

1988

## Bake v. Bake : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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DOCKET NO.

**880185-CA**

IN THE UTAH COURT OF APPEALS

VICKEY L. BAKE now known as )  
VICKEY L. ADDERLEY, )  
 )  
Plaintiff/Respondent, )  
 )  
vs. )  
 )  
NEAL F. BAKE, )  
 )  
Defendant/Appellant. )

Case No. 880185-CA

**BRIEF OF RESPONDENT**

Appeal from the Eighth Judicial District  
Court of Duchesne County, State of Utah  
The Honorable Dennis L. Draney, Judge.

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AUG 31 1998

U.S. District Court  
Utah Court of Appeals



TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF JURISDICTION AND NATURE OF THE PROCEEDINGS BELOW.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	1
STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
POINT I.           DEFENDANT IGNORES THE SUBSTANTIAL EVIDENCE THAT SUPPORTS THE FINDINGS ENTERED BY THE COURT AND IS ASKING THE COURT TO IGNORE THAT EVIDENCE AND MAKE FINDINGS THAT WOULD SUPPORT WHAT DEFENDANT WISHES WERE THE FACTS OF THIS CASE.....	7
POINT II.           THE PARTIES AGREED THAT THE ONLY CIRCUMSTANCES NECESSARY TO SHOW A CHANGE OF CIRCUMSTANCES WOULD BE A CHANGE OF PREFERENCE BY THE CHILDREN. THAT STIPULATION WAS APPROVED BY THE TRIAL COURT IN 1985 AND PROPERLY APPLIED AT THE CUSTODY HEARING IN 1988.....	12
POINT III.          THE FACTS CLEARLY ESTABLISHED THAT IT WAS IN THE BEST INTEREST OF THE CHILDREN THAT THEIR CUSTODY BE GIVEN TO THEIR MOTHER.....	16
POINT IV.           THE DEFENDANT SHOULD NOT BE ALLOWED TO CHALLENGE THE COURT'S CHILD SUPPORT ORDER CLAIMING THE COURT FAILED TO MAKE CERTAIN FINDINGS WHEN THE DEFENDANT FAILED TO PRODUCE ANY EVIDENCE UPON WHICH THE COURT COULD MAKE THOSE FINDINGS.....	20

CONCLUSION..... 21

ADDENDUM

1. Divorce Decree dated August 19, 1985
2. Exhibit 1
3. Exhibit 2
4. Recommendation and Order dated July 29, 1987
5. Letter dated August 4, 1987
6. Ruling dated January 26, 1988
7. Findings of Fact and Conclusions of Law dated February 18, 1988
8. Order and Decree Modifying Divorce Decree dated February 18, 1988

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Alexander vs. Alexander</u> , 737 P.2d 221 (Utah 1987).....	7,16
<u>Anderson vs. Anderson</u> , 481 P.2d 881 (Az. 1971).....	14
<u>Berger vs. Berger</u> , 713 P.2d 695 (Utah 1985).....	7
<u>Hirsch vs. Hirsch</u> , 725 P.2d 1320, 1321 (Utah 1986).....	7
<u>Hutchinson vs. Hutchinson</u> , 649 P.2d 38 (Utah 1982).....	6,16,19
<u>Kinsman vs. Kinsman</u> , 748 P.2d 210 (Utah 1988).....	14
<u>Kishpaugh vs. Kishpaugh</u> , 745 P.2d 1248 (Utah 1987).....	19
<u>Klein vs. Klein</u> , 544 P.2d 472 (Utah 1975).....	14
<u>Lamb vs. Lamb</u> , 605 P.2d 1248 (Utah 1980).....	14
<u>Painter vs. Painter</u> , 752 P.2d 970 (Utah 1988).....	7
<u>Porco vs. Porco</u> , 752 P.2d 365 (Utah 1988).....	7
 <u>Statutes</u>	
Utah Code Ann. §78-2a-3(2)g.....	1
Utah Code Ann. §78-45-7.....	10

STATEMENT OF JURISDICTION AND NATURE  
OF THE PROCEEDINGS BELOW

The Plaintiff filed a Petition to Modify the parties' Divorce Decree requesting that the Court change custody of the parties' two minor children. After a trial, the court granted Plaintiff's Petition and changed the custody of the two children to the Plaintiff. Defendant is appealing that decision. The Utah Court of Appeals has jurisdiction to hear this appeal under Utah Code Ann. §78-2a-3(2)g.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented on this appeal are as follows:

1. Whether Defendant can rely on his and his mother's testimony and ignore the testimony of the social workers, the children and the Plaintiff when challenging the factual finding of the court?

2. Whether the trial court should have made a finding of a change in circumstances when the parties, by written stipulation, waived that requirement and the trial court in two orders had accepted that waiver?

3. Whether the child support order is supported by the evidence?

STATUTES INVOLVED

None.

STATEMENT OF THE CASE

The parties were divorced on August 19, 1985. (R.43) The parties have two children, Nathan whose date of birth is October

10, 1974 and Kyle whose date of birth is December 17, 1976. (R.1) At the time of the divorce the boys expressed a desire to live with the Defendant. That preference by the boys was the result of the Defendant's promises to the boys that they would stay in Roosevelt, go to their same school and could call their mother any time they wanted. (T.45) Defendant also promised Mrs. Adderley that if the boys changed their mind they could return and live with her. (T.14) Because of the preference of the boys and the promises by Defendant the parties entered into a stipulation that provided that the Defendant would have custody until such time as the boys changed their mind and expressed a desire to live with their mother. The stipulation further provided that custody would be changed without a need of showing a change in circumstances. (R.35) The divorce was heard by Judge Allen B. Sorensen. He approved the stipulation of the parties and entered a decree of divorce which awarded custody to the Defendant and provided that:

Since the award of custody is based on the desire of the children, in the event the boys change their mind and express a desire to return to live with their mother, custody will be changed awarding custody to the Plaintiff without a need to show a change of circumstances. (R.44, Addendum 1)

