

1986

# James Z. Davis v. Penny A. Davis : Respondent's Brief

Utah Supreme Court

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## Recommended Citation

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BRIEF

UTAH

45.0

86-0134

IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES Z. DAVIS,

:

Plaintiff/Respondent,

:

v.

:

Case No. 86-0134

PENNY A. DAVIS,

:

Defendant/Appellant.

:

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RESPONDENT'S BRIEF

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Appeal from the Decree of Divorce of the  
Second District Court in and for Weber County  
The Honorable VeNoy Christofferson, Presiding by Designation

---

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FILED

OCT 8 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES Z. DAVIS, :  
Plaintiff/Respondent, :  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES Z. DAVIS, :  
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v. : Case No. 86-0134  
PENNY A. DAVIS, :  
Defendant/Appellant. :

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RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

In addition to the custody issues that Appellant has raised, Respondent presents the following issue on his cross appeal:

Did the trial court err in awarding permanent alimony in view of Appellant's substantial earnings and the substantial assets awarded to her in the property settlement?

NATURE OF THE CASE

This divorce case was originally presented to Judge Ronald O. Hyde of the Second Judicial District as a default matter. Both parties attended the default hearing and presented

evidence. A Decree of Divorce was granted by Judge Hyde, which was signed on August 11, 1984, and entered on August 13, 1984. (R. at 17-20.)

Thereafter, Defendant-Appellant Penny A. Davis (hereinafter "Mrs. Davis") filed a motion under Rule 60(b) of the Utah Rules of Civil Procedure, seeking to have that Decree set aside. (R. at 21-22.) Upon the motion of Appellant, Judge Hyde recused himself. (R. at 29-30.) The Honorable VeNoy Christoffersen (of the First Judicial District) was designated to hear the case. (R. at 177.) Following a two-day hearing, Judge Christoffersen ruled that, when she had agreed to the default divorce, Mrs. Davis was "not herself" (Tr. Vol. B at 365, R. at 1278)<sup>1</sup> and set the resulting Decree aside (R. at 467).

Further negotiations ensued between Mrs. Davis and Plaintiff-Respondent James Z. Davis (hereinafter "Mr. Davis"), leading to a stipulated modification of the property distribution. (R. at 481-83, reproduced infra at A-12 through A-14.) The remaining issues, principally of custody and alimony, were

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<sup>1</sup> The transcript in this case appears in five volumes. Volumes A and B relate to the Motion for Relief under Rule 60(b); Volumes I, II, and III relate to the trial of this action. For clarity, the transcript will be cited by volume number, Transcript-pagination page: line and Record pagination page (i.e., "Tr. Vol. B at 365:3-366:1, R. at 1278-79" refers to Volume B at line 3 on page 365 through line 1 on page 366, which is found at pages 1278 through 1279 of the Record).

submitted to Judge Christoffersen during a three-day trial. Judge Christoffersen ruled that Mr. Davis should be awarded custody and that Mrs. Davis should be awarded permanent alimony of \$750.00 per month. (See, Memorandum Decision, R. at 470-80.) The District Court denied Appellant's post-trial motions. (Memorandum Decision, R. at 574, and Order, R. at 577.) Dissatisfied, Mrs. Davis appeals the custody issue (R. at 580) and Mr. Davis cross-appeals from the alimony award (R. at 584-85).

#### STATEMENT OF FACTS

Upon graduation from law school in 1968, Mr. Davis served a tour of duty in Viet Nam. (Tr. Vol. I at 16, R. at 1297.) Shortly after his return to this country, he and Mrs. Davis were married on December 19, 1970. (Tr. Vol. A at 6, R. at 920.) The Davises had been introduced (Tr. Vol. A at 6, R. at 920) by now-Judge David Roth and his wife, Nancy, who is the sister of Mrs. Davis (Tr. Vol. A at 118, R. at 1031). The Roths and the Davises remained close friends, socializing frequently. (Id.) After the marriage, Mrs. Davis completed her undergraduate education and obtained a master's degree in education. (Tr. Vol. I at 20, R. at 1301.) Throughout the marriage, Mrs. Davis has pursued a career as an elementary school teacher (Tr. Vol. A at 6, R. at 920), a profession at which she had, by the time of the trial, achieved

15 years' experience (Id.) and enjoyed substantial professional recognition (Tr. Vol. III at 635, R. at 1846). Mr. Davis has practiced law in the Ogden area throughout the marriage and also enjoys professional distinction, including service as a Bar commissioner (Tr. Vol. B at 314, R. at 1227).

Like most married couples, however, the Davises experienced their frustrations as well as their successes. There were religious differences between the parties, Mr. Davis following the Episcopalian faith (Tr. Vol. I at 88, R. at 1369), while Mrs. Davis considered herself a member of the LDS church (Tr. Vol. A at 12, R. at 926). Early in the marriage, Mrs. Davis battled unsuccessfully a propensity to obesity. (Tr. Vol. I at 27, R. at 1308.) She had gained 170 pounds by 1975 (Tr. Vol. A at 9, R. at 923), when she underwent "stomach staple" surgery (Tr. Vol. I at 27, R. at 1308).

On February 28, 1982, a son, James Z. Davis III, was born. He is known as "J.Z." and is now almost five years of age. Mrs. Davis returned to work soon after the birth (Tr. Vol. I at 20, R. at 1301) and also continued to work during the summers through 1983 (Tr. Vol. I at 21, R. at 1302.) Following the birth of their son, the parties shared in the chores and responsibilities of maintaining the household, with Mr. Davis often preparing the meals (Tr. Vol. III at 598, R. at 1810). When J.Z. was six

months old, the Davises hired a neighbor, Melisse Dee, as a nanny/babysitter for him (Tr. Vol. I at 21, R. at 1302.) A very close, affectionate, and supportive relationship developed between J.Z. and Melisse Dee. (Tr. Vol. I at 22, R. at 1301.)

Unfortunately, Mrs. Davis felt uncomfortable in her role as mother. She was unusually frustrated and irritated when J. Z. did typical toddler things. (Tr. Vol. A at 86, 125-26, 133, and 164, R. at 999, 1038-39, 1046, and 1077.) She would become frustrated and agitated, sometimes to the point of shaking J.Z., when he would manifest reluctance to eat. (Tr. Vol. I at 165, R. at 1446.) She was quite often angry with J.Z. and appeared to be exasperated and frustrated with him as a child (Tr. Vol. A at 125, R. at 1048), sometimes expressing her opinion of him in negative ways (Tr. Vol. A at 126, R. at 1039). Not surprisingly, J.Z. appeared at times frightened of his mother. (Id.)

During the summer of 1984, Mrs. Davis also became discontent and frustrated with her marriage. (Tr. Vol. A at 119, R. at 1032.) She began attending an aerobics class on an almost daily basis (Tr. Vol. B at 268, R. at 1181) and developed an attachment to or infatuation with a flirtatious male classmate (Tr. Vol. A at 90, R. at 1003). Early in the summer of 1984,



at a gathering of the Roths and the Davises, Mrs. Davis expressed her desire for a change of lifestyle, noting that she wanted to live "the single life" and admitting that she had a "romantic involvement" with a fellow member of her aerobics class. (Tr. Vol. B at 269, R. at 1182.) She went so far as to comment that it was her desire to "date" every man in town. (Tr. Vol. A at 85, R. at 998.) She stated that she desired a formal separation from Mr. Davis (Tr. Vol. B at 272, R. at 1185) but he made it clear that he considered, particularly in view of her reasons for desiring it, a separation to be "absolutely out of the question" (Id.) although he later agreed to go ahead on the basis of a divorce (Tr. Vol. B at 273, R. at 1186).

