1988

Bake v. Bake : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

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VICKEY L. BAKE aka VICKEY L. ADDERLEY, Plaintiff/Respondent, v. NEAL F. BAKE, Defendant/Appellant.	APPELLANT'S BRIEF #7 Appeals No. 880185-CA Civil No. 85-CV-137D

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On Appeal from the Seventh Judicial District Court in and for Duchesne County, State of Utah.

Honorable Judge Dennis L. Draney, District Court Judge

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JURISDICTION OF COURT OF APPEALS AND NATURE OF PROCEEDINGS

This is an Appeal of a final order from the Seventh Judicial District Court in and for Duchesne County, State of Utah, modifying the Decree of Divorce previously entered in this action. This Court has jurisdiction over this appeal pursuant to §78-2(a)-3(g), Utah Code Annotated (1953, as amended).

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STATEMENT OF ISSUES PRESENTED ON APPEAL

As a result of a trial held January 19, and 21, 1988, before the Honorable Dennis L. Draney, Seventh District Court Judge, Neal F. Bake, Appellant, has requested this Court to review the following issues:

1. The trial court failed to make any threshold determination of substantial change in circumstances since entry of the Decree of Divorce on the issue of custody, before modifying that decree which is a misapplication of the law.

2. The order modifying the parties' Decree of Divorce which changed custody of the parties' two minor children from

Neal F. Bake to Vickey L. Bake, was an abuse of discretion by the trial judge.

3. The evidence offered at trial regarding custody does not support the trial court's Findings of Fact, Conclusions of Law, and Order that it is in the best interests of the children that custody be changed from Neal Bake to Vickey Bake.

4. The trial judge failed to properly apply the law to the facts in determining the best interests of the children in modifying the custody award herein.

5. The trial court improperly limited the presentation of Defendant's case by proceeding to trial without allowing the custody evaluation which had been ordered to be performed; by interviewing the children in chambers without making a record of that interview and making findings thereon; and by prohibiting any testimony at trial concerning Vickey Bake's caretaking of the parties' nephew Steven Springer.

6. The trial court failed to make sufficient findings on which to base its Order modifying custody from Neal Bake to Vickey Bake.

7. The trial court's award of child support to Vickey Bake was an abuse of discretion on the facts as presented.

STATUTES REQUIRING INTERPRETATION

The following statutes require interpretation:

1. Section 30-35-5, Utah Code Annotated (1984, as amended), copy attached.

2. Section 30-3-10, Utah Code Annotated (1984, amended), copy attached.

3. Section 78-45-7, Utah Code Annotated (1984, as amended), copy attached.

STATEMENT ON THE NATURE OF THE CASE

The parties herein were divorced by order of the Seventh Judicial District Court for Duchesne County, State of Utah, on August 19, 1985, by order of the Honorable Richard C. Davidson. The Decree of Divorce awarded the Appellant Neal F. Bake custody of the parties' two minor children, Kyle Bake and Nathan Bake, who were ages 10 and 8 at the time of the divorce. (Decree of Divorce, Findings of Fact, Conclusions of Law, and the Stipulation are attached hereto as Exhibit A).

The Decree of Divorce did not address the custody of the parties' foster child and nephew, Steven Springer, age 12 at the time of the divorce, who resided with Vickey Bake after the divorce. Because the Respondent denied Neal Bake access and visitation with his nephew Steven, and took the child out-of-state for an extended period without informing him, he filed a Verified Petition for Modification of the Divorce Decree in January 1987, seeking custody of Steven Springer. (Record, 58-62, hereafter "R.58-62"). The Respondent filed a Counterpetition for Modification of the Decree of Divorce requesting custody of the parties' two minor children.

On May 18, 1987, a hearing was held before Domestic Relations Commission Howard Maetani on the petition of Neal F.

Bake for custody of Steven Springer. The Commissioner acknowledged that joint guardianship of the boy had been previously granted by the Juvenile Court, and granted visitation to Appellant Neal Bake and ordered that Vickey Bake would continue to have physical custody of the child. The Court further ordered the parties to have a home study done by an independant child custody evaluator to determine what would be in the best interests of the parties' two natural children as regards a change of custody. (Ex. B hereto, Recommendation and Order 5-18-87.)

On November 5, 1987, attorney for Respondent requested a hearing on the Counterpetition for Modification concerning the parties' two natural children. No custody evaluation had been performed. Counsel for Neal Bake filed an objection to Plaintiff's request for hearing on or about January 13, 1988, which was denied by the Court. (R.115-118) A trial was held January 19, and 21, 1988, on the Counterpetition for Modification of the Decree of Divorce concerning custody of the parties' two natural children.

On January 26, 1988, Judge Dennis L. Draney issued a ruling changing custody of the two minor children from Neal Bake to Respondent. (Ruling attached hereto as Exhibit C.) Findings of Fact, Conclusions of Law and an Order modifying the Decree of Divorce were signed by the Court on February 18, 1988. (Findings of Fact, Conclusions of Law, and Order of Modification are attached hereto as Exhibit D.)

On February 8, 1988, Defendant filed a Motion to have the Court Reopen Judgment and Direct Entry of a New Judgment and for a Stay of Proceedings to enforce judgment. (R. 126-129, copy attached as Exhibit E.) This Motion was denied without hearing by Judge Draney on February 26, 1988. (R. 147).

The minor children Nathan and Kyle Bake were in the care and custody of Neal Bake from early summer of 1985 until the Court ordered a change of custody at the end of February, 1988. At the time of the modification trial the children were ages 11 and 13.

Judge Dennis L. Draney ordered a custody modification based on the following Findings of Fact:

3. The Plaintiff lives in a doublewide 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 it's 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 that 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 discrepancy in the evidence presented by them.

10. It was the uncontroverted testimony of the Plaintiff that the Defendant recently said to her "You better get your boys back." (R. pp. 148-150).

On the issue of child support the Court found that Vickey Bake earned $1,217.00 per month, and supported her nephew Steven. The Court found that Neal Bake earned $1,109.24 per month. (R. p. 148-150). On these facts the Court ordered Mr. Bake to pay child support in the sum of $115.00 per month, per child.

STATEMENT OF FACTS

A. Overview.

After thirteen years of marriage the parties to this action were divorced on August 19, 1985. The Appellant Neal F. Bake was awarded custody of the parties' two minor children, Kyle Kirk Bake (born, 12-17-86) and Nathan Frank Bake (born 10-10-74). Plaintiff Vickey Bake was awarded liberal visitation including every weekend, the entire summer and alternating holidays. The Decree provided that "based on the parties' income and their agreement Plaintiff should have no obligation to pay child support" and both parties waived any claim to alimony. (R. 43-45; Exh. A.)

Neal F. Bake was awarded the care, custody and control of the minor children with the provision that important decisions concerning the children, such as medical and schooling, would be discussed between the parties. (Exhibit A, Decree of Divorce, para. 2). In its findings, the Court found that Mr. Bake was a fit and proper person to be awarded the care, custody and control of the minor children and that the children had expressed a desire to live with him. No findings were made concerning Mrs. Bake. The Court also found:

> "The parties have agreed that since the award of custody is based on the desires of the children that in the event the boys change their mind and express their desire to return to live with their mother that custody would be changed awarding custody to the Plaintiff without a need to show a change of circumstances".
>
> (Exhibit A, Findings of Fact, para. 4.)

B. Facts Relating to Respondent Vickey Bake.

After her separation from Neal Bake in March, 1985, Respondent moved in with another man, Duane Adderly, whom she married ten days after her divorce was final in August. (Transcript, hereinafter "tr.", 11.) The Adderlys now live in a doublewide trailer in Roosevelt, Utah, located about 100 feet behind the lounge where they are both employed. (tr. 11-13.) Immediately after her divorce in August, 1985, the Respondent lived in a camping trailer with Mr. Adderly for about a month. (tr. 32.) After that, Respondent and Mr. Adderly moved into his grandfather's mobile home in Cedarview where they lived for about

one year. (tr. 31.) In July of 1986, the Respondent and Mr. Adderly moved to Colorado where they stayed about four months. (tr. 26.) After that, the Respondent and Mr. Adderly rented a home in Roosevelt where they lived for approximately six months. (tr. 29-30). Since July, 1987, the Adderlys have lived in their present trailer. (tr. 29.)

During these five moves in a span of two years, the Adderlys household consisted of Mr. Adderly's daughter, Rachel, age 5, and Steven Springer, the nephew of these parties, who was age 14. (tr. 11.)