Shortly after the parties separated the Defendant moved the boys to Sandy, Utah to live with his parents. (T.90) Defendant is an interstate truck driver. He is gone from the home two to six weeks at a time. (T.114) The boys were left with Defendant mother. She also works full-time so the boys generally cared fo

themselves. (T.115-118) Defendant also interfered when Mrs. Adderley tried to visit the boys, or talk to them by telephone. (T.39-41) The two boys were unhappy in that situation and expressed a desire to return and live with their mother. Those desires were expressed to the Defendant and to their mother. (Exhibits 1 and 2, Addenda 2, 3) The Defendant refused to return custody of the boys to their mother even though he repeatedly told Mrs. Adderley that "you better get your boys back." (T.17) Plaintiff then filed a Petition for Change of Custody. (R.63)

On May 18, 1987 the matter was before the Domestic Commissioner, Mr. Maetani, for a Pre-trial Settlement Hearing. (R.80) At the conclusion of the hearing the Domestic Commissioner entered his Recommendations. Defendant did not object to the Recommendations and therefore they were adopted by the court as its Order on July 29, 1987. ( R.97, Addendum 4) That Order provides that "The Decree has waived the need for a change of circumstances." The Order further provided that Plaintiff had to prove it was in the best interest of the boys to change custody. The Order also recommended that a custody evaluation be performed and that the parties share the costs of the evaluation. (R.98)

The Plaintiff did not have the financial ability to pay for a custody evaluation and the Defendant refused to cooperate or provide financial assistance for such an evaluation. (R.101, T.5-9, Addendum 5) The court therefore set the matter for trial

without requiring a custody evaluation. (R.104) At the conclusion of the trial the court interviewed the children (T.119) and then entered its Ruling granting Plaintiff's Petition and changing custody. (R.111, Addendum 6)

The evidence at trial and the facts found by the court showed that shortly after the parties' divorce the Defendant, with the two boys moved to Sandy and lived with the Defendant's parents. (T.90) The Defendant is an interstate truck driver and was gone for many weeks at a time. (T.114) The primary caretaker for the children therefore, was the Defendant's mother. (T.114) She also worked full time from 7:00 a.m. to 2:30 p.m. (T.116, 119)

The court found that the Plaintiff had remarried and had a home which was adequate in size and upkeep to accommodate the boys. (T.11, 32) The Plaintiff's work schedule and place of employment was such that she was always near the home and would be able to be with the boys every day. (T.13, 16) Plaintiff also had custody of her sister's son, Steven. Steven had been in Plaintiff's care for almost 10 years. He was about the same age as Kyle and Nathan and the boys desired to be together. (T.11-12)

Two social workers from the State of Utah, Division of Family Services also testified. (T.57, 65) George Gline testified that the Plaintiff's home was large enough to accommodate the boys, that she was a good parent and took very good care of the boys. (T.59-62) Ralph Draper stated that he ha

been to the Plaintiff's home on three occasions due to anonymous phone calls alleging neglect and abuse. (T.67-68) The reports were unsubstantiated. (T.75-79) He found nothing wrong with Vickey and her parenting abilities. (T.69-71)

The court received, as Exhibits 1 and 2, letters written by the two boys to their mother. The court, pursuant to stipulation of the parties interviewed both of the boys in his chambers. (T.10) The letters from the boys to their mother expressed their unhappiness and the problems associated with the Defendant having custody. Kyle wrote,

"Mom I really want to live whithe (sic) you Grandmom really mean and dady (sic) always goin (sic) and I miss school and sports and Steve and Rachel and Duane...."

Nathan wrote,

"I hate it out hear (sic) I want to live will you and only you....I want and want and want to live with you. I miss all my friends and all the sports I use to have...." (Addenda 2 and 3)

The court, after interviewing the boys found that the boys expressed a strong desire to live with their mother and their cousin Steven, that their friends were all in Roosevelt and they enjoyed school more in Roosevelt. (R.140)

#### SUMMARY OF ARGUMENT

1. The majority of Defendant's argument is a challenge to the findings of the trial court. Those findings are presumed valid and will not be overturned unless the Defendant shows a clear abuse of discretion or the evidence clearly preponderates against the findings of the court. Defendant tries to meet that

burden by relying on his and his mother's testimony while ignoring the evidence of two social workers, the children and Mrs. Adderley. When all the evidence is considered it fully supports the trial court's decision.

2. The parties, by stipulation, provided that the requirement that there be a change of circumstances, would be met if the two boys changed their preference of custodial party. The court in two Orders approved this stipulation and ruled that if the boys changed their preference of custodial parent then a change of custody would be considered if it was in the best interest of the boys. The evidence fully supported the finding that it was in the boys best interest to change their custody.

3. The factors set forth in Hutchinson vs. Hutchinson, 649 P.2d 38 (Utah 1982), which are used to determine custody, when applied to the facts fully support the trial court's decision. The preference of the children, keeping siblings together, personal care rather than surrogate care, and the happiness of the children all favored Mrs. Adderley. Other factors such as stability and financial status were about even as to the parties. Based on those factors it would have been an abuse of discretion if the court had not changed the custody of the boys.

4. The child support order is fully supported by the financial statements each party submitted to the court.

## ARGUMENT

POINT I. DEFENDANT IGNORES THE SUBSTANTIAL EVIDENCE THAT SUPPORTS THE FINDINGS ENTERED BY THE COURT AND IS ASKING THIS COURT TO IGNORE THAT EVIDENCE AND MAKE FINDINGS THAT WOULD SUPPORT WHAT DEFENDANT WISHES WERE THE FACTS OF THIS CASE.

The trial court is awarded considerable discretion and its actions are cloaked with the presumption of validity in a divorce matter. To overturn the trial court's findings the Defendant;

must show that the evidence clearly preponderates to the contrary, or that the trial court abused its discretion or misapplied the law, or that the trial court's award works such a manifest injustice as to show clearly an abuse of discretion.