Mr. Davis strongly encouraged Mrs. Davis to obtain counseling concerning her feelings of frustration with their marriage and their son. (Tr. Vol. B at 276, R. at 1189.) Mrs. Davis did see her gynecologist, Dr. MacMasters (Tr. Vol. A at 13, R. at 927), who referred her to Dr. Imus, an Ogden psychiatrist (Tr. Vol. A at 16, R. at 930). Mrs. Davis felt that Dr. Imus was "awful" and failed to keep her second appointment. (Tr. Vol. A at 17, R. at 931.) Apparently recognizing her need for assistance (Tr. Vol. A at 13, R. at 927) but having an extremely negative opinion of psychiatrists (Tr. Vol. A at 16 and 18, R. at 930 and 932), Mrs. Davis consulted another gynecologist, Dr. Byron Naisbitt (Tr. Vol. A at 21, R. at 935). However, when she went to Dr. Naisbitt's office on her first visit,

she behaved, in her own words, "like a perfect fool" (Id.). Although he referred her to another psychiatrist, she did not follow through despite Mr. Davis's continued urging (Tr. Vol. A at 22, R. at 936).

During the summer, Mrs. Davis spent several weeks with her sister in New Hampshire (Tr. Vol. III at 581, R. at 1793) and upon her return Mr. Davis also took a short vacation trip on his own (Tr. Vol. B at 282-83, R. at 1195-96). Almost immediately upon his return from that trip, and while Mr. Davis was still unpacking his belongings from the trip, Mrs. Davis informed him that there was "no hope" for their marriage and that she had decided that the marriage was over and that she was not going to make any further effort to keep it together. (Tr. Vol. B at 284, R. at 1197.)

At trial, Mrs. Davis admitted that, in the discussions that followed between the parties, Mr. Davis had suggested she make a list of the material assets she wanted out of the divorce. (Tr. Vol. A at 62, R. at 975.) It was a foregone conclusion from the beginning that Mr. Davis would have custody of J.Z. (Tr. Vol. A at 63 and 133, R. at 976 and 1046, and Tr. Vol. B at 279 and 286, R. at 1192 and 1199.) Mrs. Davis, who has always had a "real independent streak" (Tr. Vol. B at 291, R. at 1204), did not want any alimony, feeling that her income from

her teaching would be sufficient (Tr. Vol. A at 97-98, R. at 1010-11). Nevertheless, the parties agreed that she receive \$500.00 per month for ten years as alimony. (Decree, R. at 19.) Mr. Davis told her that she was probably legally entitled to half of their accumulated assets (Tr. Vol. B at 288, R. at 1201) and she admitted at trial that Mr. Davis had told her she was probably entitled to more than she was receiving (Tr. Vol. A at 29 and 97, R. at 943 and 1010, and Tr. Vol. B at 290-91, R. at 1203-04). Similarly, she acknowledged at trial that she had told him, based upon her production of income during the marriage, she felt what she was to receive was appropriate (Tr. Vol. A at 97, R. at 1010) and acknowledged that she considered not taking even that much (Tr. Vol. A at 97-98, R. at 1010-11). Nancy Roth encouraged her to take "all she could get." (Tr. Vol. A at 157, R. at 1070.)

The parties and witnesses testified at trial without contradiction that Mrs. Davis was anxious to have the divorce completed as rapidly as possible because she feared that her parents, who were at that time out of the country, would try to talk her out of the divorce upon their return. (Tr. Vol. A at 133 and 165, R. at 1046 and 1078, and Tr. Vol. B at 293, R. at 1206.) Mrs. Davis requested both Mr. Davis and her friends (Tr. Vol. A at 132, R. at 1045, and Tr. Vol. B at 300, R. at 1213) not to mention the impending divorce to her father, who was the United States

Ambassador to Norway and expected to return in the early fall (Tr. Vol. B at 292, R. at 1205).<sup>2</sup>

The Davises agreed that custody of J.Z. would remain with Mr. Davis and that Mrs. Davis would receive any items of personal property that she wished to include on a list and that she would receive a cash property settlement of \$50,000.00. Mr. Davis suggested that Brian Florence, an Ogden attorney, prepare the necessary legal documents. (Tr. Vol. A at 66, R. at 979.) Mr. Florence recommended that, because of the parties' prominence in the community and the propensity of the clerks in the District Court to spread gossip, the financial details of the proposed Decree be embodied in a separate agreement not part of the public file. (Tr. Vol. B at 204-05, R. at 1117-18.) Based upon conversations with Mr. Davis (Tr. Vol. B at 201-02, R. at 1114-15) and asset distribution forms that had been completed jointly by Mr. and Mrs. Davis (Tr. Vol. B at 293, R. at 1206), Mr. Florence pre-

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<sup>2</sup> In the light of subsequent events, it is apparent that these fears were not without basis in reality. Immediately upon his return to this country, Ambassador Austad commented that his daughter "should be killed for giving up her child" (Tr. Vol. I at 142, R. at 1423) and expressed his opinion that no child should, under any circumstances, be raised by its father (Tr. Vol. I at 144, R. at 1425). And, within weeks of his return, Mrs. Davis had decided that she was not satisfied with the custody, property, and alimony provisions of the Decree to which she had stipulated, and moved to have them set aside (R. at 21-22.)

pared the usual papers for a default Divorce. Mr. Davis presented these to Mrs. Davis for review and signing. (Tr. Vol. A at 68, R. at 981.) Mr. Davis encouraged her to read the documents and make sure she understood them (Tr. Vol. A at 68, R. at 981), but Mrs. Davis testified at trial that she does not like to read documents (Tr. Vol. A at 71, R. at 984) and that she had signed them without reading them (Tr. Vol. A at 68, R. at 981), although she acknowledged that Mr. Davis had offered her that opportunity (Tr. Vol. A at 83, R. at 996).

Recognizing both Mrs. Davis's desire to proceed as expeditiously as possible with the divorce (Tr. Vol. A at 160 and 164, R. at 1073 and 1077, and Tr. Vol. B at 292-93 and 300, R. at 1205-06 and 1213) and personal animosities existing between himself and Judge Wahlquist (Tr. Vol. B at 210, R. at 1123), Mr. Florence consulted with Judge Roth about the appropriate judge to hear the matter (Tr. Vol. B at 211, R. at 1124). Since Judge Roth was the brother-in-law of Mrs. Davis, he could not hear the case and suggested that Judge Hyde, although on vacation, might be willing to do so (Tr. Vol. V at 209, R. at 1122). Mr. Florence had difficulty making contact with the vacationing Judge Hyde (Tr. Vol. B at 214, R. at 1127), and so as an accomodation, Judge Roth arranged for the parties, Mr. Florence, and a court reporter to meet at Judge Hyde's residence the following morning, Saturday, August 11, 1984.

(Tr. Vol. A at 157, R. at 1070.) Judge Roth also made it possible for Mr. Florence to file the divorce Complaint and immediately withdraw it from the clerk's office so that it would be available for Judge Hyde at the hearing. (Tr. Vol. B at 212, R. at 1125.)

Both of the Davises appeared with Mr. Florence before Judge Hyde at his residence. Mr. Florence made clear to Judge Hyde both that his role was only as draftsman of the pleadings and not as counsel for Mrs. Davis (Tr. Vol. A at 143, R. at 1056) and that the specific terms of the property distribution were embodied in a separate document that was not to become part of the public record (R. at 88). Judge Hyde questioned both parties on the record (R. at 85-92) and both parties acknowledged their agreement with the terms of the proposed default Decree and encouraged the Court to waive the applicable interlocutory periods (R. at 91), which the Court did (Id. and Decree, R. at 18). The file, which Mr. Florence had withdrawn from the clerk's office the previous day, was left in the custody of the court reporter at the direction of Judge Hyde. (Tr. Vol. B at 222, R. at 1135.) Following the hearing before Judge Hyde, Mrs. Davis thanked Mr. Florence for his efforts in expediting the divorce (Tr. Vol. B at 215, R. at 1128) and later sent him a case of rum

and a card expressing her appreciation (Tr. Vol. B at 216, R. at 1129, see also Exhibit 7-P, received Tr. Vol. B at 216, R. at 1129, reproduced infra at A-58).