Vickey Bake works as a waitress and occasional bartender at the "Id Lounge" in Roosevelt, Utah. (tr. 12.) Her husband is the manager and bartender at the same bar which is located about 100 feet from the Respondent's trailer. (tr. 13.) The Respondent's hours are from 8:00 p.m. until 1:00 a.m. Tuesday through Saturday and she has also worked since the divorce at a music store and at Pizza Hut. (tr. 13, 25-26.) The Respondent's husband, Duane Adderly, works from 4:00 p.m. until 1:00 a.m. at the "Id Lounge". (tr. 33.)

Respondent testified that there have been fights both inside and outside of the bar which have required police intervention. (tr. 24, 25.)

Respondent testified that it was Steven, age 14, who tended the Adderly's daughter, Rachel, age 5, while the Adderlys were at work. (tr. 13.)

Respondent testified that she earned $1,217.00 per month which includes a monthly stipend of $217.00 from the State of Utah for the support of her nephew Steven. (R. 86-88) The Respondent also receives food stamps. (tr. 29.)

During visitation the Respondent has had the children working washing dishes in the restaurant, now closed, which was part of the "Id Lounge". (tr. 18.)

The Respondent testified that the doublewide trailer had three bedrooms, one for Steven Springer, one for herself and Mr. Adderly, and one for their daughter Rachel and that if the children came to reside with her they would share Steven's room. (tr. 32.) Respondent testified that it was her practice to rise in the morning about 9:00 or 10:00 and that Steven typically made his own breakfast and went to school on his own without supervision. (tr. 33, 34.)

Respondent testified that her husband Mr. Adderly drank beer on a daily basis and had undergone court ordered alcoholism treatment. (tr. 37, 38.) She further testified that he regularly drank whiskey while he was working. (tr. 37, 38.)

During visitation with the Respondent, Kyle had an asthma attack and was hospitalized in Roosevelt. When he was returned to Mr. Bake's custody the Respondent did not inform him of this episode which he only learned of by accident. (tr. 106.)

Vickey Bake was aware the boys were in counseling and objected to it, but never contacted the therapist, never

discussed it with Mr. Bake, and denies the boys had any adjustment problems. (tr. 43, 44.)

When Kyle was hospitalized for asthma during visitation, Vickey Bake did not inform Mr. Bake when returning the child concerning the incident or any follow-up care. (tr. 106.)

C. Facts Relating to Vickey Bake's Care of Steven Springer.

During most of the parties' marriage, they were the joint guardians of a nephew, Steven Springer. (tr. 11.) At the time of the parties' divorce, the Court did not consider the custody issue of Steven Springer and no order was made in his regard. Steven had lived with the family since he was age 5 and Neal Bake had acted as a parent towards him. (tr. 11, 23.) After the divorce, Mr. Bake was prevented from seeing Steven or having access to him. Additionally, the Respondent would not keep Mr. Bake informed of her whereabouts, she often did not have a phone and would not facilitate visitation or contact between Steven and Mr. Bake. (tr. 98, 99). When he did have contact with his nephew, Mr. Bake had concerns that his needs were not being met as he was being required to babysit continually for Rachel, he was not properly dressed, and he was not doing well in school. (tr. 98, 100; Verified Petition for Modification, R. 58-62.) These problems resulted in Appellant filing a petition for Modification of the Divorce Decree wherein he sought custody of his nephew Steven Springer. (R. 58-62.)

Since the parties' divorce, Respondent was the sole caretaker of her nephew Steven Springer and she received a

monthly stipend from the State of Utah for his care. (tr. 27.) While Vickey Bake was the sole caretaker for Steven Springer there were four referrals for child neglect and her fitness made to the Division of Social Services in Roosevelt, Utah. (tr. 72.) Mr. Ralph Draper, the Supervisor of Social Services in Roosevelt was responsible for investigating these referrals which were made by different parties. (tr. 67, 68.) The first referral was in January, 1986, where the complaining party indicated Steven was not properly clothed for school, had no lunch or lunch money, and was poorly groomed. Mr. Draper confirmed these facts which were verified by the Vice-Principal of Steven's school, Mr. Mitchell. (tr. 68.) Another referral stated that Steven Springer was always tired because he was constantly babysitting. (tr. 70.) Mr. Draper testified that he contacted Mrs. Adderly concerning these referrals and did not believe they required removal of the child from the home. (tr. 71.) Additionally, there were referrals concerning Mrs. Adderly's lifestyle, that she was living with a man she was not married to, that the family was being supported by Steven Springer's stipend check, and living in adequate housing. (tr. 74.) During a follow-up visit, Mrs. Adderly admitted she had some difficulty with Steven. Mr. Draper also interviewed Steven himself and testified that he found him to be introverted, shy, and unassertive, and "felt that he needed supervision". (tr. 81, 82.)

The trial court refused to allow Appellant to examine witnesses on the subject of Vickey Bake's care of Steven Springer

although counsel argued that her care of Steven was the best and only evidence of her parenting ability since no custody evaluation had ever been done. (tr. 100).

D. Facts Relating to Vickey Bake's Visitation.

Concerning visitation, Mrs. Cora Bake, Appellant's mother, testified that she kept an independent record of every call, letter, and visit from Vickey Bake to the boys. (tr. 123-125.) She testified that this log was kept in a yearly calendar book and was maintained ever since the boys came to live in her home. (tr. 123.) In testifying about the contacts between Vickey Bake and her sons, Mrs. Bake reviewed the calendar of 1987, specifically the months of January through May. (Trial Exh. 5.) Mrs. Bake testified that in the month of January, 1987, there was only one letter from Mrs. Bake. In February, 1987, there were two phone calls. In March, 1987, there was one call to arrange a visit which occurred on the 13th. In April there were no contacts, that is, no calls, letters or visits. In May, 1987, there was a call and a visit of a few hours on the 20th and a visit on the 22nd. (tr. 125-127.)

The visit on May 22nd was quite upsetting to Mrs. Bake as Vickey Bake arrived one hour early then had been arranged and simply walked in the house, took the children and was leaving in her car before Mrs. Bake happened to see them by glancing outside. Mrs. Bake testified that if she had not happened to see them leaving she would have never known they had left the house. (Tr. 127, 128.)

Mrs. Bake summarized the contacts in her log during several months in 1986 as follows. In January one letter was received from Vickey Bake to the boys; in April there were no contacts, in September there were no contacts, in November there was one card received, and in December there was a birthday card and one letter. (tr. 129-131.) Mrs. Bake testified that she never denied visitation when it was requested by the Respondent and that the parties had even agreed to a specific time for telephone calls so the children would be home if the Respondent happened to call. (tr. 132.) Lastly, Mrs. Bake testified that the children never asked to call Vickey Bake nor did they express the desire to live with her. (tr. 133.)

Mr. Bake testified that Vickey Bake would make visitation arrangements and then not show up which upset the boys (tr. 105) and that there were long lapses between contacts. (tr. 109.) Also, that contact with Vickey was difficult because she often had no phone and would not keep him informed of her whereabouts. (tr. 98, 99.)

Mr. Bake testified he has had to call the police when the Plaintiff refused to return the children after visitation, (tr. 109) and that the Respondent was seldom timely for arranged visitation, that she was often early, late or would not show up at all. There were even times when she refused to return the children which resulted in them missing school. (tr. 109, 110.) Mr. Bake testified that Respondent would miss special occasions

with the children, such as Christmas, 1986, and birthdays where there would be no call, letter or contact. (tr. 11.)

Vickey Bake alluded to visitation problems with the Appellant but never sought legal help and could not remember when she had called the police except that it occurred "every time" she went to the Appellant's house. (tr. 40, 41.) However Respondent did not have police with her when she went to the Appellant's home May 22, 1987 (tr. 127.) No police reports were introduced by Respondents.

Vickey Bake's father, Bud Nelson testified at the trial and stated that until seeing her at trial he had not seen his daughter for four years. (tr. 139-140.) Although he sent regular birthday and Christmas cards to his daughter Vickey and his grandson Steven Springer, he never had any response. (tr. 141.) Mr. Nelson testified that Vickey Bake never brought her sons or Steven Springer to visit him even though he was not aware of any difficulties in their relationship and that she always knew where he was. (tr. 140, 141.)

In contrast, Mr. Nelson testified that Neal Bake tried hard to stay in touch with him and would bring his grandsons Nathan and Kyle as well as Steven Springer, to visit him since the parties had been divorced. (tr. 141.) Mr. Nelson also testified that he has had extended visits with his grandsons and that in his opinion the relationship between Neal and his grandsons was good and that they appeared cared for and happy when they were with him. (tr. 142, 143.)