Porco vs. Porco, 752 P.2d 365 (Utah 1988). The trial court's findings are presumed valid and should only be overturned if they are contrary to the clear preponderance of the evidence. Berger vs. Berger, 713 P.2d 695 (Utah 1985). Painter vs. Painter, 752 P.2d 970 (Utah 1988).

[T]he task of determining the best interests of the child in a custody dispute is for the trial judge, who has the opportunity to personally observe and evaluate the witnesses. If a trial judge exercises his discretion in accord with the standards set by this Court, the decision will not be overruled.

Alexander vs. Alexander, 737 P.2d 221 (Utah 1987). The trial court is in the best position to assess the factors on which the best interests of the child turn. Therefore, the trial court is awarded particularly broad discretion in the area of child custody. Hirch vs. Hirch, 725 P.2d 1320, 1321 (Utah 1986).

Defendant agrees that the above standards of review are correct. Defendant then ignores the standards of review and

attempts to challenge the findings of the trial court by citing almost exclusively his and his mother's testimony while ignoring the testimony of Mrs. Adderley, the social workers from the Division of Family Services and the children. Their testimony fully supports the findings and decision of the trial court.

In addition to ignoring the testimony that supports the court's decision Defendant also mischaracterizes the testimony. A few examples are as follows; on page 38 of his Brief Defendant asserts that the Plaintiff's husband has a history of court ordered alcohol treatment and tries to imply that the Plaintiff's husband has an alcohol problem. The evidence, however, showed that the Defendant, as well as the Plaintiff's husband, drink beer but that neither have an alcohol problem and the use of alcohol has not had and will not have any adverse impact on the children. (T.37-38, 55, 61, 117) At page 41 of the Brief Defendant claims that the parties son Kyle was allowed to play with a knife and cut himself. The evidence showed that Kyle was using a knife without his mother's knowledge to punch a hole in a belt. As soon as his mother saw that he was using the knife she immediately went to get the knife, but before she could the knife slipped and cut him. The evidence showed no negligence or poor parenting by the Plaintiff. (T.154)

Defendant alleges that Vickey Bake arrived an hour early in May of 1987 when she picked up the children and that caused a problem. (Brief p.41) He failed to point out that the Defendant,

through his counsel, had changed the time period and that due to miscommunication that change in time period had not been communicated to the Plaintiff. (T.147) Defendant further asserts that the children are thriving, happy, enjoying school, enjoying their friends, etc., in Sandy. (Brief at page 34) A review of Exhibits 1 and 2 shows that the children were not happy but desired to be back with their friends in Roosevelt and going to school in Roosevelt. Defendant also argues that the court was wrong in not continuing the trial until a home study was prepared. Defendant failed to point out that he refused to participate financially in a study, that he had substantial time to obtain a study and that Mrs. Adderley did not have the funds for such a study. (T.3-10, Addendum 5) Finally, the Defendant makes many assertions that the court is biased, in favor of women and that the court's decision was solely made on the basis that the mother should have her children. (Brief at page 23) There is no factual support for such a serious allegation against the court.

Defendant also uses a substantial part of his Brief arguing that the court's Findings of Fact are not supported by the evidence. Defendant then cites almost exclusively from his own testimony and that of his mother while ignoring the testimony of other parties. A review of the entire transcript including the letters from the children fully supports the court's findings. Findings of Fact 3 and 4 are supported by the evidence found at

pages 10 through 13, 57 through 60 and 89 and 90 of the transcript. Findings of Fact nos. 5 and 6 are supported by testimony found at pages 10 through 16, 59 through 61, 70 through 72, 81 and 114 through 116 of the transcript.

Finding of Fact no. 8 is supported by Exhibits 1 and 2 and the court's interview of the two boys in chambers. Defendant now challenges that procedure but fails to inform the court that it was at the request of both parties that the children were interviewed by the court without the parties or counsel being present. (T.10) Finding of Fact no. 10 is fully supported by the evidence at page 17 of the transcript. Finally, Defendant challenges Finding of Fact no. 9 where the court found there were significant discrepancies in the evidence presented by the Defendant and his mother. In making that challenge Defendant fails to point out the significant discrepancies between the Defendant and his mother regarding the visitations by the Plaintiff. He fails to point out the abnormal activity of a grandmother listening in on the conversations between the Plaintiff and the children and keeping a log of those conversations and the other contacts the Plaintiff had with the children. Finally, he fails to point out that the court had an opportunity to review the demeanor of both the Defendant and his mother and the rather hostile manner in which they testified.

When one considers all of the evidence and testimony in this case, including the testimony of the social workers, the children

and the Plaintiff it is clear that the trial court's findings are fully supported. Defendant has the burden to show that there is error and that the evidence clearly preponderates against the findings of the trial court. He cannot meet that burden by discarding all of the evidence in favor of the court's decision and relying solely on his own testimony.

POINT II. THE PARTIES AGREED THAT THE ONLY CIRCUMSTANCES NECESSARY TO SHOW A CHANGE OF CIRCUMSTANCES WOULD BE A CHANGE OF PREFERENCE BY THE CHILDREN. THAT STIPULATION WAS APPROVED BY THE TRIAL COURT IN 1985 AND PROPERLY APPLIED AT THE CUSTODY HEARING IN 1988.

