Lance Randall Erwin, born July 16, 1976; Stacie Ann Erwin, born July 1, 1979; Kara Brook Erwin, born May 20, 1981 and Nicholas Charles Erwin, born January 11, 1984.

4. The Court finds that both of the parties have exhibited the necessary physical skills to properly care for and take care of the children's physical needs and that both are fit and proper parents in this regard; however, the Court finds that the Defendant has exhibited a certain amount of instability and used poor judgment in her relationship with the children in that she had affairs with other men while the parties were living with the children in the state of Arizona; that after the separation of the parties, the Defendant left the child Kara, who remained with the Defendant in Arizona, either unsupervised or with limited supervision while she worked and a time when the child was approximately five years of age; that after the Defendant returned to Utah and received two of the children into her custody, that she moved in with and began to live with another man and that she continues to this time, to live with him with said two children and does so openly; that there has developed, for whatever cause, a complete

alienation of the feelings of her oldest son so that she has had no visitation or meaningful parental relationship for over a year, and that he has stated that he does not want to visit with or have anything to do with his mother.

5. The Defendant and her live-in boyfriend are both unemployed but state that they are seeking employment in the Salt Lake area where they are presently residing.

6. The Plaintiff has provided a stable environment for the two children that he has had in his care since December of 1986 and that he was the sole provider for three of the children from October through December of 1986 and has been the sole provider for the two children in his custody from December of 1986 until the present. The Court finds that he is now occupying the home where the children have resided for the majority of their life; that he has the benefit of support of his parents and other family members in the Green River area where he is residing; that the two children are residing with him are happy and content and well adjusted in that environment; that the Plaintiff is self employed and has a good income and can provide the necessary economic means for the support of the children and that he has the support of his parents who live next door to him to help him in assisting with the raising of the children during times when he works; and, that he has demonstrated a constant desire and concern for the welfare of the children for the period of over one year that the parties marriage has been in a crisis situation.

7. The Court further finds that the children, if at all possible, should remain together as a family unit.

8. The Court finds that it is in the best interests of the four minor children of the parties that their care, custody and control be awarded to the Plaintiff subject to the right of the Defendant to visit the children at reasonable times and places including but not limited to the following:

A. The Defendant shall be entitled to take the children for visitation purposes on the second weekend of each month from 5:00 p.m. on Friday until 6:00 p.m. on Sunday; and

B. The Defendant is allowed to take the children on December 26, 27 and 28 of each year for Christmas visitation; and

C. That the Defendant be allowed to take the children on Mother's Day weekend from Friday until Sunday; and

D. That the Defendant be allowed to take the children on Friday and Saturday of each Thanksgiving weekend; and

E. That the Defendant be allowed to take the children every other Easter weekend from Friday until Sunday, commencing in 1988; and

F. The Defendant is also allowed to take the children for one month during the summer vacation time provided that the Defendant select said month and give notice of same to the Plaintiff on or before May 1 of each year designating the time for said one month summer visitation; and

9. The Court finds that each of the parties should cooperate and work together to try and re-establish a parental relationship between the oldest son and the Defendant and that the parties should work in that direction and exert their best efforts to re-establish that relationship.

10. The Court finds that the Defendant has treated the Plaintiff cruelly causing him great mental distress and suffering.

11. The Court finds that the parties have acquired certain real and personal property during the marriage and that said property should be valued as follows:

A. The Court finds that the parties have acquired real property in Green River, Utah that has an approximate value of \$50,000.00 and that they owe \$35,500.00 on the first mortgage and \$10,000.00 on the second mortgage against said property.

B. The parties have further acquired a Bronco automobile that has a value of approximately \$9,500.00 and against which is owing the sum of \$10,000.00.

C. The Court further finds that the parties have accumulated an interest in a business that is a corporation, of which the parties own one half, and that the total business interest is worth approximately \$50,000.00 and that its only value as a going business concern is subject to the provision that the Plaintiff and the other stockholders devote their full time and energy to the business to keep it as a going concern,



and that it has little value if the business were to be liquidated. The Court further finds that the parties have a one-third interest in a corporation known as San Rafael Land Development Company but that that company has little present market value since it was organized to develop land and that land has now only speculation value and that that corporation showed a net operating loss for the period of 1985 to 1986 of a minus \$280.25. Based upon the exhibits shown, the Court finds that San Rafael Land Development Company has no present economic value.