Since the summer of 1984, J.Z. has been in the custody of his father except for periods of visitation with Mrs. Davis. (Tr. Vol. I at 34, R. at 1315.) During that time, a warm, loving, and supportive relationship has developed and J.Z. is firmly "bonded" to his father (Tr. Vol. II at 267, R. at 1523). J.Z. enjoys the opportunity of sharing many and divergent activities with Mr. Davis, who spends all of his evenings and weekends at home with his son. (Tr. Vol. II at 451, R. at 1707.) As noted at trial by Judge Roth, Mr. Davis is a "friendly sort of person" (Tr. Vol. A at 126, R. at 1049), who relates to kids in a relaxed, friendly way (Tr. Vol. A at 127, R. at 1040). Typically, in the mornings before going to work, Mr. Davis and J.Z. watch educational programs on television (e.g., "Electric Company" and "Sesame Street") (Tr. Vol. I at 36, R. at 1317) and then get dressed for the day's activities. J.Z.'s nanny/babysitter, Melisse Dee, comes to Mr. Davis's home to stay with J.Z. during the day. (Id.) Before leaving for work, Mr. Davis briefs her as to what he and J.Z. have done that morning and any special instructions about J.Z.'s condition. (Id.) When Mr. Davis returns home from work, J.Z. greets him eagerly (Tr. Vol. II at 375, R. at 1631) and he is briefed by Melisse Dee

as to what she and J.Z. have done during the day (Tr. Vol. I at 37, R. at 1318). Mr. Davis, often with J.Z.'s "help," prepares and shares the evening meal with J.Z. (Id.) They then engage in various activities, depending upon the weather, including outdoor sports, hikes, snow shoveling, skiing, sleigh rides, and indoor games.

In support of her Rule 60(b) motion to set aside the default divorce, Mrs. Davis testified she had been very depressed during the summer of 1984. (Tr. Vol. A at 13, R. at 927.) She also presented the testimony of her psychiatrist, Dr. Clarke Summers. (See generally, Tr. Vol. A at 31, R. at 945 through Tr. Vol. A at 60, R. at 973.) Dr. Summers testified that he had first seen Mrs. Davis in September of 1984 at the request of her ex-husband, Mr. Davis. (Tr. Vol. A at 32, R. at 946.) On her second visit, Dr. Summers had admitted Mrs. Davis to the psychiatric ward of McKay-Dee Hospital because of "suicidal ideation." (Tr. Vol. A at 33-34, R. at 947-948.) He diagnosed Mrs. Davis as being, at that time, severely depressed (Tr. Vol. A at 36, R. at 940), but he testified that she was not psychotic and that she knew and understood that she had been divorced and voluntarily given up custody of her child (Tr. Vol. A at 56, R. at 969). He also testified that Mrs. Davis



acknowledged to him that it was she who had initiated the divorce. (Tr. Vol. A at 42 and 167, R. at 956 and 1080.) Dr. Summers noted that Mrs. Davis had told him that she could not stand to be around Z. J.Z. (Tr. Vol. A at 42, R. at 956) and that she did not think she loved him (Tr. Vol. A at 46, R. at 959). He also testified that Mrs. Davis told him that she did not think she was capable of being a good mother and that she had negative feelings toward J.Z. (Tr. Vol. A at 49 , R. at 962.) Dr. Summers testified that Mrs. Davis a deep desire to look good in the eyes of her parents (Tr. Vol. A at 56, R. at 969) and that part of her stress was due to the fact that her parents were returning and she would have to discuss with them the fact that she had gotten divorced and voluntarily given up custody of J.Z. (Tr. Vol. A at 54-55, R. at 967-68).

At the time of the trial, Mrs. Davis was employed, as she had been for the past 15 years, as a schoolteacher. (Tr. Vol. A at 6, R. at 920.) She was earning \$2,290.00 per month. (Tr. Vol. III at 620-21, R. at 1831-32.) She had received \$50,000.00 in cash from the property settlement at the time of the original default divorce and received savings accounts totaling in excess of an additional \$114,000.00 by virtue of the subsequent property distribution agreement reached by the parties prior to the trial. (Stipulation, ¶3, R. at 482.) During the tax year immediately preceding the trial, Mr. Davis

had a gross income of approximately \$110,000.00 but was in a nearly 50 percent tax bracket. Mr. Davis also testified that during the current year he had been working less than he had been previously and that it was reasonable to anticipate that, rather than increasing, his compensation would be decreasing. (Tr. Vol. I at 109-11, R. at 1390-92.)

It is with these facts and circumstances that Judge Christoffersen was faced in entering the custody and alimony awards that are now on review to this Court.

#### **SUMMARY OF ARGUMENTS**

**POINT I:** The suggestion of the Appellant that the trial court erred in failing to use its custody award in a punitive manner is entirely without merit. It is the child's best interests that are controlling and this Court has never countenanced the use of a custody award as either a penalty or a reward to the parents. Moreover, the evidence in this case indicates that, due to Appellant's emotional and psychological condition at the time of the separation of the parties, custody of their child would have been placed with Mr. Davis in any event.

POINT II: The trial court was entirely correct in its decision to place custody of the child with his father. Appellant has a demonstrated history of severe emotional and psychological problems, which were found by the trial court to have prevented her from acting in her own best interests during the summer of 1984. The testimony of the experts at the trial indicated that, while she had made substantial steps toward recovery, that recovery was incomplete and her condition would be likely to have an adverse impact upon the child. Not a single witness testified that the best interests of the child would be served by placing him in the custody of the Appellant.

POINT III: The trial court did err, however, in awarding permanent alimony of \$750.00 per month to the Appellant. Such an award fails to take into account the Appellant's demonstrated substantial income and the very substantial cash property distributions that she had received. Permanent alimony of such a substantial amount was not appropriate under the circumstances.

## ARGUMENT

**POINT I: THERE IS NO MERIT IN APPELLANT'S CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO USE ITS CUSTODY AWARD TO PENALIZE RESPONDENT FOR HIS ALLEGED MISCONDUCT AND SUCH A CONTENTION IS DIAMETRICALLY CONTRARY TO UTAH LAW.**

As her principal point in this appeal, Appellant cavalierly suggests that Judge Christoffersen erred because he failed to use the custody award to penalize Mr. Davis for alleged conduct, in connection with the entry of the original default divorce, that Appellant claims was inappropriate. (App. Br. at 8-14.) Even assuming arguendo that Mr. Davis had engaged in conduct of a sufficiently culpable nature to warrant sanction, the award of custody would certainly not be the appropriate method. Any such suggestion is as contrary to the firmly established law of this state as it is distasteful.

**A. The contention is without support in law.**

This Court has long and firmly adhered to the unequivocal proposition that in determining child custody, it is the child's best interests that are controlling. Accordingly, the "rights" and interests of the parents are secondary. Any logical extension of the social policy underlying these decisions clearly indicates that any object of penalizing or rewarding either parent

has absolutely no place in a child custody determination. Any such concept is repugnant to the fundamental principles at issue.

In the present case, there is no basis in fact for the Appellant's charge that alleged misconduct by Mr. Davis affected in some manner the custody decision. However, in Mitchell v. Mitchell, 668 P.2d 561 (Utah 1983), this Court was faced by a child custody dispute in which the father's misconduct had substantially contributed to the circumstances ultimately found by the trial court to require that custody of a daughter be awarded to him. In that case, the father quite literally "kidnapped" his two daughters while he had them on temporary visitation. By this means, the father acquired physical custody of the daughters for a period of approximately one year, during which time he affirmatively embarked on a program designed to destroy their relationships with their mother and increase their attachment to him. On account of this conduct, the trial court found the father to be in contempt and sentenced him to serve a total of 22 days of jail and community service time. Ultimately, however, the trial court awarded custody of the older daughter to the father because, in part as a result of his conduct, her relationship with her mother was such that to have removed her from "her father's custody would probably have [had] dire consequences." 668 P.2d at 563.