Prior to the time the parties obtained their divorce decree there were negotiations and discussions between the parties and their children regarding who would have custody. The Defendant made certain promises to his two boys, including that they would be able to stay in Roosevelt, go to school in Roosevelt and be with their friends and be with their mother. Based on those promises the two boys told their mother that they wanted to reside with the Defendant. Mrs. Adderley, therefore, agreed that she would not challenge custody of the children but would comply with the request of the children upon the condition that custody of the boys would be returned to her if the boys changed their preference of which parent would have custody. Both of the parties were represented by legal counsel. A written stipulation was prepared which incorporated the agreement of the parties and provided that custody of the children would be returned to Mrs. Adderley if the boys changed their preference of custodial parent. That stipulation was presented to the court. The court approved that stipulation and entered it as the court's order. (R.34, 43, Addendum 1)

The Defendant failed to live up to his promises to the children and Mrs. Adderley. Also it became apparent that the Defendant was having his mother raise the children. The children

therefore expressed a desire, both verbally and in writing, to both parties to return to live with their mother. Defendant was unwilling to voluntarily return the boys to Mrs. Adderley so she filed a Petition for a change of custody. A pre-trial settlement conference was held before the Domestic Commissioner. The Domestic Commissioner reviewed the terms of the decree and was of the opinion that the parties, by stipulation and the court by court order, had waived the requirement of showing a change of circumstances. The Domestic Commissioner was of the opinion that Mrs. Adderley had the burden to show that it was in the best interest of the children to change their custody. The Domestic Commissioner made those recommendations to the trial court. (R.97) The Defendant had 10 days to raise any objections to those recommendations. He made no objections and therefore, the recommendations were entered as an order by the court. (Addendum 6) In this case there has been a written stipulation and two court orders that waive the need of Mrs. Adderley to prove a change of circumstances other than a change of preference by the boys. Mrs. Adderley still had and sustained her burden of proving to the trial court that it was in the best interest of the children to change their custody.

The law in the State of Utah generally requires that the moving party overcome a two-step hurdle in seeking to change custody. Those two steps are showing a change in circumstances and that it is in the best interest of the children to make the

change. The most critical step and the one of paramount importance is proving that it is in the best interest of the children to change custody. When there is a waiver or limitation on the need to show a change of circumstances the court still looks to the best interest and welfare of the children. Anderson vs. Anderson, 481 P.2d 881 (Az. 1971). In this particular case the trial court required Vickey to produce evidence and the trial court found the facts showing a change of preference by the boys and that it was in the best interest of the boys to change custody.

Defendant has cited no authority to the court that shows that the court and the parties could not waive or limit the need to show a change in circumstances. It is undisputed that stipulations between the parties are binding between the parties and are generally followed by the court unless there is some injustice that would be caused. Klein vs. Klein, 544 P.2d 472 (Utah 1975). Stipulations should only be overturned by the court with great reluctance and for compelling reasons. Lamb vs. Lamb, 605 P.2d 1248 (Utah 1980), Kinsman vs. Kinsman, 748 P.2d 210 (Utah 1988).

If this court were to find that the parties and the trial court could not restrict or waive the obligation of showing a change of circumstances, the undisputed evidence in this case shows that there was a substantial change of circumstances. The finding of custody was based on the stipulation of the parties,

the preference of the children and promises made by the Defendant to both the children and Mrs. Adderley. Exhibits 1 and 2 and the findings of the trial court with regards to the preference of the children, shows that there has been a substantial change in circumstances and that the childrens' preference has completely changed.

POINT III. THE FACTS CLEARLY ESTABLISHED THAT IT WAS IN THE BEST INTEREST OF THE CHILDREN THAT THEIR CUSTODY BE GIVEN TO THEIR MOTHER.

The trial court found that it was in the best interest of the minor children that their custody be changed to their mother. The court entered its Findings of Fact citing several factors to support this conclusion. The Defendant, in his Brief, challenges these factual findings by the court. As pointed out in Point I Defendant's arguments totally ignore the facts presented at trial that support the decision of the court.

The question of what is in the best interest and welfare of the children is the paramount consideration to be made in custody cases. The task of determining the best interest of a child is generally for the trial judge who has the best opportunity to observe and evaluate witnesses. The exercise of the discretion by the trial judge in making a custody finding is generally not overturned by the reviewing court. Alexander vs. Alexander, 737 P.2d 221 (Utah 1987).

This court has reiterated several factors the court may consider in determining the childrens' best interest. In Hutchinson vs. Hutchinson, 649 P.2d 38 (Utah 1982) the court set forth a list of factors the court may use. A comparison of those factors to this case clearly support a finding that the best interests of the boys was to put their custody with their mother. Those factors and the findings in this case are as follows:

- a. The preference of the child. In this case Exhibits 1

and 2 make it very clear that the childrens' preference was to be with their mother. See Finding of Fact No. 8 (Addendum 7)

b. Keeping siblings together. In this particular case the two children had a cousin, Steven, with whom they had lived with most of their lives. Steven was in the custody of Vickey and the children wanted to be back together. See Finding of Fact No. 8.

c. Child's bond with one or both of the perspective custodians. There was little evidence on this issue. What evidence there was showed that the children were being primarily raised by their grandmother, that they were unhappy and wanted to be back with their mother. Findings of Fact No. 6, 7 and 8.

d. Custody arrangement where the children are happy and well adjusted. The facts of this case, particularly Exhibits 1 and 2, showed that the children were very unhappy in their present situation. Finding of Fact No. 8.

e. Moral character and emotional stability of the parents. The evidence in this case was about even. The facts did show that Vickey had remarried and had a stable home while the Defendant was still residing with his parents. Findings of Fact No. 3 and 4.

f. Duration and depth of desire for custody. The evidence showed that both parties desired custody of their children. Finding of Fact No. 7.

g. Ability to provide personal rather than surrogate care. In this case the facts supported Vickey. The facts showed that

she would be home all day with the children, and that her work was next to the home so that she could be in constant contact with them. The Defendant was never home. He is an interstate trucker and as a result the children were being raised by their grandmother. Findings of Fact Nos. 5 and 6.

h. Impairment of ability to function as a parent through drinking or drug abuse. Defendant, in his Brief, tries to insinuate that Vickey's husband has an alcohol problem. The facts at trial did not show that. The facts showed that both Vickey's husband and the Defendant were beer drinkers but that neither had an effect on their parenting abilities. Finding of Fact No. 7.

i. Reasons for relinquishing custody in the past. The facts clearly showed that the relinquishment of custody was based on promises from the Defendant to the Plaintiff and the children and on the preference of the children, that those promises had not been complied with and the preference had changed. Finding of Fact No. 8.

j. Religious compatibility. There are no facts as to the religious position of the parties.

k. Financial condition. The facts on this point showed that both parties were employed and had somewhat near the same income. Exhibits 3 and 4, Finding of Fact No. 11.