D. The Court further finds that the parties have an investment in a retirement fund in the approximate sum of \$18,489.06 which is not readily available for the use of the parties at this time.

E. The Court further finds that the parties have accumulated substantial debts other than the debts owed on the home and the Bronco in the approximate sum of \$5,809.38.

12. Based upon said finding of value, the Court awards said property as follows:

A. To the Defendant the Bronco automobile, free and clear of all claims of the Plaintiff and free and clear of all debts and obligations. The Court orders the Plaintiff to assume and pay the outstanding indebtedness owed for the Bronco.

B. The Court further orders that the Plaintiff pay to the Defendant the sum of \$12,000.00 as Defendant's share of the equity in the home and business and that the Plaintiff pay the Defendant this amount in the sum of at least \$200.00 per month, commencing with the month of November, 1987 and that said cash settlement shall bear interest at the rate of 6% per annum on the unpaid balance with the interest to be deducted from each payment and then the balance applied to principle. The Plaintiff shall have the right to pay the Defendant the full amount of this indebtedness at any time and the Defendant shall be given a lien against the real property to secure the payment of said indebtedness.

C. The Plaintiff is awarded the home and real property for his use and the use of the children, subject to all outstanding indebtedness owed thereon.

D. The Plaintiff is awarded the parties' interest in the business and corporations, subject to all indebtedness owed thereon.

E. The Plaintiff is ordered to assume and pay all other debts owed by the parties and incurred and listed on their financial statements as marital debts.

F. The Plaintiff is awarded any and all interest which the parties may have in the retirement fund in order to provide for himself and the children.

G. The Plaintiff shall be awarded all of the household furniture and fixtures and other personal property now in his possession except that the Defendant is awarded the old living room set, the stereo, the 19" television set, the afghan that she made, one half of the slides and pictures of the children, the piano which the Defendant had prior to this marriage, the kitchen items that were given to her as gifts consisting of a set of pans, a crock pot, a pressure cooker, cookbooks and cookie sheets and the Defendant shall be awarded one half of the bedding and sheets not used on the beds of the children or for the children's use.

13. The Court further orders that the Plaintiff pay to the Defendant to assist her with payment of the balance of the attorney's fees the sum of \$350.00 and that said payment be made to the Defendant with sixty (60) days from the entry of the Decree in this matter.

14. The Court further orders that the two children now in the custody of the Defendant, namely, Nicholas Charles Erwin born January 11, 1984 and Kara Brook Erwin, born May 20, 1981, be turned over to the Plaintiff at the conclusion of their school activities on October 16, 1987 and that all of their personal clothing and personal items be delivered to the Plaintiff along with the children on that date.

15. The Court further orders that the Plaintiff shall deliver the children to the Defendant on the weekends and dates

when Defendant is entitled to visitation and that the Defendant shall be responsible to return the children to the Plaintiff at the conclusion of each visit.

16. The Plaintiff is ordered to maintain medical, dental and optical insurance for the benefit of the minor children of the parties when he is employed with an employer who offers such insurance as a benefit of his employment. The Plaintiff is further ordered to pay all reasonable medical, dental and optical expenses incurred on behalf of the minor children which are not covered by a policy of insurance.

17. No alimony is awarded herein.

18. The Court finds that the Defendant is unemployed at the current time and, therefore, no child support is awarded.

19. The Plaintiff has sustained the allegations of his Complaint by adequate evidence.

The Court having entered the foregoing Findings of Fact now concludes as follows:

#### CONCLUSIONS OF LAW

1. That the Plaintiff is granted a divorce from the Defendant.

2. That the Plaintiff is awarded the care, custody and control of the four minor children of the parties, subject to Defendant's rights to visit said children pursuant to paragraph 8 of the Findings of Fact and the subdivisions thereof.