E. Facts Relating to Neal Bake, Appellant.

Mr. Bake testified that he was a truck driver employed by Uintah Freightways and earned $1,109.00 per month. (tr. 87, 89., R. 90-93) He stated that he had worked for his present employer three or four months and before that worked for PST Vans. He changed companies so that he could be home more with his sons even though it meant a cut in pay. (tr. 88.) His present job allowed him to be home on weekends and holidays. He also testified that he had been looking for other work which would be local driving so he could be home on a daily basis. (tr. 88.)

Ever since his separation from the Respondent on about March 11, 1985, Mr. Bake has resided with his parents at their home in Sandy. (tr. 89, 90.) There are five bedrooms in the home, with two bedrooms downstairs and a play room where the boys stay, a large yard and that, the home is located next to Nathan's school. (tr. 90.)

When asked how the original stipulated custody arrangement came about, Mr. Bake testified that Mrs. Bake said she "had raised kids all of her life, [that she did not want to raise anymore and,] wanted to start a life of her own". (tr. 96.)

Mr. Bake testified that he spent all of his time off with his children and that they were seldom apart. (tr. 97.) He often took them on his driving trips, to visit his friends and also stated that he actively participated in their school functions and Boy Scouts. (tr. 97, 98.) He testified that the boys

were involved in music and choir lessons and that Kyle received excellent grades in school. (tr. 97, 102.) Mr. Bake testified that his son Nathan had about a C average in school and that he personally met with his teachers and implemented a structured study time to help improve his grades. (tr. 102, 103.) Mr. Bake further testified that he had concerns about his son's adjustment to the divorce and thus took his sons to counseling and participated with them in family counseling. (tr. 101.)

Mr. Bake stated that his sons' health was quite good although Kyle used to suffered from asthma. However, he testified that since the divorce his son was much better and no longer needed daily medication for this condition. (tr. 105.) Mr. Bake noted that Kyle's asthma attacks apparently reasserted themselves when he was visiting his mother. Since the divorce only a single episode of asthma arose while Kyle was in Neal's care, and that occurred because his mother had told him that she would pick them up for visitation and never showed up. The stress from this episode resulted in a slight attack of asthma. (tr. 105.)

Mr. Bake has noticed that when the children return from visitation they are much harder to handle and are undisciplined (tr. 103, 104). He testified that when they visited the Respondent they were allowed to stay up as late as they wanted and that they were much harder to control after returning to Salt Lake. (tr. 104.) Mr. Bake attributed the deteriorations in behaviour to alcohol use in Respondent's household, and lack of

supervision. (tr. 103, 104.) Mr. Bake also noted that the boys have usually not been fed when he picks them up in the evening after visitation. (tr. 105.)

Mr. Bake indicated that he and his mother would closely supervise the children at home and had definite expectations for the boy's homework and chores. Mr. Bake testified that one night a week the boys were expected to do dishes and were also expected to keep their rooms and play area picked up. He also testified that he never denied the children clothes or shoes but tried to teach them the value of earning money which included that they contribute to their purchase of shoes. (tr. 112.)

In addition to Mr. Bake, the childrens' daily needs were also provided for by Cora Bake, the Appellant's mother. Mrs. Bake testified that she was employed full time as a school lunch manager where she worked from 7:00 to 2:30 every school day but was always home before the boys returned from school. (tr. 118, 119.)

She testified that Mr. Bake set the rules in the household and that they would jointly discipline the boys if that was needed, by exercising a time-out or having them write down and explain what they did wrong and how it should be handled. (tr. 120, 135.) Mrs. Bake testified that the boys were extremely close to Neal stating they were "like shadows with him" and that he called at least every other day and often every day to talk to the boys when he was on the road (tr. 120, 121.) She testified

that these phone calls would not be brief rather that they would have long discussions about what the boys were doing and any problems that had arisen because communication was important to the household. (tr. 120, 121.) Mrs. Bake also testified that Neal would stay home from work on occasion if his sons were sick. (tr. 122.)

SUMMARY OF ARGUMENTS

I. The trial Court failed to make a determination or finding of changed circumstances which is an invariable precondition to modification of a Divorce Decree in Utah. Although the Decree of Divorce waived such a determination, the law requires this determination before reopening a custody decree and the court erred in failing to make such a determination before issuing an Order modifying custody herein.

II. The findings of the trial court to support modification of the custody order in this case were insufficient, and showed that the Court failed to follow the legal standards established in Utah for custody determinations. Further, these findings do not set forth a rational basis for changing custody from Mr. Bake who had been the sole caretaker of the children for over two years. The findings also do not reflect that the "best interests" of the children were better served by a change of custody.

III. The Court failed to make adequate findings concerning the financial circumstances of the parties when making its order of child support which was an abuse of discretion.

ARGUMENTS

Introduction

Neal Bake had sole custody and control of his sons Nathan and Kyle for over two years until Judge Dennis Draney modified the custody order on grounds that were totally insufficient and contrary to law. At the outset, Judge Draney did not require the moving party to make a showing of any change of circumstances from the time of the divorce on the custody issue. Rather, he waived that burden based on the parties' settlement stipulation as reflected in their Decree of Divorce.

In deciding to change custody, Judge Draney totally ignored the substantial part of the Defendant's evidence. That is, he makes no reference and apparently gives no weight to the fact that Vickey Bake kept in very poor contact with her sons, during the two years since the divorce where lapses of two or three months would occur with no phone calls, letters or visits despite an order permitting weekly visits. Additionally, Judge Draney makes no reference, and gives no apparent weight, to the dramatic differences in the households and styles of living between the parties' homes. He makes no mention of the fact that Plaintiff and her husband work full time in a bar which is 100 feet from where their trailer is and that the children are unsupervised from at least 8:00 at night and often in the mornings. This situation contrasts with that of the Defendant where the Defendant's parents are present to assist with child rearing and

supervision even though the Defendant is often out-of-town during the weekdays because of work.

Lastly, the Court's ruling was made without the benefit of a custody evaluation which was previously entered by the Court. Prior to the trial, the Appellant filed objections and requested a postponement of the trial so this evaluation could be done to provide an objective view of the children's best interests and this was denied by the Court. (tr. 2, 3, 7, 8.) Additionally, the Court imposed severe limitations on the presentation of Appellant's case by ruling that testimony concerning Vickey Bake's raising of the minor child in her care, Steven Springer, was not relevant. Without a custody evaluation, this ruling deprived the court of the best evidence available to show the parenting abilities, or lack thereof, of Vickey Bake.

Appellant submits that although the appealable errors are based primarily upon misapplication of the law to the facts, the Judge's selective use of the evidence and shallowness of analysis, poses a disturbing question concerning the courts attitude and bias towards Mr. Bake. In short, it appears that the Court ruled simply out of a bias in favor of the children being with their mother rather than on the basis of the "best interest" of the minor children herein.

I. THE COURT ERRED IN FAILING TO MAKE AN INITIAL DETERMINATION OF CHANGED CIRCUMSTANCES PRIOR TO MODIFYING CUSTODY.

It is well settled in Utah that before a Divorce Decree can be modified to change custody, that a showing of substantial and material change of circumstances must be made by the moving party. In the absence of such a showing the Utah Supreme Court has held that a petition to modify custody must be dismissed. Hogge v. Hogge, 649 P.2d 51 (Ut. 1982); Lord v. Shaw, 682 P.2d 853 (Ut. 1987).

The Supreme Court elaborated on the modification threshold standard in the case of Becker v. Becker 694 P.2d 608, 610 (Ut. 1984) where the Court stated:

> "The asserted change must ... have some material relationship to and substantial effect on the parenting ability [of the custodial parent] or the functioning of the presently existing custodial relationship." 694 P.2d 610; accord Shioji v. Shioji, 712 P.2d 197, 200 (Ut. 1985).

If a Court determines that the threshold change of circumstances has been met on a given issue, then the Court is required to weigh all of the evidence in determining whether a changed placement would be in the best interest of the child. Utah Code Annotated §30-3-10; Williams v. Williams 655 P.2d 652 (Ut. 1982) Hogge v. Hogge 649 P.2d at 54. Always an important factor in this analysis is the child's interest in maintaining a stable long term placement. Moody v. Moody, 715 P.2d 507, at 510 (Ut. 1986). Basically, once the custody question is reopened the trial court must consider the changes in circumstance along with all other relevant evidence and "determinate de novo which

custody arrangement will serve the welfare or best interest of the child". Hogge v. Hogge, supra.

Without question, the Court's equitable powers also give it the authority to overrule the stipulation of the parties and in this case requires the court to follow legal precedent concerning the burden to show a substantial change of circumstances prior to a modification of a custody decree. The trial courts failure to apply this essential prerequisite in the present case is clearly erroneous and must be reversed.