In some areas the parties are about equal on factors the court considered. However, in several critical areas it was

readily apparent that it would be in the best interest of the children that their custody be with their mother. It was undisputed that the children were unhappy in their present situation, that the Defendant was never home because of his interstate truck driving and that the boys, who were ages 11 and 13, wanted to return and be with their mother. It is also undisputed that the children were being raised by their grandmother and not by either parent. The law of this State provides a presumption that it is in the best interest of the children to be raised by their parents rather than a grandparent. Kishpaugh vs. Kishpaugh, 745 P.2d 1248 (Utah 1987), Hutchinson vs. Hutchinson, 649 P.2d 38 (Utah 1982).

The trial court made specific findings upon several essential factors. The court found that Mrs. Adderley would be with the boys virtually every day, that the Defendant was generally away from home a majority of time, the children had a strong desire and wanted to live with their mother and with their cousin, Steven, and that Mrs. Adderley had the desire and the ability to care for the children and she had a home adequate to provide for them. Those findings fully support the court's conclusion that it was in the best interest of the two boys to have their custody changed to their mother.

POINT IV. THE DEFENDANT SHOULD NOT BE ALLOWED TO CHALLENGE THE COURT'S CHILD SUPPORT ORDER CLAIMING THE COURT FAILED TO MAKE CERTAIN FINDINGS WHEN THE DEFENDANT FAILED TO PRODUCE ANY EVIDENCE UPON WHICH THE COURT COULD MAKE THOSE FINDINGS.

The Defendant challenges the court's child support order arguing that the court failed to make findings on all the factors set forth in Utah Code Ann. §78-45-7. The evidence submitted to the court on the issue of support was a financial declaration from each of the parties. (Exhibits 3 and 4) The financial statements provided by the parties support the court's findings that the Plaintiff earns \$1,217.00 per month and has an obligation to support her nephew Steven on that amount. Defendant's financial statement supported the court's findings that he made \$1,109.24 a month, had no other parties to support and no obligations for house payments, etc., since he lived with his parents. The income of the Defendant, in light of his lack of other obligations, fully support the finding that he pay \$150.00 per month per child as support.

Defendant finally claims in his Brief that the \$150.00 per month assessment is higher than the uniform child support schedule used by the Office of Recovery Services. However, in this case Defendant has no house payments or other obligations since he lives with his parents. Furthermore, it should be noted that the schedule is not binding on the court, but is only used by the court in an advisory capacity.

CONCLUSION

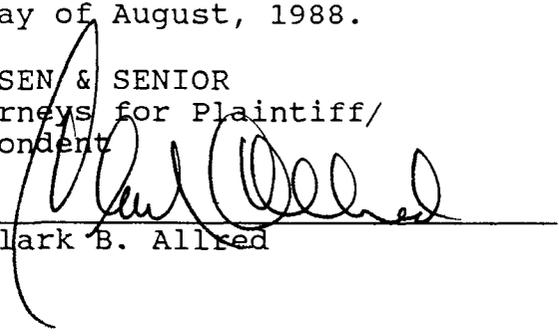
The main thrust of Defendant's appeal is to challenge the facts found by the court. In making that challenge Defendant ignores the evidence that supports the trial court, including the evidence of the Plaintiff, the minor children and the Department of Social Services. Instead Defendant relies mainly on his own testimony and that of his mother. The court, which had an opportunity to hear the evidence and review the demeanor of the parties on the stand, found that the Defendant and his mother's testimony was suspect.

The findings by the court show that it was in the best interest of the children to make a change of custody. In light of the facts of this case it would probably have been an abuse of discretion for the court not to have changed custody.

THEREFORE, it is respectfully requested that the court's decision be affirmed.

Respectfully submitted this 30 day of August, 1988.

NIELSEN & SENIOR  
Attorneys for Plaintiff/  
Respondent

By:   
Clark B. Allred

## ADDENDUM

ADDENDUM NO. 1

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
STATE OF UTAH

---

VICKEY L. BAKE,	)	
	)	DIVORCE DECREE
Plaintiff,	)	
	)	
vs.	)	
	)	
NEAL F. BAKE,	)	
	)	Civil No. 85 CV 137D
Defendant.	)	

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Pursuant to the Findings of Fact and Conclusions of Law made in this matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is awarded a decree of divorce dissolving the bonds of matrimony now existing between the parties, the same to become final on signing and entry.

2. Defendant is awarded the care, custody, and control of the minor children subject to the right of Plaintiff to visit the children at reasonable times and places including having the boys on weekends, the summer vacation and every other holiday. The alternating holidays shall be Christmas, Thanksgiving, New Year's, July 4th, July 24th, Labor Day and Memorial Day. When the boys are with the Plaintiff in the summer, the Defendant

shall have visitation rights on every weekend. All important decisions regarding the boys, such as medical and schooling, shall be discussed between the parties. Since the award of custody is based on the desire of the children in the event the boys change their mind and express a desire to return to live with their mother custody will be changed awarding custody to the Plaintiff without a need to show a change of circumstances. In the event custody is changed to the Plaintiff, then Defendant will be entitled to the visitation rights outlined herein for the Plaintiff.

3. Defendant is hereby ordered and obligated to pay all of the debts and obligations incurred by the parties or either of them prior to the filing of this action and the Defendant shall provide medical and dental insurance for the children.