3. No alimony is awarded herein.

4. No child support is awarded herein.

5. The property and debts accumulated by the parties during the marriage is distributed pursuant to paragraph 11 of the Findings of Fact and the subdivisions thereof.

4. The Plaintiff is ordered to maintain medical, dental and optical insurance for the benefit of the minor children of the parties when he is employed with an employer who offers such insurance as a benefit of his employment. The Plaintiff is further ordered to pay all reasonable medical, dental and optical expenses incurred on behalf of the minor children which are not covered by a policy of insurance.

5. The Plaintiff is ordered to pay to the Defendant the sum of \$350.00 to assist the Defendant with her costs and attorney's fees in this matter and to pay same within sixty (60) days from the entry of the Decree of Divorce in this matter.

6. The Court orders the Defendant to turn over to the Plaintiff the two minor children Nicholas Charles Erwin and Kara Brook Erwin, following the conclusion of their school activities on October 16, 1987 together with all of their personal clothing and personal items.

7. The Court orders that the Plaintiff shall deliver the children to the Defendant on weekends and dates when she is scheduled for visitation and that the Defendant shall be responsible to return said children to the Plaintiff at the conclusion of each such visits.

8. The Court orders that each of the parties cooperate and work toward trying to re-establish a parental relationship between the parties' oldest son Lance and the Defendant and orders the parties to work in that direction and to exert their best efforts to re-establish said relationship.

DATED this \_\_\_\_ day of October, 1987.

\_\_\_\_\_  
HONORABLE BOYD BUNNELL  
District Court Judge

CERTIFICATE OF MAILING

I do hereby certify that on this 2<sup>nd</sup> day of October, 1987, I mailed a true and correct copy of the above and foregoing Findings of Fact, Conclusions of Law, postage prepaid to the Defendant, Valerie Ann Erwin, addressed as follows: 3631 South 6545 West, West Valley City, Utah 84120.

Gena Welch  
Gena Welch  
Secretary to Mrs. White

ADDENDUM "B"

Memorandum Decision

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR EMERY COUNTY  
STATE OF UTAH

KIRK RANDALL ERWIN,

Plaintiff,

VS.

VALERIE ANN ERWIN,

Defendant.

MEMORANDUM DECISION

Civil No. 4868

This matter came on regularly for trial before the Court on the 30th day of September, 1987, and the parties appeared in person and presented evidence and exhibits and witnesses for the Court's consideration and the Court took this matter under advisement and rules as hereinafter stated:

The Court finds that the defendant has treated the plaintiff cruelly causing him mental suffering and distress and therefore grants a divorce to the plaintiff and against the defendant.

The Court finds that both of the parties have exhibited the necessary physical skills to properly care for and take care of the childrens' physical needs, and that both are fit and proper parents in this regard. However, the Court finds that the defendant has exhibited a certain amount of instability and used poor judgment in her relationship with the children in that she had affairs with other men while the parties were living with the children in the state of Arizona; that after the separation of the parties, she left the child



that remained with her in Arizona either unsupervised or with limited supervision while she worked and at a time when the child was approximately five years of age; that after she returned to Utah and received two of the children in her custody, that she moved in with and began to live with another man and that she continues to this time to live with him with the two children that are in her custody, and does so openly; that there has developed, for whatever cause, a complete alienation of the feelings of her oldest son so that she has had no visitation or meaningful parental relationship with him for over a year, and that he has stated that he does not want to visit with or have anything to do with his mother.

The defendant and her live-in boyfriend are both unemployed but state that they are seeking employment in the Salt Lake area where they are presently residing.

The plaintiff has provided a stable environment for the two children that he has had in his care since December of 1986, and that he was the sole provider for three of the children from July until December of 1986, and has been the sole provider for two of the children since that time to the present. The Court further finds that he is now occupying the home where the children have resided for a majority of their life; that he has the benefit of support of his parents and other family members in the Green River area where he is

residing; that the two children who are residing with him are happy and content and well adjusted in that environment; that the plaintiff is self-employed and has a good income and can provide the necessary economic means for the support of the children, and that he has the support of his parents who live next door to him to help him in assisting with the raising of the children during the time that he works; and, that he has demonstrated a constant desire and concern for the welfare of the children for the period of over one year that the parties marriage has been in a crisis situation.