The trial court herein should have ignored the stipulation waiving the threshold burden of showing changed circumstances set forth in the decree. There is ample precedent to support a trial courts authority to set aside or modify a stipulation of the parties as presented in this case.

In the case of Naylor v. Naylor, 700 P.2d 707 (Ut. 1985), the Court expressly addressed the judicial power to modify the stipulation for agreement of the parties in the context of support awards. Citing Callister v. Callister, the Utah Supreme Court stated:

> "It is therefore reasonable to assume that the law was intended to give the Courts power to disregard the stipulations or agreement of the parties in the first instance and enter judgment for such alimony or child support as appears reasonable, and to thereafter modify such judgments when a change of circumstances justifies it, regardless of attempts of the parties to control the matter by contract."

See also, Nunley v. Nunley, 85 Ut.Adv.Rept. 15 (6/22/88); Clausen v. Clausen, 675 P.2d 562 (Ut. 1983).

Thus, following proper procedure, a Court would not reopen a custody question until it had first made a threshold finding of substantial and material change of circumstances. This did not occur in the case at bar where the Decree of Divorce stated that the parties waive the need to show a change of circumstances and states that if the minor children ever express a desire to live with Respondent Vickey Bake then custody would be changed. (Exh. A, Decree of Divorce). Based on this decree and despite counsel's objections, Judge Draney waived any showing of changed circumstances prior to modifying custody herein. (tr. 2, 3, 167; R. 140-144.)

Appellant submits that the law in Utah is clearly opposed to the parties' stipulation as stated in the Divorce Decree and that it was improper for this Court to not follow legal precedent and require a showing of substantial change of circumstances prior to modifying the custody decree. Certainly, the rationale for the bifurcated modification process in the custody area is totally applicable to the case at bar and mitigates against the Court's attempt to side step this vital legal requirement. The Utah Supreme Court set forth this reasoning in the Hogge case as follows:

> "This would protect the custodial parent from harassment by repeated litigation and protect the child from "ping pong" custody awards....[in] apparent response to the importance of stability and custody arrangements, many states have adopted a bifurcated procedure for considering petitions to modify custody awards. (citations omitted)." Supra at 54.

Clearly, in the present case these children would be at risk for a future of "ping pong" custody awards if the Court were to consider their wishes as controlling in every instance as the parties' Divorce Decree provides. As argued in closing at trial, the childrens' wishes can only be one of many factors for the court to consider before changing custody. Utah Code Annotated §30-3-10. More important than the child's preferences is the Court's objective assessment of the "best interests" of the child, and the past conduct and moral standards of the parties. UCA §30-3-10. Relying on a child's preference alone is unsuitable for obvious reasons. A child is easily influenced and manipulated; the maturity and insight of minors varies widely; and improper considerations may motivate the expressed desire to change custody such as wanting a more lenient parent over one who applies rules. Of these factors, we have no way of knowing what the maturity level of these children are, although we do know they are very young at age 11 and 13. We also know that there is far less supervision in Respondent's household as proposed to Mr. Bake who applies rules and has high expectations of his sons.

It is noteworthy that the Decree of Divorce in this case not only provided for a change of custody based on the preference of the children but also gave Vickey Bake extremely liberal visitation consisting of every weekend, the entire summer, and alternating holidays. Such a generous visitation award could allow a caring parent to maintain a close bond to her children with fre-

quent contact. Sadly, Vickey Bake ignored this opportunity to maintain contact with her children. Rather, after she was divorced in August, 1985, Vickey Bake had four visits in four months with her sons. In all of 1986, out of fifty-two weeks she had eight visits and in 1987, January through May there were two visits. Additionally, there was unrefuted testimony of frequent abuses of visitation which adversely affected the children where Vickey Bake made arrangements and would not show up. Also, there was an occasion when she refused to return the children on time and they missed school. Thus, instead of remaining a strong presence in her sons lives, Mrs. Bake gave them scant attention until Mr. Bake asserted his interest in custody of Steven Springer which generated the Respondent's counterclaim for custody.

If nothing else, this erratic and dismal record of visitation by a non-custodial parent should have been considered by the Court in evaluating whether the stipulation entered by the parties in 1985 to change custody based solely on the children's preferences alone should be given any weight when the other parts of the Decree providing liberal visitation were not adhered to. Unfortunately, Judge Draney makes no comment whatsoever on these points choosing to ignore Vickey Bake's neglect of her sons by failing to visit and the fact that the boys were in fact thriving in the care of Mr. Bake and his family. Instead the Court seems to apply a bias in favor of mothers having custody instead of

weighing the evidence. Such a bias is clearly reversible error, as is the Court's failure to require a showing of changed circumstances. Marchant v. Marchant, 743 P.2d 199 (Ut. App. 1987).

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A MODIFICATION CHANGING CUSTODY TO VICKEY BAKE.

The trial evidence strongly shows that the Judge should have maintained the existing custody award set forth in the Divorce Decree rather than modifying that order. Although a trial court judge is granted broad discretion in making custody determinations, a Court must apply legal standards to the decision making process which rationally relate to the ultimate conclusions in the custody process. Smith v. Smith, 726 P.2d 423, 425 (Ut. 1986). It is particularly because of this broad discretion that a trial court judge must carefully weigh all of the evidence presented and rule within established legal guidelines to arrive at proper conclusions. In the instant case, the trial court totally failed in this charge.

A. Legal Standards in custody modification determinations.

The threshold issue in a custody modification is whether the moving party has shown a substantial change of circumstances which justifies reopening the custody issue. (Reference Point I, this Brief.) If this burden is met, the court has continuing jurisdiction to make changes in custody which are found to be "reasonable and necessary." UCA 30-3-5(3).

Although a child custody proceeding is equitable in nature, nevertheless, a determination of the "best interests of the children" is the standard and must be fairly evaluated by the Court. Kallas v. Kallas 614 P.2d 641, 645 (Ut. 1980).

On numerous occasions this Court has set forth factors which should be considered in arriving at conclusions regarding the "best interests of children". In Hutchinson v. Hutchinson, 649 P.2d 38 (Ut. 1982), this Court listed factors to consider in reviewing a child's best interest which focused on the child's feelings or needs, and also factors which relate primarily to the character or status of the proposed custodians.

Among the factors focusing on the child's needs were: the preference of the child; keeping siblings together; the strength of the child's bond with prospective custodians; and, in some cases, the general interests in continuing previously determined custody arrangments where the child is happy and well adjusted. Among the factors focusing on the character of the custodians, the Court listed: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of the ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatabiliy with the child; and, financial condition. (citations omitted) Hutchinson at pg. 41. Certainly, the assessment of the applicability and

weight of these various facts in a given case is within the court's discretion. However, a court may not arbitrarily substitute factors which are not functionally related to the "best interest of the child" standard. Smith v. Smith, supra; Hutchinson v. Hutchinson, supra.

B. Judge Draney Misapplied the Law in Modifying the Custody Award to Neal Bake.

The Findings of Fact entered by Judge Draney show a total misapplication of the foregoing law to the facts of this case. These findings show no basis whatsoever for terminating the custody of Neal Bake which existed uninterrupted for a period of over two years prior to the Modification Order. The Supreme Court has held that Findings of Fact must demonstrate a rationale and logical basis for the ultimate decision on custody by references to pertinent factors that relate to the best interest of the child, including specific attributes of the parents. Smith v. Smith, supra.

The Findings of Fact in the present case were not logical, do not relate to the best interest of the children, show bias on the part of the trial court, are not supported by the evidence in the record and totally ignore critical elements of the Defendant/Appellant's evidence.

1. Findings of Fact 3, 4. (3) "Plaintiff lives in a doublewide 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 works 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."

These findings appear to imply that the parties are similarly situated and have comparable households. That is definitely not the case as reflected in the record. The Court makes no mention that the bar where respondent works is 100 feet from her trailer and that there have been fights both inside and outside of the bar which have required police intervention. (tr. 25.) The size and amenities of the homes are also vastly different where respondents live in a three bedroom trailer with two adults and four children (including the children at issue) and appellant resides in a five bedroom home with three adults and two children where the children have a separate play room, a large yard and the school next door. (tr. 89,90.)

2. Findings of Fact 5, 6. (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 had 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."