4. Plaintiff is awarded the mobile home and premises located at Roosevelt, Utah subject to any liens thereon, the six and one-third acres located in Neola, Utah, subject to any liens thereon, the 1979 Ford pickup truck, the 1970 Javelin automobile, and her personal property.

5. Defendant is awarded all his personal property presently in his possession, including the items on a list agreed to by the parties.

6. Defendant is ordered to reimburse Plaintiff the sum of

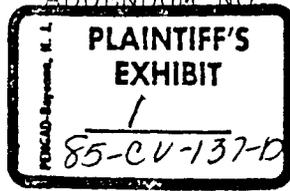
\$250.00 for part of the legal fees and costs she has incurred herein.

DATED this 19 day of <sup>Aug</sup> July, 1985.

Judy Sause  
District Judge  
~~Richard C. Davidson~~

APPROVED AS TO FORM:  
#

---



Dear Mom

Mom how are you?  
 I hope you are doing all.  
 Mom I really ~~to~~ want to live with you  
 Grandmom really I mean and  
 Daddy always ~~was~~ goin and  
 I miss school and sports  
 and sleep and peddle ~~to~~ ~~to~~ ~~to~~ home  
 and I hope I see you  
 soon and really really really  
 want to live ~~for~~ with you

Love

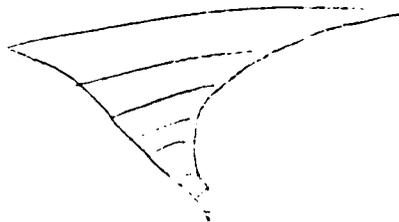
KYLE

PLAINTIFF'S  
EXHIBIT  
2  
85-CV-137-P  
FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE

case, Mason

How are you? I am fine  
I hate it out here. I want to  
live with you and only you. Well  
how is your? I want and want  
and want to live with you.  
I miss all my friends and all  
the sports I like to have. I like  
you the fine and I want and  
love and love but not love  
the court matter Rachel.

Love  
and  
Miss  
all of you  
Mason



ADDENDUM NO. 4

CLARK B. ALLRED - 0055  
GAYLE F. McKEACHNIE - 2200  
NIELSEN & SENIOR  
Attorneys for Plaintiff  
363 East Main Street  
Vernal, Utah 84078  
Telephone: (801) 789-4908

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

---

VICKEY L. BAKE now known as	)	
VICKEY L. ADDERLEY,	)	RECOMMENDATIONS AND
	)	ORDER
Plaintiff,	)	
	)	
vs.	)	
	)	
NEAL F. BAKE,	)	
	)	
Defendant.	)	Civil No. 85-CV-137D

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The above captioned matter came before the Domestic Commissioner on May 18, 1987, pursuant to the Petitions filed by both parties. Plaintiff was present and represented by her attorney, Clark B. Allred. Defendant was present and represented by his attorney, Suzanne Marelius. The Court having reviewed the Petitions, the financial statements filed by the parties and having discussed the matter with the parties makes the following recommendations.

1. Defendant's Petition regarding Steven Springer should be dismissed without prejudice. The question of custody of Steven Springer should either be handled through the Juvenile Court or in the alternative a Petition for Guardianship should be

filed in the Probate Division of District Court. Because of the uncertain status of the Juvenile Court proceeding involving Steven Springer, the Commissioner recommends that presently physical custody remain with the Plaintiff and Defendant have reasonable visitation rights with Steven which should include every other weekend, one day during the week when Defendant does not have weekend visitation and six weeks in the summer, being either a continuous six weeks or two three week periods depending on Steven's schedule.

2. Unless Defendant can provide proof that Plaintiff has the tools requested in his Counter-Petition or can show that Plaintiff has had possession of said tools and disposed of the same his Counter-Petition should be dismissed.

3. The Plaintiff's Petition requesting a change of custody of the two minor children, Nathan and Kyle, requires a determination by the Court as to what is the best interest of the children. The Decree has waived the need for a change of circumstances. In order for the Court to determine what is in the best interest of the children it is recommended that a custody evaluation be performed and the Commissioner further recommends that only one evaluator be retained by both parties and that both parties share the costs.

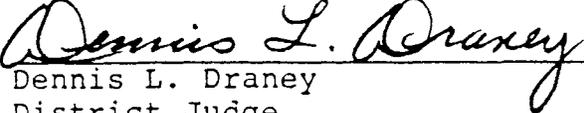
Defendant has 10 days in which to make specific objections to the Recommendations and Order.

DATED this *13* day of July, 1987.

  
Howard Maerani  
Domestic Commissioner

The above recommendations are hereby adopted by the Court and incorporated as the Court's Recommendations and Order.

DATED this *29th* day of July, 1987.

  
Dennis L. Draney  
District Judge

ADDENDUM NO. 5  
LITTLEFIELD & PETERSON  
ATTORNEYS AT LAW  
426 SOUTH FIFTH EAST  
SALT LAKE CITY, UTAH 84102  
(801) 531-0435

DAVID E. LITTLEFIELD  
CRAIG M. PETERSON  
E. PAUL WOOD  
ANN L. WASSERMANN  
SUZANNE MARELIUS  
THOMAS A. MITCHELL  
SUZANNE M. DALLIMORE

OF COUNSEL:  
DAVID A. RITCHEY

August 4, 1987

Mr. Clark B. Allred  
Attorney at Law  
Nielsen & Senior  
Vernal Office  
363 East Main  
Vernal, Utah 84078

Re: Adderley v. Bake

Dear Mr. Allred:

I apologize for the delay in returning the enclosed signed Recommendation and Order to you. I have signed my approval as to form and am enclosing that for you to file with the Court.

It is my understanding that the Court ordered a custody evaluation only as it pertains to the parties natural children, Nathan and Kyle. This issue was raised by your client and was not at issue in our pleadings, rather, we were only concerned with the custody and visitation of Steven Springer. On this basis, my client is not willing to contribute to the costs of a custody evaluation of those children. It does not appear that either of our clients are financially able to afford a private evaluator. Certainly, your client has a right to pursue the change of custody which was raised in your Counter-Petition and we will cooperate with any evaluation which may follow. However, in light of your clients infrequent contacts with the children Nathan and Kyle and the fact of her currently receiving public assistance I do not believe she is in a position to take on the responsibility for two additional children nor, do I believe that a Court would order such a change under these circumstances.