On appeal to this Court, the mother contended that the trial court had erred in awarding custody of the older daughter to the father because the circumstances most justifying that custody award had been created by the father's deliberate, contemptuous misconduct. This Court, while noting that the father had "profited from an egregious act," rejected any notion that the custody award should be used to punish him and affirmed the trial court's award, noting that the trial court had "appropriately considered [the elder daughter's] strong attachment as a factor, among others, in its judgment as to her best interest." 668 P.2d 564 (emphasis added). Similarly, it is the best interests of the child that Judge Christoffersen correctly looked to in awarding custody of J.Z. to Mr. Davis in this case.

This Court has constantly emphasized that, in custody matters, it is the child's interests that are paramount. For example, in Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979), Chief Justice Crockett noted in his concurring opinion that:

[O]ur Court has ever and invariably stated its agreement with the quite universally recognized principle that in disputes over custody of children, consideration of their welfare should be given priority over the rights of disputing parents.

599 P.2d at 512 (footnote omitted). The cases supporting Justice

Crockett's observation are legion: Kallas v. Kallas, 614 P.2d 641 (Utah 1980) ("a court must, in a custody dispute, give the highest priority to the welfare of the child over the desires of either parent"); Walton v. Coffman, 110 Utah 1, 169 P.2d 97 (1946) ("all of our decisions recognize the general rule that the welfare of the child is controlling"); Henderson v. Henderson, 576 P.2d 1289 (Utah 1978) ("the best interests and welfare of the children is the controlling factor") (original emphasis); Tuckey v. Tuckey, 649 P.2d 88 (Utah 1982) ("custody should be determined by focusing on the children's welfare and best interests"); and Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982) ("in a controversy over custody, the paramount consideration is the best interest of the child").

In an effort to bolster her ill-conceived contention that child custody awards should be used vindictively, Appellant argues (App. Br. at 12-13) that support is found for the concept in Section 30-3-10 of the Utah Code. That section states:

Custody of children. . . . 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 . . . .

§30-3-10, Utah Code Annotated (1953 as amended). By placing emphasis on the conjunctive "and," Appellant seeks to imply a

difference between the best interests of the child, on the one hand, and the past conduct of the parties on the other hand. While the latter may be indicative of the former, there is no merit to the contention that the latter should be applied to the exclusion of the former.

This Court rejected a very similar contention by a mother disappointed at the award of custody to her former husband in Hyde v. Hyde, 22 Utah 2d 429, 454 P.2d 884 (1969). In that case, the trial court found that the best interests of the child required that the child be placed in the custody of the father because since the birth of the child, the mother had been in a state of anxiety, confusion, and emotional disturbance. The mother had also voluntarily left the child in the care of the father for an extended period of time. The mother appealed, relying upon the provisions of Section 30-3-10, the predecessor of the very section upon which Appellant now relies. In affirming the trial court's award of custody to the father, this Court held that the predecessor of Section 30-3-10 had no applicability to divorce actions and emphasized that "the welfare of the children is paramount." 454 P.2d at 885-86. While the statute has since been substantially amended and now applies by its terms to divorce actions, this Court's reluctance to read



into the statute any nebulous legislative intent not clearly appearing is well manifest by the Hyde decision. The statute does not support Appellant's novel contention that custody awards are to be entered for punitive purposes.

Similarly misplaced is Appellant's reliance (App. Br. at 12) upon this Court's decision in Jacobson v. Jacobson, 557 P.2d 156 (Utah 1976). Although the style of the case is perhaps mis-leading, the case was not a domestic relations matter and did not involve any custody concerns whatsoever; rather, it was a quiet title action to determine whether a deed absolute on its face should be construed as an equitable mortgage. By no stretch of the imagination can it be viewed as supporting Appellant's contention that the best interests of her young son should be subordinated for the purpose of penalizing his father. Equity cringes from such an abhorrent concept.

Judge Christoffersen's comments from the bench while taking the custody issues under consideration at the conclusion of the trial make clear that he soundly understood that it was the best interests of the child rather than the desires, "rights," or benefit of the parties themselves that was the determinative factor:

THE COURT: . . . . [A]s to the idea of custody being a benefit to anybody, whether it's through misconduct or otherwise, of course, is not the question of custody being a benefit to either parent. I'm sure they look upon it as a benefit, of course, to have custody, but to look at the custody question, you don't look as to who it benefits as far as the parent. You look to the child's interests rather than a benefit to either party.

I say that to clear up any misconceptions that either of you may have or that you feel I may have in connection with it.

. . . .

Tr. Vol. III at 704:10-20, R. at 1913. This comment makes clear that the trial judge completely understood the determinative test he was to apply.

**B. The contention is without support in fact.**

The facts of this case render inapplicable the Appellant's concept of punitive custody awards regardless of its legal validity. In August of 1984, Mrs. Davis voluntarily entered into a default divorce and voluntarily relinquished custody of her child. At that time, she was admittedly frustrated with J.Z. (Tr. Vol. III at 603, R. at 1815) and told friends and her

psychiatrist that she could not stand to be around him (Tr. Vol. A at 42, R. at 956). In November of 1984, she came before the District Court contending that in August of 1984 she was so emotionally disturbed and distraught that she did not know what she was doing and lacked the capacity to act in her own best interests. In September of 1985, in support of her motion to set aside the default Decree, she stood before Judge Christoffersen and testified that she was confused and did not know what she was doing in August of 1984 and presented the testimony of her psychiatrist, Dr. Clarke Summers, in support of that contention. (Tr. Vol. A at 30, R. at 944 through Tr. Vol. A at 60, R. at 973.) In November of 1985, Mrs. Davis called, as a witness in support of her efforts to obtain custody of J.Z., Dr. Donald Strassberg. Dr. Strassberg testified that, given the problems that Mrs. Davis was experiencing in the summer of 1984, her decision to allow someone else to have custody of J.Z. was an "appropriate one." (Tr. Vol. III at 548, R. at 1760.) The independent custody evaluator appointed by the Court, Kim Petersen, also firmly stated his opinion that J.Z. was better off in the custody of Mr. Davis at that time. (Tr. Vol. I at 169, R. at 1450.) Judge Christoffersen, in his ruling from the bench on the Rule 60(b) motion, specifically stated "I think that in her mental state [in

August of 1984] an appropriate decision was made probably as to custody . . . ." (Tr. Vol. B at 364:2-5, R. at 1277.)

Thus, even one of the clinical psychologists called by Mrs. Davis testified it was in J.Z.'s best interests that she had relinquished custody of him at the time of the original default divorce. The custody evaluator and trial judge agreed. Under such circumstances, even if one were to assume that Mr. Davis had obtained that default divorce and custody of J.Z. through some nefarious misconduct, there would be no point in penalizing him, since Mrs. Davis's own expert testified that her decision to relinquish custody of J.Z. had been "a good one." In other words, Mrs. Davis, by her own expert's testimony, was not deprived of custody that should otherwise have been awarded to her, nor were J.Z.'s best interests adversely affected. Accordingly, there is no more factual support for the application of Appellant's punitive custody concept in this case than there is legal support for the concept itself. In short, the trial court did not err in awarding custody of J.Z. to his father.

**POINT II: THE EVIDENCE ADDUCED AT TRIAL FIRMLY SUPPORTS THE TRIAL COURT'S CAREFULLY CONSIDERED CUSTODY AWARD.**

It is apparent from Appellant's Brief that Mrs. Davis is not pleased with Judge Christoffersen's custody award; however, the fact that one of the parties to a custody proceeding is dissatisfied with the trial court's ruling is indicative neither of the propriety nor of the merit of the ruling. Such remonstrances are not unusual in the aftermath of a custody trial, which is an inherently emotional and psychologically traumatic process.