The Court further finds that the children, if at all possible, should remain together as a family unit.

Based upon the foregoing findings of fact, the Court has concluded that it is in the best interest of the children that their care, custody and control be awarded to the plaintiff subject to the right of the defendant to visit the children at all reasonable times and places.

The Court further orders that the defendant shall be entitled to take the children for visitation purposes on the second weekend of each month from 5:00 p.m. on Friday until 6:00 p.m. on Sunday, and that she shall be further allowed to take the children on December 26, 27 and 28 of each year for a Christmas visit, and that she shall be allowed to take the children on the Mother's Day weekend from Friday until Sunday,

and on Friday and Saturday of each Thanksgiving weekend, and every other Easter weekend from Friday until Sunday, commencing in 1988. She shall further be allowed to take the children for one month during the summer school vacation time, and that she shall select the month that she shall have the children and givenotice to the plaintiff on or before May 1 of each year of the time that she intends to take the children.

The Court further orders that each of the parties cooperate and work toward trying to re-establish a parental relationship between the oldest son and the defendant, and that the parties work in that direction and exert their best efforts to re-establish that relationship.

The Court finds that the parties have acquired a home and real property in Green River, Utah, that has an approximate value of \$50,000 and that they owe \$35,500 on the first mortgage and \$10,000 on a second mortgage against the property. The parties have further acquired a Bronco automobile that has a value of approximately \$9,500 and against which there is owing the sum of \$10,000.

The Court further finds that the parties have accumulated an interest in a business that is a corporation, of which the parties own one half, and that the total business interest is worth approximately \$50,000 and that its ownly value as a going business concern is subject to the provision that

the plaintiff and the other stockholders devote their full time and energy to the business to keep it as a going concern, and that it has little value if the business were to be liquidated. The Court further finds that the parties have a one-third interest in a corporation known as the San Rafael Land Development Company, but that that company has little present market value since it was organized to develop land and that that land now has only speculation value, and that that corporation showed a net operating loss for the period 1985 to 1986 of \$280.25. Based upon the exhibits shown, the Court finds that this corporation has no present economic value.

The Court further finds that the parties have an investment in a retirement fund in the approximate sum of \$18,489.06 which is not readily available for the use of the parties at this time.

The Court further finds that the parties have accumulated substantial debts other than the debts owed on the home and the Bronco in the approximate sum of \$5,809.38.

Based upon these findings, the Court awards to the defendant the Bronco automobile, free and clear of all claims of the plaintiff, and orders the plaintiff to pay and assume the outstanding debt owed on the Bronco so that she will receive this asset free and clear of any debt.

The Court further orders that the plaintiff pay to the defendant the sum of \$12,000 as her share of the equity in

the home and the business, and that he pay her this amount in a sum of at least \$200 per month commencing with the month of November, 1987, and that said cash settlement shall bear interest at the rate of 6% per annum on the unpaid balance with the interest to be deducted from each payment and the balance applied to principal. The plaintiff shall have the right to pay her the full amount of this indebtedness at any time, and the defendant shall be given a lien against the real property to secure the payment of this indebtedness.

The plaintiff shall be awarded the home and real property for his use and the use of the children, subject to all outstanding indebtednesses owed thereon, and, further, he shall be awarded the parties' interest in the business and corporations, subject to all indebtednesses owed, and the plaintiff shall further assume and pay all the other debts owed by the parties and incurred and listed on their financial statements, and the plaintiff shall be awarded any and all interest they have in the retirement fund for his use and the use of the children.

The plaintiff shall be awarded all of the household furniture and fixtures and other personal property now in his possession except that the defendant shall be awarded the old living room set, the stereo, the 19" television set, the afghan that she made, one half of the slides and pictures of the

children, the piano that she had prior to this marriage, the kitchen items that were given to her as gifts consisting of a set of pans, the crockpot, pressure cooker, cookbooks and cookie sheets, and the defendant shall be awarded one half of the bedding and sheets not used on the beds of the children or for the childrens' use.