These very significant findings are a distortion of the trial evidence, conclusory, and parts of them are simply inaccurate. While the Court notes that Plaintiff would "be with the boys virtually every day" there appears to be no mention or weight given to the fact that all four children would be unsuper-

vised after 8:00 p.m. at least five nights a week because both Respondent and her husband are working in the bar until 1:00 a.m.. Concerning the Defendant, the Court notes that he is a long haul truck driver and states he is away from home "the majority of the time". This is simply not true. Mr. Bake's testimony was that he was home most weekends and holidays. (tr. 88) There was also testimony that he called his sons on nearly a daily basis while he was gone and spent virtually all of his free time with them when he was home. (tr. 97, 120, 121.) The Court also ignores Mr. Bake's testimony about his efforts to obtain local truck driving employment so he could spend more time with his children and the fact that he had already changed jobs and reduced his income only because the job allowed him to spend more time with his sons. (tr. 88.) The Court also ignores totally Mrs. Cora Bake's testimony that she cares for the boys on a daily basis and is present when they come home from school every day. (tr. 118, 119). Importantly, the Court altogether misses the fact that Mr. Bake's household provides constant adult supervision for the children where Vickey Bake's has no adults present after 8:00 p.m.. There was also significant evidence that the boys benefited from the supervision in Mr. Bake's home as they got good grades, were healthy, obedient and maintained close family ties. In contrast, the lack of supervision by Vickey Bake resulted in the deterioration of the children's behavior after visitation.

3. Findings of Fact 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."

It is clear by statute and case law that in a custody decision the preferences of a minor child are not controlling of the custody decision and are merely one factor among many for a court to consider. Williams v. Williams, supra; U.C.A., §30-30-10; see this Brief, Point I infra. Additionally, the Court only briefly interviewed the children in chambers and made no record of that interview. The Court makes no reference to the questions asked of the children, does not assess their credibility or maturity and thus does not lay a proper foundation for expressing these desires as a court "finding" on which a change of custody can be based. Most importantly, this shows that this court is again being selective and biased in its treatment of the evidence. It is noteworthy that there are no findings showing the objective success of the children in Mr. Bake's care despite substantial evidence at trial. There is unrefuted testimony that the children were actively engaged in extracurricular activities, scouting, music lessons, that they had friends and activities they enjoyed, and that they were succeeding in school and in every way appeared to be thriving. (tr. 97, 101-105, 118-122.)

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

While acknowledging a "very favorable picture of Defendant's home and care for the boys" and in finding No. 8,

also acknowledging that Defendant has a deep concern and ability to care for the boys needs, the Court nevertheless seems to decide that none of the testimony of Mr. Bake or his witnesses are to be believed. This testimony is thrown out because of "significant discrepancies" and yet no such discrepancies are described in the Court's findings and conclusions.

Additionally, the Court significantly hampered the presentation of Defendant's case by prohibiting testimony concerning the caretaking of Steven Springer by Vickey Bake. (tr. 100.) As was argued at trial, this testimony was extremely important as it is the best evidence of Vickey Bake's caretaking abilities and the Court had no other evidence than Mrs. Bake's own testimony on which to assess her parenting abilities. At the outset of the trial the Court did not allow a custody evaluation and none had been done at the initial divorce, rather, custody was awarded by agreement of the parties.

The Court's failure to specify the "significant discrepancies in the evidence" is also very misleading. It is impossible to know whether the evidence in which the Court saw discrepancies related to the best interest of the children and yet these "discrepancies" alone seem to be enough for the Court to totally discount the testimony of Mr. Bake and his mother. Without further specificity it is impossible to understand this finding which is unsupported, vague and sheds no light on the court's ruling.

5. Findings of Fact 10. "It was the uncontroverted testimony of the Plaintiff that the Defendant recently said to her "you had better get your boys back".

In the Defendants post-trial motion to have the court reopen judgment and direct entry of a new judgment, and for a stay of proceedings to enforce judgment, the Defendant's Affidavit was attached and at paragraph 11 thereof, Defendant denies that he made the statement to Plaintiff "you had better get your boys back". (Motion and Affidavit, is attached hereto, Exhibit C.) Rather, in that Affidavit he recalls telling Vickey Bake that she should "straighten up her act" if she ever wanted to regain custody of the boys. Mr. Bake also explained that he, at no time, suggested he did not want to care for the boys, rather, that he has repeatedly discussed with Vickey issues concerning her lifestyle and care of the boys which he believes is harmful to them. (R. 120-129.)

Additionally, a review of the trial transcript provides more meaning to Mr. Bake's out-of-context statement cited in this Finding. The transcript shows Vickey Bake went on to explain that Neal also said "you have got to start working on making things right like I want them so you can have them back." (tr. 18.) When Finding 8 is read in context with this follow-up statement, the meaning is clarified to be a statement merely commenting on Mrs. Bake's lifestyle, and not a veiled threat concerning custody as the Court seems to imply. Frankly, no other

interpretation makes sense nor does the court express in its conclusions or other findings what interpretation it makes or weight is given to Finding 10. Again, this Finding certainly has no relevance to the best interests of the children and seems only to show the Court's unexplained dissatisfaction with Mr. Bake.

In short, this unsupported and vague finding of fact does not provide a rationale basis on which the Court can make a custody modification order.

In conclusion, the trial court has entirely failed to provide a rationale, factual basis for the ultimate decision by drafting Findings with references to pertinent facts on the best interests of the children. Smith v. Smith, supra at 426. As stated in Acton v. Deliran, 737 P.2d 996, 999, (Ut. 1987), findings:

> "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was revealed."

The only factor outlined in Hutchinson, supra, which appears in these inadequate findings is that of preferences of the children which should not be controlling. Rather, the Court ignored valid, unrefuted evidence which was presented concerning the Hutchinson factors. To summarize, there was testimony from Mrs. Cora Bake, Mr. Nelson and Mr. Bake of the very strong bond between Neal Bake and the children. There was testimony concerning Mr. Bake's personal sacrifices to spend time with his children and of the close contacts and communication which he

maintained with them. There was testimony concerning his sensitivity and responsiveness to the needs of his children such as taking them to counseling when it was appropriate and setting up structured study times in response to poor grades. There was testimony that Mr. Bake's household was structured and well organized, that the children had appropriate discipline with time-out and that they were always under adult supervision. There was also testimony concerning adverse factors in Vickey Bake's household such as the daily alcohol use by her husband, his history of court ordered treatment, the unrefuted testimony of Respondent that she was "tired of raising children" as a reason for relinquishing custody initially, and the very important objective evidence of Respondent's minimal contact with the children during the two years since the divorce. The trial court makes absolutely no mention of the foregoing testimony and evidence which was presented to the Court and which represent factors that the Supreme Court held to be determinative in custody cases.

C. The Court Should have Affirmed the Divorce Decree Custody Award to Neal Bake and Abused its Discretion in modifying that order.

If the Court had properly reviewed the factors and legal standards of Hutchinson v. Hutchinson, supra, the Court should have affirmed the original custody award to Neal Bake and made no modification thereof. There is simply no evidence on the record which points to disturbing the present custody arrangement after

the children have been in the care of Mr. Bake for over two years, have become well adjusted to the Salt Lake City area, have become involved in their school and have gained friends and established new successful routines in Appellant's household. Despite evidence and argument, the court absolutely ignored these factors of stability and continuity in the childs' lives. The Court also ignored testimony by Appellant's witnesses of Neal Bake's commitment to his family and extended family. There was no reference in the Court's opinion nor explanation by Vickey Bake of why she had not seen her father Bud Nelson for four years. Mr. Nelson testified at trial that he had no idea why she did not keep in touch even though he had made continuing efforts to reestablish contact. Instead, it was Mr. Bake that maintained the family connection with his grandsons to his ex-wife's parents through visits and regular communications. Mr. Nelson testified to the closeness he observed between Mr. Bake and his grandsons and that the children were well cared for and happy in his care.

There was also absolutely no mention in the Court's opinion of the unstable and erratic history exhibited by the Respondent since the divorce. In the two years since the divorce she had moved five times and in two states. She and her husband had experienced periods of unemployment and are on food stamps to supplement their income. Respondent's witness George Glinds the landlord of Respondent and owner of the "Id Lounge" testified that he was a receiver appointed by the Bankruptcy Court to

operate the lounge. Thus, it is questionable whether that employment is stable and certainly, Respondent's job history is of unskilled labor with her longest employment being Pizza Hut where she worked for only two years.

In contrast to Vickey Bake's own unstable lifestyle with frequent changes of residence and employment, Mr. Bake has lived ever since his separation with his parents in Sandy. They have a large home and are a closely bonded and supportive family who have all been active in the caretaking of the children. The importance of extended family support and stability such as the appellant's was recognized as highly important to the custody decision in the case of Hirsch v. Hirsch, 41 Ut. Adv. Rep. 4 (9-5-86).