**A. Appellant misstates the applicable standard.**

Appellant argues that the factors relied upon by the trial court in awarding custody to Mr. Davis "do not clearly indicate that the child's well being is best served by remaining in his father's custody." App. Br. at 14 (emphasis added). This language makes it sound as if the Appellant perceives that she is entitled to custody unless the evidence clearly preponderates in favor of the father. As the Appellant has noted in her letter of August 22, 1986, to the Clerk of this Court (infra at A-65), this Court's decision in Pusey v. Pusey, -- P.2d --, 40 Utah Adv. Rep. 3 (Utah 1986), has abolished any presumption (whether statutory, "natural," or otherwise) in favor of the

mother. Thus, the only test to be applied is the "best interests of the child." Since the court is merely determining between the two competing parents without the benefit of any presumption either way, a simple preponderance is the only applicable evidentiary standard. Accordingly, this caption of Appellant's second point of her Brief is, perhaps, tacit recognition of the fact that the Findings of Fact entered by Judge Christoffersen are supported by sufficient credible evidence.

**B. The standard of review.**

This Court very recently articulated the standard of review applicable to the custody issues in this case in its decision in Smith v. Smith, -- P.2d --, \_\_\_ Utah Adv. Rep. \_\_\_ (filed 9/30/86). In that custody case, this Court held:

Because the proper adjudication of custody matters "is highly dependent upon personal equations which the trial court is in an advantaged position to appraise," . . . this Court will not overturn a trial court's custody determination on appeal unless the evidence clearly shows that the custody determination was not in the best interests of the child or that the trial court misapplied applicable principles of law. . . .

-- P.2d at --, \_\_\_ Utah Adv. Rep. at \_\_\_, slip op. at 3 (citations omitted). Similar expressions of the applicable standard of review may be found in Shioji v. Shioji, 712 P.2d 197 (Utah

1985); Cox v. Cox, 532 P.2d 994 (Utah 1975); and, with respect to divorce actions generally, Wiese v. Wiese, 699 P.2d 700 (Utah 1985).

In order to prevail in this appeal on the custody issue, the Appellant must convince this Court that the evidence adduced at the trial "clearly shows" that the custody determination was not in the best interests of the child. This is a burden that the Appellant simply cannot carry.

**C. The evidence firmly supports the award of custody to Mr. Davis.**

The trial court appointed Kim Petersen to make an independent custody evaluation. (Tr. Vol. I at 159, R. at 1440.) The parties had stipulated that Kim Petersen was an appropriate individual to perform this evaluation. (R. at 270-71.) Kim Petersen had psychological evaluations of both parties performed by Dr. Ralph Gant (Tr. Vol. I at 160, R. at 1441), interviewed both parties (Tr. Vol. I at 163, R. at 1444), observed J.Z. in the custody of both parties (Id.), interviewed knowledgeable third parties (Tr. Vol. I at 165, R. at 1446), prepared a written evaluation that was filed with the court (R. at 403) and received as Exhibit 5-P (Tr. Vol. I at 160, R. at 1441), and appeared as a witness at trial. Holding a master's degree in social work from the University of Utah and employed in the inpatient psychiatric

unit at Primary Children's Medical Center, Kim Petersen had, by the time of trial, performed more than 300 custody evaluations. (Tr. Vol. I at 158-59, R. at 1439-40.) During interviews with Mrs. Davis, she admitted that she had become so frustrated with J.Z. that she had **shaken** him (Tr. Vol. I at 165, R. at 1446), and that she felt rejected by J.Z., felt she was failing him, and felt that she needed space from him (Id.). Kim Petersen formed the opinion that Mrs. Davis was a **perfectionist** and overly critical of herself, lacked confidence, and had a tendency to "give up." (Tr. Vol. I at 166-68, R. at 1447-49.) Most importantly, however, he felt that Mrs. Davis was "trying too hard" with J.Z. and smothering him, which he feared would create dependency problems in the child later in life. (Tr. Vol. I at 172, R. at 1453.) In short, he viewed the critical factor as being that Mrs. Davis's emotional problems had interfered, and would continue to interfere, with her relationship with J.Z. (Tr. Vol. I at 208, R. at 1489.)

On the other hand, it was Kim Petersen's professional opinion that J.Z. was "very bonded to his father" and that this bonding was more important than the bonding between J.Z. and his mother. (Tr. Vol. II at 267, R. at 1523.) He noted that there would be "potential damage if we [were to] break that bond and disrupt the living **arrangement** that exists." (Tr. Vol. II at 269, R. at 1525.) He further testified that a "very close and



warm loving relationship" existed between J.Z. and his father (Tr. Vol. I at 171, R. at 1452) and that J.Z. frequently climbs into his father's lap (Tr. Vol. I at 216, R. at 1497).

Kim Petersen concluded that, while when all things are equal he would prefer to place custody of a small child with its mother (Tr. Vol. I at 207, R. at 1488), it was his recommendation that J.Z. would be better off with Mr. Davis because they enjoyed a more stable relationship and there were "real problems in the relationship between the child and the mother." (Tr. Vol. I at 166, R. at 1447.) He characterized his recommendation that custody be placed with the father as being "quite strong." (Tr. Vol. I at 173, R. at 1454.)

The testimony given by Kim Petersen must be accorded special weight in this case because he was the only professional witness called who had an opportunity to evaluate or observe both parents and their relationship with J.Z. All of the other psychiatrists and psychologists called as witnesses by the parties had had the opportunity only to examine and evaluate their respective patient. They had had no opportunity to observe J.Z. or his relationship with the other parent. Under the circumstances, Kim Petersen was the only person in a position to compare the competing potential custody arrangements. Since it is the "best interests of the child" that are of controlling

importance, the trial court had to determine in whose custody J.Z. would do best. The trial court's task was not merely to determine whether the parents were capable of adequately caring for J.Z., he had to determine which parent could best care for J.Z.

The trial court was guided in this case not only by the professional opinions of the expert witnesses, but by the observations of the lay witnesses. Judge David Roth testified of the "comfortable," "warm and friendly" relationship that existed between J.Z. and his father (Tr. Vol. A at 126, R. at 1039) and the large amount of time that Mr. Davis and J.Z. spent together (Tr. Vol. II at 451, R. at 1707). Judge Roth explained that Mr. Davis related to kids in a "relaxed, friendly way" and that Mr. Davis was a very stable person (Tr. Vol. A at 126-27, R. at 1039-40) and noted that J.Z. and his father spent a good deal of time skiing (Tr. Vol. II at 452, R. at 1708). Mr. Davis testified to the specific things that he and J.Z. do together (Tr. Vol. I at 36-47, R. at 1317-28), including that he involves J.Z. in daily tasks by allowing him to "help" (Tr. Vol. I at 37, R. at 1318).

Mr. Davis's mother, Blossom Davis, testified that J.Z. has his own little snow shovel and "helps" Jim shovel the driveway and that they enjoy a "great bond" of affection. (Tr. Vol. II at 297-98, R. at 1553-54.) Melisse Dee, J.Z.'s

nanny/babysitter, testified of her observations of "a very loving and caring relationship" between J.Z. and his father, noting that they are "pals" and "friends" and that they constantly discuss "anything and everything." (Tr. Vol. II at 375, R. at 1631.) Dr. William McVaugh, a child psychologist retained by Mr. Davis to provide counseling and guidance to him and J.Z., noted the "normal, positive, father-son relationship" that exists and was impressed that J.Z. functions well independently and at the same time is eager to ask questions of Mr. Davis. (Tr. Vol. II at 381, R. at 1637.)