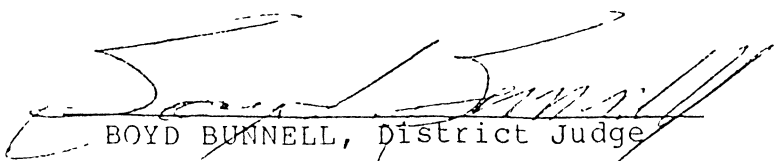
The Court further orders that the plaintiff pay to the defendant to assist her with the payment of the balance of her attorney's fees the sum of \$350 and that said payment be made to her within 60 days of the entry of the Decree.

The Court will further order that the two children now in the custody of the defendant be turned over to the plaintiff at the conclusion of their school activities on October 16, 1987, and that all of their personal clothing and personal items be delivered to the plaintiff along with the children on that date.

The Court further orders that the plaintiff shall deliver the children to the defendant on the weekends and dates that she is to commence visitation and that the defendant shall be responsible to return the children to the plaintiff at the conclusion of each visit.

The Court hereby directs that the attorney for the plaintiff prepare Findings of Fact, Conclusions of Law and a Decree in accordance with this decision.

DATED this 9<sup>th</sup> day of October, 1987.

  
BOYD BUNNELL, District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I mailed true and correct copies of the foregoing MEMORANDUM DECISION by depositing the same in the United States Mail, postage prepaid, to the following:

Joane P. White  
Attorney at Law  
23 South Carbon Avenue  
Price, Utah 84501

George M. Harmond, Jr.  
JENSEN LAW OFFICES  
Attorneys at Law  
190 North Carbon Avenue  
Price, Utah 84501

DATED this 9th day of October, 1987.

  
Secretary

ADDENDUM "C" Custody Evaluation



# FINDINGS OF CUSTODY EVALUATION

May 19, 1987

Re: Kirk Randall Erwin

vs.

Valerie Ann Erwin

Civil No. 4868

This report is submitted in compliance with a court order dated February 24, 1987, requesting that I conduct an evaluation of the Erwin family in order to provide the court with information that would be useful to it in deciding which of the Erwin parents should have custody of their children Lance, Stacie, Kara and Nicholas.

My findings and recommendations are based on the parents seen conjointly and individually. Home visits were made to each parent's residence at a time all four children were present (with the exception of Lance--he has been unwilling to visit with his mother). The children were observed in interaction with family members and were also interviewed privately at both households. In addition, telephone and/or personal contacts occurred between the time frame of April 1 to May 13, 1987, with the following persons:

Mrs. Betty Bastain, friend of Mrs. Erwin  
Mrs. Chris Spadafora, friend of Mrs. Erwin  
Mrs. Charlotte Seely, friend of Mrs. Erwin  
Dr. Ralph Vanderlinden, therapist for Mrs. Erwin  
Dr. Lynn Ravsten, therapist for Mr. & Mrs. Erwin  
Mr. J. D. Banasky, friend of Mr. Erwin  
Mrs. Cindy Ekker, friend of Mr. Erwin  
Mr. Morris Quaranberg, partner of Mr. Erwin  
Bishop Larry Rowley, Mr. & Mrs. Erwin's bishop  
Mrs. Durrant, Lance's fifth grade teacher  
Mrs. Quaranberg, Stacie's second grade teacher  
Mrs. Evans, Kara's kindergarten teacher

## BACKGROUND INFORMATION:

Mr. and Mrs. Erwin were both raised in Green River. They began dating after Mr. Erwin completed the service and the summer before Mrs. Erwin began her senior year of high school. After dating for six months they were married in December, 1973. Although Mrs. Erwin reports insecurity and the inability to

measure up to Mr. Erwin's expectations, Mr. Erwin describes their relationship as very good until about five years ago. He reports that after the birth of their third child, Kara, he was made aware of Mrs. Erwin's feelings of being neglected. Approximately ten years ago Mr. Erwin began a construction business with Mr. Morris Quarenberg. The business was very demanding, and Mr. Erwin spent the majority of his time working and much of this was spent out of town and away from the family for long periods of time. Reportedly, very little time was spent with the family, with the child rearing responsibilities falling upon Mrs. Erwin.