Lastly, the Court totally omitted any reference to Vickey Bake's pattern of visitation during the two and a half years after the parties' divorce. The highly unusual and objective evidence of a daily contemporaneous log was presented to the Court and was not refuted except by the testimony that there may have been a few emergency phone calls which the record keeper Mrs. Bake was not aware of. Outside of this, there was no testimony to refute the fact that in the first five months of 1987 from January through May there were only two actual visits, one letter and two phone calls which were not for the purpose to arrange visits. There was no testimony to refute that in 1986 there was only one letter in January, no contact whatsoever

in April, or September; only one card in November and in December one card and one letter. The Court also failed to mention the insensitive and often reckless behaviour of the Respondent which could have a definite impact on her parenting abilities. Among these examples are when the parties son Kyle was allowed to play with a knife and cut himself during visitation. Additionally, Kyle suffered from an asthma attack which required hospitalization during visitation and when he was returned no mention was made of this incident so Mr. Bake had no way of knowing what follow-up care or risk may still have existed from this illness. Additionally, there was testimony that police intervention was required to assist Mr. Bake in retrieving children after visitation and that the children were sometimes not returned in a timely fashion which caused them to miss school. Also, there was the visitation incident when Vickey Bake arrived an hour early and proceeded to simply walk in the house and take the children away without informing their caretaker that she was taking the children. None of this irresponsible and possibly endangering behaviour by Mrs. Bake was referred to in the Court's opinion. Finally, the Court restricted testimony concerning Vickey Bake's caretaking of the only related minor child in her care, that is, Steven Springer. There was testimony by the social services personnel of several child neglect referrals concerning Steven Springer and yet the Court still barred questioning on this point as "irrelevant" to Mrs. Bake's caretaking abilities.

Based upon the court's apparent prejudice, failure to review appropriate factors, its failure to apply the law, and the positive factors which preponderate in favor of Neal Bake's having continued custody of the minor children Nathan and Kyle, it is apparent that the Court abused its discretion. As this Court has traditionally held and recently stated:

> "This Court will not overturn a trial court's custody determination on appeal unless the evidence clearly shows that the determination was not in the best interest of the child or that the trial Court misapplied a applicable principles of law". Smith v. Smith, at 425.

This case is one of those clear instances when the Court abused it's discretion and should be reversed.

III. THE COURT ABUSED ITS DISCRETION IN AWARDING CHILD SUPPORT TO VICKEY BAKE

The Decree of Divorce stated that "based on the parties' income and their agreement, Plaintiff should have no obligation to pay child support. Alimony was also waived by the parties. (Ex. A, Findings of Fact, para. 7). At trial, the financial declaration statements were submitted by both parties, and the Court found that Vickey Bake earned $1,217.00 per month and the Defendant earned $1,109.24 per month. Based on these findings the Court entered a support order that Mr. Bake should pay the sum of $115.00 per month, per child to Mrs. Bake.

Appellant submits that these conclusory findings by the court assessing child support against Mr. Bake are totally inade-

quate and are reversible error. The Utah Supreme Court has clearly held that the trial court must make findings on all material issues. Acton v. Deliran, supra. The findings made by Judge Draney on child support do not specifically set forth the financial condition or need for support, including earning capacity or ability to pay for either party. Such a failure to address the basic factors necessary to make a proper support award requires reversal of that award. Rather, the Court should have considered all of the factors set forth in Utah Code Annotated, §78-45-7 which states:

> "The Court, in determining the amount of prospective support, shall consider all relevant factors including but not limited to:
>
> (a) the standard of living in situation of the parties;
> (b) the relative wealth and income of the parties;
> (c) the ability of the obligor to earn;
> (d) the ability of the obligee to earn;
> (e) the need of the obligee;
> (f) at the age of the parties;
> (g) the responsibility of the obligor for the support of others.

All of the above factors constitute material issues upon which the trial court must enter Findings of Fact. Jefferies v. Jefferies, 80 Ut.Adv.Rept. 18 (4-13-88). Additionally, in the present case the Court gave great deference on other issues to the parties' stipulation as incorporated in their Decree of Divorce. That stipulation waives support and alimony and should have been a consideration in awarding support herein. Certainly,

the fact that Vickey Bake, the recipient of the support earns more than Neal Bake would have been an important factor to consider in assessing this support award. The Court makes no mention of this fact and nor does the Court disclose the basis for its $115.00 per month assessment which is higher than the Uniform Child Support Schedule used by the Utah Office of Recovery Services.

For these reasons the Court's award of child support is vague, based on insufficient findings, and must be reversed.

CONCLUSION

On the issue of custody modification the Court erred at the outset of trial by proceeding without the requested custody evaluation and by failing to have respondent carry her burden of proof to establish a substantial, material change of circumstances before reopening the custody issue. The Findings of Fact concerning the custody award are clearly not dispositive of the best interest of the children, constitute a misapplication of the law to the facts, wholly failed to consider prominent basis that this Court has asserted should be controlling in custody matters, and discloses an apparent bias by the trial court against Mr. Bake's continuing custody. The Court also fails to make sufficient findings or follow applicable legal standards in setting the child support herein. This Court should reverse the judgment of the trial court as abuses of discretion and enter judgment in accordance with the controlling cases set forth herein, and the

facts and the record which Appellant submits require affirming the original custody award of the minor children to Neal Bake.

RESPECTFULLY SUBMITTED this 29 day of July, 1988.

SUZANNE MARELIUS
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing "Appellant's Brief" to Attorney for the Respondent, Mr. Clark Allred, NIELSEN & SENIOR, 36 South State, Suite 1100, Salt Lake City, Utah, 84111, postage prepaid this 29 day of July, 1988.

28491(501)

STATUTES REQUIRING INTERPRETATION

30-3-5. Disposition of property - Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony. (1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties and children, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

(2) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse shall automatically terminate upon the remarriage of that former spouse, unless that marriage is annulled and found to be void ab initio, in which case alimony shall resume, providing that the party paying alimony be made a party to the action of annulment and that party's rights are determined.

(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.

30-3-10. **Custody of children.** In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise.

78-45-7. Determination of amount of support.—(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) When no prior court order exists, or a material change in circumstances has occurred, the court in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the need of the obligee;

(f) the age of the parties;

(g) the responsibility of the obligor for the support of others.

(3) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

(a) The amount of public assistance received by the obligee, if any;

(b) The funds that have been reasonably and necessarily expended in support of spouse and children.

30-3-5. Disposition of property - Maintenance and health care of parties and children — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony. (1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties and children, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

(2) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse shall automatically terminate upon the remarriage of that former spouse, unless that marriage is annulled and found to be void ab initio, in which case alimony shall resume, providing that the party paying alimony be made a party to the action of annulment and that party's rights are determined.

(3) Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship or association between them is without any sexual contact.

ADDENDUMS AND EXHIBITS

EXHIBIT A

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IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

VICKEY L. BAKE, Plaintiff, vs. NEAL F. BAKE, Defendant.	DIVORCE DECREE 8 5 C V 1 7 2 Civil No.

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, the 1979 ~~and 1965~~ Ford pickup trucks, the 1970 Javelin automobile, ~~the ten foot camping trailer~~ and her personal property.

5. Defendant is awarded all his personal property presently in his possession, [illegible]

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 day of July, 1985.

District Judge
Richard C. Davidson

APPROVED AS TO FORM:

Earl Hatch

with the minor changes indicated and accepted by the parties in stipulation by counsel

GAYLE F. McKEACHNIE
CLARK B. ALLRED
NIELSEN & SENIOR
Attorney for Plaintiff
363 East Main Street
Vernal, Utah 34078
Telephone: (801) 789-4908

IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

VICKEY L. BAKE, Plaintiff, vs. NEAL F. BAKE, Defendant.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No.

This matter was heard before me, Judge of the above entitled Court, on the _____ day of _____, 1985.

Plaintiff appeared in person and was represented by Clark B. Allred, attorney. Defendant was not present in Court.

Defendant and Plaintiff have entered into the written stipulation and property settlement agreement and Defendant has waived the 90 day period between the filing of the Complaint and the hearing for the decree of divorce.

The Court found that good cause existed for waiving the remainder of the 90 day waiting period between the filing of the Complaint and the hearing for the decree of divorce and the Court heard the testimony of the Plaintiff and approved a written stipulation and property settlement agreement and after being

fully advised, makes these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff is a resident of Duchesne County, State of Utah, and has been for more than three months immediately prior to the commencement of this action.