The quality of this relationship is in stark contrast to the frustration and desire for "space" admittedly manifest by Mrs. Davis. While it is not questioned that she "adores" "her baby" (Tr. Vol. II at 272, R. at 1528), it must be noted that not a single witness -- including the experts hired by Mrs. Davis -- testified that J.Z. would be better off in her care: They merely indicated that she would be "an adequate" parent (e.g., Tr. Vol. III at 509, R. at 1721). In response to a leading question by Mrs. Davis's own counsel, her psychiatrist candidly stated that he was not willing to testify that "in no way will her problems affect her future handling of J.Z. or her own life." (Tr. Vol. III at 578, R. at 1790.) Similarly, Dr. Strassberg, a witness called by Mrs. Davis, acknowledged both

her tendency to "over-mother" J.Z. and his concern about that tendency. (Tr. Vol. III at 513 and 549, R. at 1725 and 1761.)

The trial court was also undoubtedly impressed by the fact that, while the testimony presented by Mr. Davis and his witnesses centered around the best interests of J.Z., Mrs. Davis was concerned about her "rights to be with him and see him" (Tr. Vol. A at 95, R. at 1008). Mrs. Davis's treating psychiatrist, Dr. Clarke Summers, testified that he thought that Mrs. Davis wanted custody of J.Z. because "it is her son and she cares for this child and she wants to raise the child." (Tr. Vol. III at 560, R. at 1772.) Even Mrs. Davis's testimony elicited by her own counsel indicates a confusion between her desires and happiness and her son's best interests:

ANSWER: . . . .

I would never have denied visitation as  
I have been denied.<sup>3</sup>

QUESTION: So you think it's very important  
that the parents remain flexible  
about sharing the child?

ANSWER: Absolutely.

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<sup>3</sup> The Record is devoid of any evidence that Mr. Davis inappropriately impeded visitation or failed in any way to comply with the visitation provisions of the temporary custody order. This was not an issue before the trial court.

QUESTION: So even if the Court puts you on a visitation schedule, it would be your intent to be flexible about making the child available to Jim?

ANSWER: Yes . . . .

Tr. Vol. III at 610:3-11, R. at 1821 (emphasis added). She also acknowledged telling Kim Petersen that "I've had [J.Z.] now for two months and we've had a wonderful time, I've had a wonderful summer, I just can't stand it to end . . . ."

(Tr. Vol. III at 614:12-15, R. at 1825.) Such comments, while clearly indicative of the mother's very understandable own, personal feelings, are clearly not related to the child's best interests.

In her Brief, Appellant expresses a lack of understanding as to why the fact she is still recovering from what she herself described to the Court as severe emotional problems would be relevant to the inquiry as to J.Z.'s best interests. Actually, there was a wealth of testimony on this issue by the experts who testified at trial. Kim Petersen noted that while Mrs. Davis had made improvements, he continued to see her as fragile with the "possibility of re-emergence" of her past problems (Tr. Vol. I at 167, R. at 1448), and noted that if she were to have custody of J.Z., he feared that the stress of her life situation would be introduced into her relationship with J.Z. (Tr. Vol. I at 171, R. at 1452). Dr. Ralph Gant, who had done a

psychological evaluation of Mrs. Davis at Kim Petersen's request, noted that depression in Mrs. Davis's case had been a long term process (Tr. Vol. II at 335, R. at 1591), that there was a concern that various pressures and stresses would cause a recurrence (Tr. Vol. II at 312, R. at 1568), and that Mr. Davis was the more stable of the parents (Tr. Vol. II at 316, R. at 1572).

The most significant testimony, however, came from Dr. William McVaugh, J.Z.'s child psychologist. He testified that the scientific studies indicate that, of all the factors that can have an impact on children, the emotional stability of the parent is the single most important. (Tr. Vol. II at 384, R. at 1640.) Thus, the emotional stability of the custodial parent is perhaps the single most important factor to be considered. In the case of Mrs. Davis, that emotional stability was lacking or at the very least questionable because of the fact that she was in this process of "reconstruction" as it was characterized by the District Court.

Mrs. Davis's own treating psychiatrist, Dr. Clarke Summers, testified that Mrs. Davis had previously been suffering from a "major depression" and that it was so profound that it even affected her with suicidal ideation in September of 1984. (Tr. Vol. III at 564, R. at 1776.) He noted that people who have been depressed in the past have a greater chance of being

depressed in the future. (Tr. Vol. III at 561, R. at 1773.) He also noted that Mrs. Davis's depression was of long duration and that her continuing problems of a lack of self confidence are also long-term problems that have existed in her life for a long period of time. (Tr. Vol. III at 567 and 571, R. at 1779 and 1783.) As noted earlier (supra at 32), Dr. Summers candidly admitted that he could not testify that "in no way would her problems affect her future handling of J.Z. . . . ." (Tr. Vol. III at 578, R. at 1790.) In view of the immense importance knowledgeable professionals place upon the emotional stability of the custodial parent, it is certainly not unusual or unreasonable -- but rather it is entirely appropriate -- that Judge Christoffersen placed emphasis upon Mrs. Davis's unfortunate previous psychological and emotional problems.

Similarly, there is a great deal of evidentiary support in the Record for the concern placed by the trial court upon the maintenance of environmental stability in J.Z.'s life by not, absent good reason, changing his custody. J.Z. had lived with Mr. Davis all of his life and, except for periods of visitation, with him exclusively since the summer of 1984. Kim Petersen noted the "potential damage" if the strong bonds that had developed between Mr. Davis and J.Z. were broken and the living arrangement disrupted. (Tr. Vol. II at 269, R. at 1525.) Dr. McVaugh testified that a change in living circumstances

intensifies the feelings of abandonment invariably experienced by children involved in divorce situations (Tr. Vol. II at 383, R. at 1639), and emphasized that for all children of a young age there is an importance in constancy of the home environment both because they do not have the logical skills to understand the reasons for and implications of being moved about and because they rely heavily on routine and normal schedules in order to feel secure (Tr. Vol. II at 87, R. at 1643).

Recent decisions of this Court have likewise recognized the importance both of environmental stability and of giving due consideration to leaving the child in the custody of that parent with whom the child has resided during the pendency of the action. (See, e.g., Pusey v. Pusey, -- P.2d --, 40 Utah Adv. Rep. 3,4 (Utah 1986) ("custody factors should include . . . the identity of the parent with whom the child has spend most of his or her time pending custody determination if that period has been lengthy [and a]nother important factor should be the stability of the environment provided by each parent").)

The Memorandum Decision (R. at 470, infra at A-2), and the Findings of Fact (R. at 488, infra at A-15) entered by the District Court make clear that Judge Christoffersen considered the appropriate factors and properly applied them in this case. Inter alia, the District Court specifically noted and considered



the child's special needs, the relative strength of the child's bond with his parents, the interest to be served by continuing the temporary custody arrangement, the capacity and demonstrated willingness of the respective parents to function as parents, their moral character and emotional stability, the depth of their desire for custody, their actual ability to provide appropriate care, the availability of surrogate child care, and the reasons for having released custody in the past. (Id.) These are all appropriate considerations under the facts of this case. The District Court went on to make findings concerning Mrs. Davis's admitted psychological and emotional conditions in the past and her undisputed partial recovery at the time of trial.

Mrs. Davis cannot complain that the District Court found that her mental stability was compromised during 1984, after all she had prevailed in her motion to set aside the default Decree on just that basis. She cannot complain that the District Court found that her recovery was not yet complete, for her own psychiatrist so testified. How then can she complain that the trial court found that she "still is in a period of reconstruction?"

The District Court went on to find that J.Z. was well adjusted, happy, and having no problems in his present circumstances (Findings, ¶6, R. at 495, infra at A-19-20), a finding that was entirely appropriate since there was absolutely no

evidence to the contrary and both parties testified to this fact. Judge Christoffersen found that there would be "some detriment" in changing his present living environment (Id.), a finding supported by the testimony of several qualified experts at the trial and refuted by none.