In March, 1986, Mr. Erwin obtained employment in Arizona. For a few months he would travel home every other weekend. With the conclusion of school, Mrs. Erwin and the children moved to Arizona in order for the family to be together. Mr. Erwin reports that he was happy to have his family with him, but Mrs. Erwin states that she felt as though she and the children were in his way. She alleges that he would work long hours and very little time was spent interacting with the family. Arguments became more frequent, and in an attempt to save his marriage, Mr. Erwin moved his family back to Green River in August, and he and Mrs. Erwin saw Dr. Lynn Ravsten for two sessions. Feeling problems may be worked out, the family returned to Arizona. Reportedly, Mrs. Erwin soon claimed the marriage was over and she no longer cared to continue the relationship. Mr. Erwin feels that she was having a relationship; she denies this accusation.

Irregardless, Mr. Erwin announced he was returning to Green River and asked Mrs. Erwin which two children she wished to keep in her custody because he was taking two with him. She indicates she could not choose, so he stated he was leaving with Lance and Nick. But before he left he also took Stacie, leaving Kara alone with Mrs. Erwin. Mr. Erwin returned to the family home in Green River, and Mrs. Erwin remained in Arizona for another two months before returning to Green River in December.

Since the court hearing in February, Mrs. Erwin lives with her mother in Green River with Kara and Nick. Mr. Erwin continues to live in the family home with Stacie and Lance. Visits are alternating every other weekend with the children being brought together. The only exception to this arrangement is that Lance refuses to visit with his mother.

ALLEGATIONS:

It is Mr. Erwin's position that his children are his main concern. "They are my life." He feels that he can provide the children with a "safe and secure environment in the home they have been raised in." He alleges that although Mrs. Erwin was a good mother, her parenting attributes changed dramatically. He alleges that she failed, during the time she was in Arizona, to provide adequate supervision of the children, especially Kara. He feels he is more mature and emotionally stable than his wife, and better capable of raising the children.

Mrs. Erwin contends that she has carried most of the responsibility for the children's care over the years and that the father has not been actively involved in every day aspects of their lives because of his involvement in his business. Mrs. Erwin alleges that Mr. Erwin was demanding with high expectations for her and the children. She reports that he was never affectionate with her. She feels that Randy does care for his children, but also feels that the time and activities he is presently sharing with his children will not continue once custody has been decided.

EVALUATION OF FAMILY MEMBERS:

Mrs. Valérie Erwin (Mother)

Mrs. Erwin was born and raised in Green River, and was the youngest of four children. She reports having a warm relationship with fond memories of her mother and siblings. Memories of her father are not as memorable. It seems that he was an alcoholic and her parents were divorced when she was fourteen. Mrs. Erwin reports enjoying school. References who knew her in school described her as being "shy and lacking in self-esteem. She was liked, but did not shine as a leader." She and Mr. Erwin were married during her senior year, but she did graduate with her classmates.

The major problems growing up as she described them were "shyness" and "insecurity". She married Mr. Erwin her senior year because she was attracted to his competency and strong character.

Mrs. Erwin presently lives with her mother, Mrs. Muriel Smith, age 67, in the small two bedroom home she grew up in. Mrs. Erwin acknowledges that this home is not adequate to care for her children, nor can she secure adequate employment to raise her children in Green River. Her plans, if she receives custody of the children, would be to move to Price, with her mother, and attend C.E.U., taking classes in business in hopes that she might develop marketable skills in a short amount of time to support her family. She has already discussed her educational

plans with Ray Maestas, Vocational Rehabilitation. She states that financial assistance through the Rehab. Program may be available for her education. Mrs. Smith would provide the needed daycare while Mrs. Erwin was out of the home.

Undoubtedly, the children would have to change schools. However, in talking with the three teachers, this would not be a difficult transition for the children. All of them do exceptionally well in school. The changes they made to Arizona and back again this past year did not appear to have a negative effect on their academic or social adjustment in school.