2. Plaintiff and Defendant are husband and wife, having married on August 1, 1972.

3. Plaintiff and Defendant are the parents of the following minor children as issue of this marriage, to-wit:

Nathen Frank	October 10, 1974
Kyle Kirk	December 17, 1976

4. Defendant is a fit and proper person to be awarded the care, custody and control of the minor children and the children have expressed a desire to live with the Defendant. The parties have agreed that since the award of custody is based on the desires of the children that in the event the boys change their mind and express a desire to return to live with their mother that custody will be changed awarding custody to the Plaintiff without a need to show a change of circumstances.

5. Plaintiff should have reasonable visitation rights with the minor children including having the boys on weekends, the summer and every other holiday. The alternating holidays being 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 should have visitation rights on every weekend. In the event the custody of the children is changed, the Defendant should be entitled to the visitation rights outlined herein for the Plaintiff.

6. Defendant has treated Plaintiff cruelly, causing her great mental distress and suffering.

7. Based on the parties income and their agreement Plaintiff should have no ~~duty~~ obligation to pay child support. Both parties have waived any claim to alimony.

8. Defendant should be obligated to pay all of the debts and obligations incurred by the parties or either of them during the marriage and the Defendant should provide medical and dental insurance for the children.

9. The parties have certain property which should be divided as follows: 12 2/3 acres in Neola

a. 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 real property, the 1979 ~~and 1965~~ Ford pickup trucks, the 1970 Javelin automobile, ~~the ten foot camping trailer~~ and her personal property should be awarded to Plaintiff.

b. All his personal property presently in his possession should be awarded to Defendant, including the items on a list agreed to by the

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes:

1. Plaintiff is entitled to be awarded a divorce from

Defendant, the decree to become final on its signing and entry.

2. Defendant is entitled to be awarded the care, custody and control of the minor or children subject to the right of Plaintiff to visit the minor children at reasonable times and places including having the boys on weekends, the summer school vacation and every other holiday. The alternating holidays being 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 this 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 that 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 the Defendant will be entitled to the visitation outlined herein for the Plaintiff.

3. Alimony by both parties is waived.

4. Defendant should be obligated to pay all of the debts and obligations incurred by the parties or either of them during the marriage and the Defendant should provide medical and dental insurance for the children.

5. Plaintiff should be awarded the mobile home and premises located at Roosevelt, Utah subject to any liens thereon,

subject to any liens [illegible]

the six and one-third acres located in Neola, Utah, the 1979 ~~and 1965~~ Ford pickup trucks, the 1970 Javelin automobile, ~~the ten-foot camping~~ ~~trailer~~ and her personal property. The Defendant should be awarded all his personal property presently in his possession. and to by the parties.

6. Defendant should pay to Plaintiff $250.00 as reimbursement for part of her legal fees.

DATED this day of July, 1985.

District Judge
Richard C. Davidson

APPROVED AS TO FORM:

[illegible]

[illegible]
[illegible]

CLARK B. ALLRED
GAYLE F. McKEACHNIE
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, Plaintiff, vs. NEAL F. BAKE, Defendant.	)	STIPULATION AND PROPERTY SETTLEMENT AGREEMENT Civil No. 85-CV-137D

WHEREAS, the Plaintiff has filed a complaint for divorce and whereas the parties have agreed regarding the division of their property, the payment of support and the custody of their children, and;

WHEREAS, the parties desire to set forth their agreement in writing and requests that the court enter a decree of divorce according to the terms of this stipulation and property settlement agreement.

NOW, THEREFORE, it is hereby agreed as follows:

1. The parties both request that the court waive any further waiting period, that a decree of divorce be awarded to Plaintiff and that the same become final on signing and entry.

2. The parties have two children, Nathan Frank and Kyle

Kirk. The two children have expressed a preference of residing with the Defendant. Therefore, it is agreed that custody be awarded to the Defendant and that Plaintiff have reasonable visitation rights including have the boys on weekends, the summer vacation and every other holiday. The alternating holidays should 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. The parties further agree that all important decisions regarding the boys, such as medical and schooling shall be discussed between the parties. The parties further agree that since this agreement on custody is based on the desires of the children that in the event the boys change their mind and express a desire to return to live with their mother that 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 the Defendant will be entitled to the visitation rights outlined herein for the Plaintiff.

2. It is agreed that Plaintiff shall have no ~~duty~~ obligation to pay child support. Both parties hereby waive any claim to alimony.

3. It is agreed that Defendant shall pay all medical obligations and other bills incurred prior to the filing of this action and that the Defendant will provide medical and dental insurance for the children.

4. It is agreed that Plaintiff should be 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, , the 1979 ~~and 1965~~ Ford pickup-truck~~s~~, the 1970 Javelin automobile, ~~the~~ ten ~~foot camping trailer~~ and her personal property and that Defendant should be awarded all his personal property presently in his possession, [illegible].

5. It is agreed that Defendant will reimburse Plaintiff the sum of $250.00 for part of the legal fees and costs she has incurred herein.

DATED this 12th day of July, 1985.

Vickey L. Bake

Neal F. Bake

EXHIBIT B

CLARK B. ALLRED - 0055
GAYLE F. McKEACHNIE - 2200
NIELSEN & SENIOR
Attorneys for Plaintiff
363 East Main Street
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IN THE SEVENTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH

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

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 reguesting 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 day of May, 1987.

Howard Maetani
Domestic Commissioner

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

DATED this day of May, 1987.

Dennis L. Draney
District Judge

APPROVED AS TO FORM:

Suzanne Marelius
Attorney for Defendant

EXHIBIT C

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 earms #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 (½) 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:

Dennis L. Draney

cc: Clark B. Allred
Suzanne Marelius

EXHIBIT D

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, Plaintiff, vs. NEAL F. BAKE, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 85-CV-137D

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 day of February, 1988.

Dennis L. Draney
District Judge

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

Shelly Massey, being duly sworn, says:

That she is employed in the office of NIELSEN & SENIOR, Clark B. Allred, attorney for Plaintiff, herein; that she served the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW upon counsel by placing a true and correct copy thereon in an envelope addressed to:

Ms. Suzanne Marelius
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Vernal, Utah, on the 3rd day of February, 1988.

Shelly Massey

Subscribed and sworn to before me this 3rd day of February, 1988.

Notary Public
Residing at Vernal, Utah

My commission expires:
Oct 22 1988

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, Plaintiff, vs. NEAL F. BAKE, Defendant.	ORDER AND DECREE MODIFYING DIVORCE DECREE 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 day of February, 1988.

Dennis L. Draney
District Judge

MAILING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UINTAH)

Shelly Massey, being duly sworn, says:

That she is employed in the office of NIELSEN & SENIOR, Clark B. Allred, attorney for Plaintiff, herein; that she served the attached ORDER AND DECREE MODIFYING DIVORCE DECREE upon counsel by placing a true and correct copy thereon in an envelope addressed to:

Ms. Suzanne Marelius
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Vernal, Utah, on the 3rd day of February, 1988.

Shelly Massey

Subscribed and sworn to before me this 3rd day of February, 1988.

Notary Public
Residing at Vernal, Utah

My commission expires:
6-22-1988

EXHIBIT E

SUZANNE MARELIUS - 2081
Attorney for Defendant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

--------ooOoo--------

VICKEY L. BAKE now known VICKEY L. ADDERLEY, Plaintiff, v. NEAL F. BAKE, Defendant.	MOTION TO HAVE COURT REOPEN JUDGMENT AND DIRECT ENTRY OF A NEW JUDGMENT, AND FOR A STAY OF PROCEEDINGS TO ENFORCE JUDGMENT Civil No. 85-CV-137D (Judge Dennis Draney)

--------ooOoo--------

Defendant Neal F. Bake by and through counsel moves this Court pursuant to Rules 59 and 62 of the Utah Rules of Civil Procedure, for an Order to Reopen the Judgment in this matter for the purpose of taking additional testimony relating to the issue of custody of the minor child of the parties, and to direct entry of a new judgment. Plaintiff further moves this Court to stay proceedings to enforce the Judgment altering custody in this action.

Defendant requests that this Court reopen the Judgment for the purpose of obtaining a custody evaluation as recommended by Domestic Relations Commissioner Howard Maetani to be conducted to determine the best interests of the minor children regarding a

change of custody and to evaluate the fitness and appropriateness of the parties requesting custody. Such an evaluation was not obtained by the parties because of their financial limitations and the Court denied Defendant's Motion to Direct the Division of Family Services to conduct such an evaluation.