Given the fact that the question the District Court had to determine was not whether Mrs. Davis was capable of caring for J.Z. but was instead whether it was Mrs. Davis or Mr. Davis who was most capable and best able to care for J.Z. and in whose care J.Z. would do best, how can it be said that the trial court erred in determining that Mr. Davis should have custody? No witness produced by either party had anything negative to say about Mr. Davis's ability to care for his son or the environment that he provided for his son. Unfortunately, all the witnesses, including Mrs. Davis herself, were in agreement that in 1984 she had had a "major" depression that the District Court had earlier found, at her own instigation, had rendered her unable to look out not only for J.Z.'s best interests, but in fact for her own. All witnesses were in agreement that she was in the process of recovery but that her recovery was not complete. Even her own psychiatrist so testified. Under such circumstances, Judge Christoffersen made the most appropriate custody determination possible: custody of J.Z. was awarded to his father.

**POINT III: THE TRIAL COURT ERRED IN AWARDING PERMANENT ALIMONY.**

Apparently based upon the trial court's perception that Mr. Davis was making more money than Mrs. Davis, the trial court awarded permanent alimony of \$750.00 per month. In view of the fact that Mrs. Davis was clearly able to support herself in a reasonable fashion without long-term, permanent alimony, such an award was erroneous and should be reversed.

While it is frequently said that alimony should be awarded in order to maintain the wife at the standard of living to which she has been accustomed during the marriage, the impropriety of the award of alimony to a spouse able to sustain herself without such an award was recognized and relied upon by this Court in Dehm v. Dehm, 545 P.2d 525 (Utah 1976). In that case, this Court reversed an order providing continued alimony to an ex-wife even though she was charged with the custody and care of twin girls who were severely mentally and physically retarded. This Court noted that the ex-wife, who had obtained both a bachelor's and a master's degree during the marriage, was gainfully employed with earnings of approximately \$1,000.00 per month, which was less than one-half of her ex-husband's income. In rejecting the ex-wife's contention that alimony was necessary in order to assist her in caring for the retarded daughters and saving for her retirement, this Court held:

[The] thrust of defendant's testimony is that she needs this alimony in order to augment her retirement income and to maintain the insurance policy for the two children. No claim is made that the alimony is needed for her support, nor could such a claim be made, in view of her present ability to support herself.

In a situation such as this, where the defendant is gainfully employed, making a salary sufficient to satisfy her needs, is adequately housed, and is in good health; one of the functions of alimony is not to provide retirement income. We do not want to confuse alimony with annuity.

. . . .

We conclude that to award alimony in these circumstances is neither necessary nor reasonable, and reverse that part of the trial court's order . . . .

545 P.2d at 529-29. Likewise in the present case, it is "neither necessary nor reasonable" to award permanent alimony to Mrs. Davis, a well educated, physically healthy young woman with a demonstrated ability to earn substantial income and with very substantial property assets capable of producing additional income.

In Carter v. Carter, 563 P.2d 177 (Utah 1977), this Court again recognized that an award of alimony is not justified merely because one spouse has substantial income. In so holding, this Court observed:

[The husband] is mistaken in his assumption that the amount of alimony payable should be correlated in percentage to his income, to be scaled up or down as his income may vary. His earning capacity and his income are, of course, important factors to be considered. But that is only part of the total circumstances to be considered as to what is appropriate and equitable. Another major one is what are plaintiff's needs and requirements. . . .

563 P.2d at 178 (footnote citations omitted). In the present case, Mrs. Davis's legitimate "needs and requirements" do not mandate a permanent alimony award. During the marriage, she has obtained her bachelor's degree and a master's degree in education. She is currently gainfully employed full time as a teacher. From the divorce, she has received a cash property settlement totaling approximately \$170,000.00. (See, infra at 44.) Even invested in federally insured accounts or "treasury bills," these amounts, when coupled with her demonstrated earnings from her employment, will provide a comfortable income with which to support herself.

Similarly, in English v. English, 565 P.2d 409 (Utah 1977), this Court substantially reduced an alimony award entered by the trial court on the basis that the wife had failed to demonstrate the need for a greater amount. In so holding, this Court expressly stated that the trial court had erred in failing to consider the spouse's earning potential and actual need for support:

In the matter under consideration, [the wife] testified she was paid \$45 per day by [her employer], for her work as a home economist. She worked, by choice, approximately 60 days per year. The record does not indicate the court considered either [the wife's] actual or potential earning ability, in determining her alimony. There is no indication the potential rental income from the commercial property was considered in determining the alimony. In her testimony, [the wife] could only substantiate a need for support in the amount of \$1,500 per month for the entire family. She merely thought that she should receive the greater amounts.

565 P.2d at 412 (footnotes omitted, original emphasis). Again, this case underscores the error committed by the trial court in the present action in awarding permanent alimony in view of the totality of the circumstances of the parties.

The financial evidence received at the trial was essentially uncontradicted. Mr. Davis had received, during the tax year immediately preceding the trial, a gross income of approximately \$110,000.00 (Tr. Vol. I at 122, R. at 1403) and he was in a nearly 50 percent tax bracket. Mr. Davis testified, however, that during the past year he had been working less than he had been previously and it was reasonable to anticipate that, rather than increasing, his compensation from his law firm would be decreasing. (Tr. Vol. I at 109-11, R. at 1390-92.)

On the other hand, Mrs. Davis, as she had been for the past 15 years, was employed as a schoolteacher. At the time of

the trial, she was earning at least \$2,290.00 per month on a 12-month contract (Tr. Vol. III at 620-21, R. at 1831-32) and, in addition, she had worked essentially every summer except during 1984 (Tr. Vol. I at 21, R. at 1302), which would result in additional income. Moreover, she had received \$50,000.00 from Mr. Davis at the time of the original default divorce, which would have accrued at least \$6,000.00 in interest by the time of the trial (Tr. Vol. III at 647, R. at 1858). In addition to this amount, Mrs. Davis received more than \$114,000.00 in savings accounts by virtue of the property distribution agreement reached by the parties prior to the trial in November of 1985 (Stipulation, ¶3, R. at 482).

At trial, Mrs. Davis acknowledged that her actual monthly living expenses during the two months surrounding the time of the trial, exclusive of litigation-related costs, were approximately \$1,200.00. (Tr. Vol. III at 650, R. at 1861.) Since she was not awarded custody of J.Z., was earning approximately \$2,300.00 per month as a teacher, and would additionally have the benefit either of reducing her indebtedness by expending a part of the approximately \$170,000.00 in cash property settlement that she had recovered or investing that money at interest, it is apparent Mrs. Davis is simply not in need of alimony for her support and certainly not long-term, permanent alimony.

While a short-term alimony award in a reduced amount might have been justifiable under the circumstances, a permanent alimony award in such a substantial amount was clearly an abuse of the trial court's discretion in view of Mrs. Davis's age, demonstrated earning capacity, and very substantial cash and in-kind property settlement. The permanent alimony ordered by Judge Christoffersen must be reversed.

#### CONCLUSION

The suggestion of the Appellant that the trial court erred in failing to use its custody award in a punitive manner is entirely without merit for two principal reasons. First, the punitive use of custody awards is wholly inappropriate and contrary to the fundamental policy unequivocally recognized in custody cases, which is the well being and best interests of the child. Second, the evidence in this case does not demonstrate any misconduct by Mr. Davis and, in any event, both Mrs. Davis's own expert and the expert doing the custody evaluation on behalf of the District Court both agreed that at the time Mrs. Davis relinquished custody, her emotional condition was such that it was in the child's best interests.

The trial court's decision to place the child in the custody of his father is entirely appropriate. In August of 1984, Mrs. Davis voluntarily relinquished custody of her son. In



September of that year she was placed temporarily in a psychiatric ward as a suicide-prevention measure. In November of 1984, she filed pleadings with the trial court seeking to be relieved of the default divorce to which she had agreed upon the basis that her emotional and psychological condition was such that she could not function in her own best interests. The professional witnesses called on her behalf at the trial a year later agreed that while she had improved, she was still in the process of recovering from these disturbances. All of the witnesses called at the trial agreed that Mr. Davis was an exemplary father and the only witness to evaluate the parenting capabilities of both of the parties recommended strongly that custody be placed with Mr. Davis. Faced with such evidence, the District Court clearly did not err in awarding custody of the child to Mr. Davis.