Collateral interviewees saw Mrs. Erwin as "quiet, reserved, submissive, and dependent". Everyone describes her as a good mother always having her home in order and children clean. She is described as "being creative, patient, and always with her little family". She was never seen as abusive or inappropriate in disciplining her children and she always volunteered to assist in school and community activities her children were involved in. She was described by another as "hard to get to know" and "shy". Valerie's best friends were probably her sisters. Another referent feels that Valerie's relationship with Randy "lacked emotional validation". She is seen as "a happier, more outgoing, self-confident person since the separation".

#### Mr. Randy Erwin (Father)

Mr. Randy Erwin is a thirty-six year old contractor who was born and raised in Green River. Mr. Erwin reports a good relationship with his parents and two sisters. He felt he had to "tow the line" Chores were expected to be completed, and the family participated in outdoor activities together. Mr. Erwin was active in sports during high school and reportedly was "well-liked". Mr. Erwin went to college for a short time before joining the Army. After completing two years in the Army he returned to Green River and began dating Mrs. Erwin.

They moved to Provo shortly after the marriage in order for Mr. Erwin to attend Trade Tech in hopes of learning a trade that would allow him to provide a stable financial foundation for his family. He returned to Green River and began a construction business with his former shop teacher, Mr. Morris Quaranberg.

Mr. Erwin is presently living in the family home which he built seven years ago on property located next to his parents' home. If he were to have custody of the children, he plans to remain in the home. The four-bedroom home is very adequate to accommodate the family. Mr. Erwin has done an excellent job of caring for Lance and Stacie. According to the children he prepares meals,

maintains the home, and meets the children's personal needs with the assistance of his mother.

During the home visit, Mr. Erwin interacted very appropriately directing the family activity. Positive interaction was observed with all four children. They seemed very comfortable in the environment. Information gathered would not indicate that Mr. Erwin has ever neglected nor been abusive to his children.

Collateral interviewees describe Mr. Erwin as "a hard worker, honest, and a homebody". He is also seen as being "high strung, a perfectionist, and a very private individual with few close friends". The majority of the collaterals saw Randy as spending only a limited amount of time with his family prior to the separation. Randy is seen by another collateral as "over-protective and a worrywart".

Lance Randall Erwin (D.O.B. July 16, 1976)

Lance comes across as a mature, intelligent, observant ten-year-old boy who is feeling a lot of sad feelings over his parent's separation. He wishes "his Mom and Dad would get back together". Since Lance returned to Green River with his father in October he has only visited with his mother on one occasion for one day. He is, in part, blaming Mrs. Erwin for the divorce stating that he "saw Mom at the swimming pool talking to men". Lance is described by his teachers as an excellent student, a leader in his class, and an outgoing sports enthusiast. Lance describes himself as most happy "when with Dad", and he can always "count on Dad". He acknowledges that he and his mother had a close relationship for all the years preceding the move to Arizona, but he refuses to deal with his feelings concerning Mrs. Erwin at this point in time. Lance's room was very clean and orderly with baseball posters and his own artistic illustrations decorating the walls. Lance feels that his family is very affectionate and those feelings are expressed through hugs and kisses. Lance verbalizes his desires to stay with Dad, play Little League baseball, and help Grandpa Erwin with the watermelons this summer.

Stacie Ann Erwin (D.O.B. July 1, 1979)

Stacie, who will be eight in July, is a very sensitive, shy, beautiful freckle-face little girl. She is very sad and unwilling to discuss family problems surrounding the divorce. Stacie has a strong alliance to both parents, speaking only positively of both. She does well academically, having attained the top achiever status in her class this past quarter. She is well liked by her teachers and friends, and is perceived as being a lot like her mother was in school. She describes activities as being attended

by all family members, including grandparents (on both sides). If Stacie had a problem she would go to "Mom and Dad", and if she needed to be comforted she would go to "Mom and Dad". Stacie is extremely close to her younger sister, Kara. This is very apparent in observing and listening to the interaction when the two are together.