Furthermore, Defendant respectfully submits that the decision of the Court in this matter was not supported by the evidence and was contrary to law. The Court made no finding of changed circumstances which is a precondition to modifying a Divorce Decree. It is well settled that before a Divorce Decree can be modified to change custody, a showing of "substantial material" change of circumstances must be made. In the absence of such a showing the Utah Supreme Court has held a petition to modify custody must be dismissed. Hogge v. Hogge 649 P.2d 51 (Utah 1982), and Lord v. Shaw 682 P.2d 853 (Utah 1987).

Furthermore, the Court erred in not setting forth particularized findings as to why it would be in the best interests of the minor children herein to change custody from Defendant's care to the Plaintiff where they have resided with the Defendant for over two years since the Divorce and are bonded to him very strongly. The requirement for a Court to specify the best interest of the child in the Findings and Conclusions of Law as set forth in the following case. Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982) and most recently Smith v. Smith, 43 Ut. Adv. Rpt. 5 (No. 20419, filed 9-30-86).

Additionally, Defendant has moved this Court to stay the Judgment transferring custody of the minor children from Defendant's care to Plaintiff. In suppport of this second request for a stay, Defendant submits that the Court has erred in not directing the Division of Family Services to conduct an evaluation; by not requiring Plaintiff to show a change of circumstances before modifying a Decree of Divorce; and by not finding that it would be in the best interest of the minor children to have custody changed. Unless a stay of the judgment transferring custody is granted, the children may suffer irreparable injury in the event this Court's ruling is overturned on appeal and custody is returned to the Defendant. The minor children have resided with the Defendant since August of 1985, and have a stable, secure home with the Defendant to whom they are closely bonded, and it would be very disruptive to them to change schools and be uprooted from their neighborhood and friends at this time. Plaintiff will suffer no prejudice from a stay of the Court's ruling as she has exercised visitation with the minor children since the divorce.

Defendant specifically requests the Court to alter it's Judgment as regards Paragraph Number 8 of the Ruling where the Court states Defendant said to Plaintiff "you better get your boys back". Defendant's Affidavit is attached hereto which specifically denies making this statement or that it was not taken in the appropriate context.

These Motions are based upon the pleadings on file, the testimony introduced at trial and the Affidavit of Defendant submitted herewith.

DATED this 8 day of February, 1988.

SUZANNE MARELIUS
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing to Attorney for the Plaintiff, Mr. Clark B. Allred, NIELSEN & SENIOR, 363 East Main Street, Vernal, Utah, 84078, postage prepaid this 8 day of February, 1988.

25471

SUZANNE MARELIUS - 2081
Attorney for Defendant
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

--------ooOoo--------

VICKEY L. BAKE now known VICKEY L. ADDERLEY, Plaintiff, v. NEAL F. BAKE, Defendant.	AFFIDAVIT OF NEAL F. BAKE Civil No. 85-CV-137D (Judge Dennis Draney)

--------ooOoo--------

COMES NOW Neal F. Bake who upon his oath deposes and says:

1. I am the Defendant in the above-captioned matter and was given custody of my sons when I was divorced from Plaintiff in August of 1985.

2. Plaintiff's petition to modify the Decree of Divorce and obtain custody was tried on January 19 and 21, 1988. At that time the Court ruled that the Plaintiff should have custody of our sons Nathan H. Bake, age 13 and Kyle Bake, age 11.

3. My sons have lived with me ever since the divorce in August 1985, and the Plaintiff has had visitation. The divorce was settled by a Stipulation between myself and the Plaintiff

where she agreed that I should have custody. That Decree also states that if the children change their mind and express a desire to live with the Plaintiff then custody will change.

4. Although I am aware that the children have expressed a desire at times, to live with the Plaintiff, I do not believe this is in their best interest and believe that a change of custody would be extremely detrimental to them. I believe that the main reason they have expressed a desire to live with the Plaintiff is because they have very little supervision when they are in her home and they do not have the maturity to make a reasoned decision on this matter.

5. The Plaintiff lives in a trailer in Roosevelt, Utah, located behind the "Wave Lounge" (formerly "ID Club"). Plaintiff's employment is as a waitress in the lounge. The Plaintiff works from 8:00 p.m. until 1:00 a.m., as does her husband who works from 4:00 p.m. until 1:00 a.m. in the bar. Thus, the children are without any supervision after 8:00 p.m. every night.

6. Since the Divorce two years ago the Plaintiff has moved at least four times and since the Divorce she has worked for Pizza Hut and at her present waitressing job. The Wave Lounge where Plaintiff works is in bankruptcy or foreclosure and it is thus likely that the employment of both Plaintiff and her husband there may soon end. It is thus reasonable to anticipate that the Plaintiff may again have to move or go out of state as she has

done before, and that I will have very little access to my sons if Plaintiff were to have custody. They will also have less stability than if they lived with me.

7. I also question the commitment which Plaintiff has to our sons as her visitation has been sporadic and there have been gaps of several months with no contact, not even a phone call or letter, although Plaintiff is entitled to visitation every weekend. A complete log has been kept of the Plaintiff's contact with our sons ever since the divorce which shows the following:

1987	January through May	there were two visits, three phone calls and one letter during this time.
1987	April	No contact.
1986	January through June	A total of five visits occurred one in February, one in March, one in May and two in June.
1986	April	No contact.
	July through December	A total of three visits occurred, two of which involved me taking the boys to visit the Plaintiff.
	September and November	No calls or visits.
	December	A card was received.
1985	September through December	A total of four visits plus Thanksgiving was spent with the Plaintiff.

8. During the two years I have had custody I have frequently facilitated visitation between the boys and the Plaintiff

by driving them to Roosevelt, Utah, from my home in Sandy. I have always resided at the same location and Plaintiff has always had my address and phone number. There have also been several occasions where visitation has been scheduled and either cancelled by the Plaintiff or forgotten by her.

9. In addition, I am extremely concerned about the care Kyle and Nathan have received while with the Plaintiff. The following are some examples of her poor care of the boys while in her custody.

December 29, 1985: The boys were returned to my home at 10:00 a.m., without having had breakfast;

June 27, 1986: I picked up the boys from Plaintiff at 7:00 p.m. and they had not been fed dinner; in fact, they are usually never fed when I picked them up at 7:00 p.m.

August 1987: During visitation my youngest son was allowed to play with a knife and cut himself and was required to have stitches.

My son Kyle has asthma which normally does not affect him unless under emotional strees. The only episodes of asthma attacks he has had since the divorce have been while in Plaintiff's care. Most recently, this occurred while Kyle was with Plaintiff on December 30 and he was hospitalized. Additionally, the Plaintiff did not, inform me of this hospitalization and I fear she will continue to hide information concerning my son's welfare if she has custody.

10. My nephew Steven, who is in Plaintiff's full time care has not had his needs adequately met. For example, he is

underweight in my opinion and there have been several referrals by the Division of Family Services regarding his neglect. Steven also has very bad teeth and Plaintiff has not given him adequate dental care. I am obviously extremely concerned about the quality of care that Nathan and Kyle would receive from the Plaintiff if custody were changed. Also, when mye boys have returned from visitation their behaviour is very different then when they are living with me, as they are more disobedient and unruly. I believe this is because they have little supervision when they are with Plaintiff, and no supervision after 8:00 p.m. at night and I know they are allowed to stay up as long as they wish.

11. The Court's ruling, at paragraph 8, quotes a statement which I do not believe I made, reporting that I said to the Plaintiff "you had better get your boys back". I have no recollection of making this statement and do not believe I did. Rather, I do recall telling Plaintiff that she should "straighten up her act" if she ever wanted to regain custody of the boys. At no time did I suggest to her that I did not want to be the caretaker for the boys, rather, I have discussed with her the problems concerning her lifestyle and care of the boys which I believe is harmful to them.

12. I have a very strong sense of family ties and have made the effort to keep the children in touch through visits and calls with the Plaintiff's parents. The Plaintiff, has not maintained ties with her parents or extended family. The Plaintiff

has also denied me visitation and telephone contact with my nephew Steven who is in Plaintiff's exclusive care. I had to obtain a Court Order to get rights to visit and call Steven. I fear that if Plaintiff were to have custody of Nathan and Kyle that Plaintiff would again deny me access to my sons and also deny the access of my family with whom she does not like, and may even move out of state as she has done in the past. I believe it would be quite detrimental to my sons to have their family relationships undermined in this way.

DATED this 8 day of February, 1988.

NEAL F. BAKE
Defendant

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

SUBSCRIBED AND SWORN to before me this 8th day of February, 1988.

NOTARY PUBLIC
Residing at: Ogden, Utah

My Commission Expires:
9-4-89

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