For your information, based on the Court's ruling that they did not have jurisdiction to alter the status of Steven Springer, Jr., I do not intend to proceed with the pending Seventh District Court Modification Petition except as may be needed to respond to your Counter-Petition. The goal of the Petition was to adjudicate the status of Steven Springer, Jr. and since the Court has refused to do so we will not proceed further with that course. Rather, as the Court recommended we are contemplating filing a Petition in either Juvenile Court or District

Mr. Clark B. Allred  
Page Two  
August 4, 1987

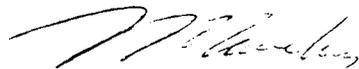
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Court on the issue of guardianship since it does not appear that any current guardianship order regarding Steven is in force. I will be in touch with you on that matter once we make a determination as to the next course of action.

I would be glad to discuss any of these matters and have appreciated your cooperation thus far.

Sincerely,

LITTLEFIELD & PETERSON



Suzanne Marelius

SM/emw

Enclosure

cc: Mr. Neal Baker

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
STATE OF UTAH

---

VICKEY L. BAKE,	)	
	)	
Plaintiff,	)	R U L I N G
	)	
vs.	)	
	)	
NEAL F. BAKE,	)	
	)	
Defendant.	)	Civil No. 85-CV-137D

---

This matter came on for hearing on January 19, 1988 and was re-convened on January 21, 1988. Plaintiff was present and represented by Clark B. Allred, and Defendant was present and represented by Suzanne Marelius. Each of the parties and other witnesses were called, and testified regarding the fitness of the parties for custody, and the adequacy of the homes occupied by the parties. Upon stipulation of the parties and counsel, the court interviewed each of the boys separately, in private, in chambers. Based upon the testimony given, the evidence received, and the statements of the children, the court finds:

1. The Plaintiff lives in a double-wide mobile home with her husband, his daughter Rachel, age 5 and Plaintiff's nephew Steven, age 14. The home is located in the business district of Roosevelt, Utah, on the same lot, somewhat removed from a building containing a cafe and a lounge. The home is adequate in size and upkeep for its present occupants and for the boys which are the subject of this action.

2. The Defendant lives in Sandy, Utah with his parents in a residential area of the city. The home is adequate in size and upkeep for its present occupants including the boys.

3. Plaintiff is employed as a waitress at the lounge near her home, and works from 8:00 P.M. to 1:00 A.M. While she is working, Steven cares for Rachel, and there was no evidence that the arrangement has not worked satisfactorily. Plaintiff would be with the boys virtually every day.

4. Defendant works as a long-haul truck driver, and is away from home the majority of the time. While he is away, his mother cares for the boys.

5. Both of the parties have a deep concern for the boys, and have the ability to care for their needs.

6. The boys have expressed a strong desire to live with the Plaintiff, stating that they want to be with her and with their cousin Steven, and they enjoy school more in Roosevelt, and that their friends are in Roosevelt.

7. A very favorable picture of Defendant's home and care for the boys is presented by the testimony of the Defendant and his mother. However, the validity of their testimony is adversely affected by significant discrepancies in the evidence presented by them.

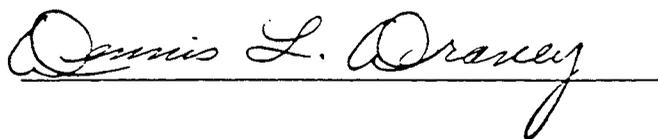
8. It was the uncontroverted testimony of the Plaintiff that the Defendant recently said to her "You'd better get your boys back."

9. Plaintiff earns \$1,217.00 per month, and supports her nephew, Steven. Defendant earns \$1,109.24 per month.

Based on the foregoing findings, the court concludes that the best interests of the boys are served by awarding their custody to the Plaintiff, subject to the reasonable visitation rights of the Defendant. Therefore, Plaintiff's petition is granted, and the Decree of Divorce is modified to award the care, custody and control of Nathan Bake and Kyle Bake to the Plaintiff, now Vickey L. Adderly. Defendant is awarded visitation rights as previously awarded to Plaintiff. Defendant is ordered to pay child support to the Plaintiff in the sum of \$115.00 per month per child, and is ordered to maintain health and accident insurance on the children. Each party is to pay one-half ( $\frac{1}{2}$ ) the cost of medical expenses not covered by insurance. If Defendant does not maintain such insurance, he shall be responsible for all medical expense which would have been covered by insurance. The parties are ordered not to do or say anything which will alienate the children from the other parent, or from other close family members.

DATED this 26th day of January, 1988.

BY THE COURT:

  
\_\_\_\_\_

cc: Clark B. Allred  
Suzanne Marelius

ADDENDUM NO. 7

CLARK B. ALLRED - 0055  
GAYLE F. McKEACHNIE - 2200  
NIELSEN & SENIOR  
Attorneys for Plaintiff  
363 East Main Street  
Vernal, Utah 84078  
Telephone: (801) 789-4908

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

<hr/>		
VICKEY L. BAKE now known	)	
as VICKEY L. ADDERLEY,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,	)	
	)	
vs.	)	
	)	
NEAL F. BAKE,	)	
	)	
Defendant.	)	Civil No. 85-CV-137D
<hr/>		