Kara Brook Erwin (D. O. B. May 20, 1981)

Tomorrow Kara will turn six years old. She is a giggly, shy, darling blond little girl. She giggles and smiles when asked questions. She is very spontaneous and excited when discussing her animals, especially her dog, Rusty, and the bunnies Stacie and Lance received for Easter from Dad. Kara's teacher, Mrs. Evans, reports that except for a short period of time when the family returned in October, Kara has done well in school. During this time she was emotional and cried easily. Kara reports that she did not like school in Arizona and was glad to get back with her friends and "Stacie".

Nicholas Charles Erwin (D.O.B. January 11, 1984)

Nicholas, who is three years old, is well developed physically and intellectually. He drew a family picture and recognized colors during our conversation. He participated in the structured activity with the family members, but also sought the limelight by riding his rocking horse when he became bored with the activity. During our fantasy game, Nick stated that he would want Mommy to join him on the fantasy island. During the home visits Nick showed affection equally with each parent.

IMPRESSIONS AND CONCLUSIONS:

Interviews with both parents, as well as collaterals, suggest that both parents are concerned, caring people. It is the opinion of this evaluator that both parents could make acceptable parents to the children in question. Neither parent has serious concerns of the other parent with regard to their child-rearing capacity. Both parents have excellent relationships with their extended families, and this provides consistent emotional nurturing to the children. Both are seen by their therapists as having no serious emotional maladjustment problems.

Although Mr. Erwin's plans are to remain in the family home providing the continuity of care these children desperately need, Mrs. Erwin is planning to move to Price to a home which could adequately meet the children's needs in the immediate future.

Once established in Price she would also be in a position to provide a stable, secure environment. Both parents would depend on the grandmothers for back-up child care when they were out of the home due to employment or education.

As previously mentioned, Mrs. Erwin's plans are to attend C.E.U. in hopes of completing classes in business in a short amount of time so she could obtain employment to provide for her family. She is presently working at a convenience store in Green River. This would not provide her with adequate income. Mr. Erwin is in partnership in a construction company based in Green River. Although his employment provides a substantial income to support his family, this business requires out-of-town commitments. Mr. Erwin states that he will not have to leave town to work. In discussing the practicality of this arrangement, Mr. Erwin's partner feels that it is highly unlikely Mr. Erwin would be able to work from Green River for the majority of the time. This may necessitate arrangements like those made in the past, such as coming home on weekends or every other weekend. Mr. Erwin claims that he would change occupations if need be. This evaluator questions the commitment to this statement.

It is clear that each parent can provide certain benefits and that each parent has a psychological bonding with the children. I believe that the two youngest children, however, are closer with Mrs. Erwin. This is also consistent with the needs paramount with children of these ages. Kara and Nick have been with Mrs. Erwin since February and, in addition, she was seen by the majority of the references as the primary caretaker for all of the children prior to the separation. She has been providing them with continuity of care and affection. Although I feel Stacie could successfully live with either parent, I feel her bond with Kara is important to both girls. At this point in time, Lance is refusing to visit with his Mother because of feelings he has regarding the separation. I believe he should deal with those emotions immediately. However, at this point in time, placing Lance with his Father is in his best interest. Lance's strong desire to be with his Father (and Grandfather) cannot be ignored. All indications suggest that his strong feelings of attachment for his Father and Grandfather are based on positive, satisfying past relationships. To separate Lance from these relationships would now create much emotional distress for him.

However, I believe that if Lance is allowed to ignore dealing with the issues surrounding he and his Mother's present relationship this may create irreparable harm weakening the mother-child bond. Thus, I recommend that Lance and Mrs. Erwin enter therapy to deal with these feelings. In addition, should Mr. Erwin's employment take him away from home, I feel it would be best for Lance to live with his Mother during these periods of time.

The relationship between the siblings should be protected. They are very important to each other. Regular, frequent visits should continue.

RECOMMENDATIONS:

1. Mrs. Erwin continue to have custody of Nicholas and Kara. In addition, Stacie should also be placed with her.
2. Mr. Erwin continue to have Lance. However, if Mr. Erwin's employment takes him away from home for extended periods of time, Lance should be placed with Mrs. Erwin.
3. Lance and Mrs. Erwin should be involved in therapy to address the friction between them.
4. Visitation should occur as often as feasible, with extended summer vacations occurring to bring the children together.