The above captioned matter came before the Court for trial on January 19, 1988. The trial was reconvened on January 21, 1988. Plaintiff was present and represented by her attorney, Clark B. Allred. Defendant was present and represented by Suzanne Marelius. The matter was before the Court, pursuant to Plaintiff's Petition to Change Custody of the parties two minor children. Each of the parties and other witnesses were called and testified regarding the issues before the Court. The parties and their counsel stipulated that the Court should interview each of the two boys separately, in private, in chambers. Based upon the testimony and other evidence received and upon the statements of the boys, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The parties were divorced on August 19, 1985.
2. The parties are the parents of two children, Nathan Frank Bake born October 10, 1974 and Kyle Kirk Bake born December 17, 1976.
3. The Plaintiff lives in a double-wide mobile home with her husband, his daughter Rachel, age 5 and Plaintiff's nephew Steven, age 14. The home is located in the business district of Roosevelt, Utah, on the same lot, somewhat removed from a building containing a cafe and a lounge. The home is adequate in size and upkeep for its present occupants and for the boys which are the subject of this action.
4. The Defendant lives in Sandy, Utah with his parents in a residential area of the city. The home is adequate in size and upkeep for its present occupants including the boys.
5. Plaintiff is employed as a waitress at the lounge near her home, and works from 8:00 p.m. to 1:00 a.m. While she is working, Steven cares for Rachel, and there was no evidence that the arrangement has not worked satisfactorily. Plaintiff would be with the boys virtually every day.
6. Defendant works as a long-haul truck driver, and is away from home the majority of the time. While he is away, his mother cares for the boys.
7. Both of the parties have a deep concern for the boys,

and have the ability to care for their needs.

8. The boys have expressed a strong desire to live with the Plaintiff, stating that they want to be with her and with their cousin Steven, and they enjoy school more in Roosevelt, and that their friends are in Roosevelt.

9. A very favorable picture of Defendant's home and care for the boys is presented by the testimony of the Defendant and his mother. However, the validity of their testimony is adversely affected by significant discrepancies in the evidence presented by them.

10. It was the uncontroverted testimony of the Plaintiff that the Defendant recently said to her "You'd better get your boys back."

11. Plaintiff earns \$1,217.00 per month, and supports her nephew, Steven. Defendant earns \$1,109.24 per month.

Based on the foregoing Findings of Fact, the Court enters the following Conclusions of Law.

#### CONCLUSIONS OF LAW

1. The parties two boys have expressed a desire to return to live in the custody of their mother.

2. It is in the best interest of the parties two boys that their custody be changed to the Plaintiff, subject to the Defendant having reasonable visitation rights.

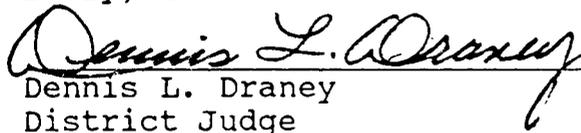
3. Plaintiff's Petition should be granted and the Decree

of Divorce modified to award the care, custody and control of the two minor boys to the Plaintiff.

4. Defendant should be awarded to pay child support to Plaintiff the sum of \$115.00 per month per child.

5. Defendant has health and accident insurance available on the children and he should be ordered to maintain that insurance on the children. The parties should split the costs of any expenses not covered by insurance and if Defendant fails to provide insurance he should be responsible for those medical expenses.

DATED this *18th* day of February, 1988.

  
Dennis L. Draney  
District Judge

CLARK B. ALLRED - 0055  
GAYLE F. McKEACHNIE - 2200  
NIELSEN & SENIOR  
Attorneys for Plaintiff  
363 East Main Street  
Vernal, Utah 84078  
Telephone: (801) 789-4908

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

---

VICKEY L. BAKE now known	)	
as VICKEY L. ADDERLEY,	)	ORDER AND DECREE MODIFYING
	)	DIVORCE DECREE
Plaintiff,	)	
	)	
vs.	)	
	)	
NEAL F. BAKE,	)	
	)	
Defendant.	)	Civil No. 85-CV-137D

---

The above captioned matter having come before the Court for trial on January 19, 1988, and the Court having entered its Findings of Fact and Conclusions of Law and being fully advised, hereby;

ORDERS, ADJUDGES AND DECREES that:

1. The parties Divorce Decree is hereby modified and the care, custody and control of the parties two minor boys, Nathan Bake and Kyle Bake is hereby awarded to the Plaintiff, Vickey L. Adderly.

2. Defendant, Neal Bake, is hereby awarded visitation rights with the children. The visitation rights are to be the same as the visitation rights that were originally awarded to the Plaintiff pursuant to the terms of the parties Divorce Decree.

3. Defendant is hereby ordered to pay to Plaintiff the sum of \$115.00 per month per child as child support beginning February, 1988.

4. Defendant is hereby ordered to maintain health and accident insurance on the children. Each party is to pay one-half of any medical expense not covered by insurance. If Defendant fails to maintain health and accident insurance on the children then he will be responsible for all medical expenses which would have been covered by that insurance.

5. Pursuant to Utah Code Ann. Section 78-45d-2 Defendant is authorized to institute the income withholding provisions of Section 78-453-1 et. seq. Whenever child support is delinquent as defined by Utah Code Ann. Section 78-45d-1(4) appropriate income withholding procedures shall apply to all existing and further payors. This provision shall remain in effect until the Defendant no longer owes child support.

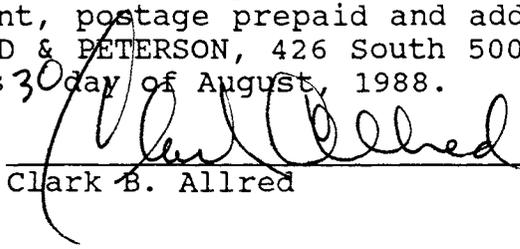
6. It is further ordered that neither party shall do or say anything which will alienate the children from the other party or from other close family members.

DATED this <sup>18th</sup> day of February, 1988.

  
Dennis L. Draney  
District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing Brief of the Plaintiff/Respondent, postage prepaid and addressed to Suzanne Marelius, LITTLEFIELD & PETERSON, 426 South 500 East, Salt Lake City, Utah 84102, this 30 day of August, 1988.

  
Clark B. Allred