The trial court did err, however, in awarding permanent alimony of \$750.00 per month to Mrs. Davis. Such an award fails to recognize that, over a very substantial period of time, Mrs. Davis with a master's degree in education has a very substantial earning capacity and that, having received a cash property settlement totaling approximately \$170,000.00, she was in a position either to discharge all of her debts or earn substantial additional interest income. On the other hand, while Mr. Davis earned substantial income as an attorney, he is in a very high

tax bracket and has all of the expenses of caring and providing for the parties' son. Under such circumstances, permanent alimony of such a substantial amount was not appropriate.

The District Court's determination with respect to custody must be affirmed, but its award of permanent alimony must be reversed.

RESPECTFULLY SUBMITTED this 24 day of October, 1986.

DART, ADAMSON & PARKEN

By \_\_\_\_\_  
B. L. Dart

By \_\_\_\_\_  
John D. Parken

Counsel for Respondent

MAILING CERTIFICATE

I hereby certify that on the \_\_\_\_ day of October, 1986,  
I caused four (4) true and correct copies of the foregoing  
Respondent's Brief to be mailed, with postage prepaid, and  
addressed to:

Gordon L. Roberts  
T. Patrick Casey  
Parsons, Behle & Latimer  
185 South State Street, Suite 700  
P. O. Box 11898  
Salt Lake City, Utah 84147-0898

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## ADDENDUM

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IN THE SECOND JUDICIAL DISTRICT COURT, COUNTY OF WEBER  
STATE OF UTAH

-----  
JAMES Z. DAVIS,

Plaintiff

v.

PENNY A. DAVIS,

Defendant

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)

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)  
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MEMORANDUM DECISION

Civil No. 89675

This is a divorce case tried before the Court, both sides having rested, the Court now renders its decision.

Plaintiff is granted a judgment and decree of divorce from the defendant, the interlocutory period is waived, the decree to become final upon signing. The defendant is granted a judgment and decree of divorce from the plaintiff on her counterclaim, the interlocutory period to be waived and the decree to become final upon signing.

The parties stipulated as to a settlement of their property affairs and the Court adopts that settlement leaving questions for decision of child custody, visitation, support, alimony, and attorney's fees.

As to the question of custody, the Court looks as to such factors as the child's feelings or special needs, the preference of the child, relative strength of the child's bond with one or more of the prospective custodians, the general interest and continuing previously determined custody arrangements where the child is happy and well adjusted, capacity and willingness of the

parties to function as parents, their moral character and emotional stability, depth and desire for custody, their ability to provide appropriate child care, the question of surrogate care, reasons for having released custody in the past, and religious compatibility.

There was an original decree in August, 1984, and a subsequent 60(b) motion made by the defendant to set aside that judgment and decree. Hearing was held in September of 1985 and that judgment and decree was set aside hence this hearing now for the divorce.

A major factor, although not the only one was a psychological condition of the defendant at the time of the first divorce. There was a mental upset that existed at the time of separation and this divorce, an inability of the defendant to logically look toward her own interest. She, at that time, being in a state of mind where she was willing to do anything to get out of her situation, and agreed to many things to her disadvantage, this Court felt she would not otherwise do and that the plaintiff had notice of her mental upset and changed personality as he testified to this. Also, there was a question of the defendant's mental stability during the year of 1984. There has been subsequent testimony at this trial that the defendant has made extremely good recovery. But, according to her psychiatrist, Dr. Summers, she still is in a period of re-construction from her mental problems of 1984. There were a number of expert witnesses, social workers, psychologists, called to testify after they had given various tests to the parties. About the only thing they could concur

upon is that they felt both parents would be adequate parents for custody of the child and neither are unfit to give parental care. They did disagree as to the effect of psychological testing and the values to be assigned to the same in reaching their conclusions. There seemed to be no disagreement that the child had adjusted as well as possible to the fact his parents are separated. That he is a happy, intelligent child and has no problem with his present circumstances. Having resided with his father as the custodial parent since the separation in August, 1984. The child will be four years old in February and will be starting school probably not this fall but the next fall. The parents are geographically located so they are not too far apart and the child would be going to the same school regardless of who had custody, and in fact, his mother would be teaching in the school he was attending. Since the child is happy and well adjusted, the Court feels there would be some detriment in changing his present home living environment. This is partially corroborated by the view of some of the experts in testifying in this case. Both parties would be required to provide surrogate care since they are both employed. Lessor on the part of the mother because she would have the summer off as a school teacher. There is no evidence to show his present situation with his father as detrimental or that his father is not providing adequate parental care or that he could not continue to do so. The Court believes the mother could also do the same. The fact she is still in a re-construction process from her past mental difficulties and the

possible detriment to the child of changing his present enviromental condition, the Court feels these factors weigh more favorable with the father remaining the custodial parent.

As to visitation, this should be reasonable visitation and liberal visitation. It is important in this case that visitation should be regular, frequent, and predicable. Geography apparently presents little or no problem. Visitation should also be flexible. Therefore, the Court is not fixing specific hours or days concerning visitation, but reiterates that the visitation should be liberal and that the parents should set aside their personal differences and cooperate in seeing that the child maintains a wholesome relationship with both parents. The minimum visitation should include the following based on the supposition that it will not be too long until the child is entering school and visitation should be based upon this understanding. There should be visitation of at least every other weekend, alternate holidays, such as Thanksgiving, any spring vacations (when he enters school) a minimum of 45 days visitation during the summer either all at once or split, Christmas vacation to be split as determined by the school release time during that time with the plaintiff having the first half of that vacation and the defendant the second half. These would be minimum requirements for visitation. It would be in effect now even though the child is not yet in school. This type of visitation should go into effect now in order to prepare for this eventuality. The parents should look toward flexibility in a visitation schedule so as to adjust for any planned events that are for the benefit of



of the child. They should not plan, however, events simply for the purpose of frustrating the intended liberal visitation rights.

As to child support, both parents have an obligation of support to their children. There is a relative disparity in the parties income. The Court feels it is equitable that the plaintiff provide the support maintaining the necessary medical and dental care. Woodward v. Woodward, 21 Utah Advanced Report, Page 38.

As to the question of alimony. The purpose of alimony is to provide support as nearly as possible at the standard of living the defendant enjoyed at the time of marriage. The factor of receiving a divorce where there are now two households to consider instead of one reduces the ~~expected~~ standard of living for both parties. So, the defendant cannot expect an alimony provision to place her in the same standard of living she had as before the marriage. In order to reach the objective of alimony, the following factors are to be considered.

- 1: The financial conditions and needs of the wife;
- 2: The ability of the wife to produce sufficient income for herself; and,
- 3: The ability of the husband to provide support.

Jones v. Jones, 8 UAR, Page 14; Olsen v. Olsen, 14 UAR, Page 8.

The defendant, in her testimony and exhibits, indicate her past needs for the month of October of \$4,505.00; November of \$4,117.00. However, it is to be noted in the breakdown in those needed expenses, the present Court Costs constituted the bulk of those expenses. This is not an ongoing expense and would not be normally part of

her needed monthly expenses. Her answers to interrogatories, Exhibit 20, would appear to be a more likely reflection of those expenses plus the payments to her parents would place the needed expenses in the neighborhood of \$2,000.00 to \$2,400.00 maximum. The defendant also has ability to produce income having a masters degree in education and is teaching at an elementary school receiving a gross salary of \$2,290.00 a month. In addition, she will have some cash from the property settlement agreement in the amount of some \$114,000.00, which if conservatively invested would increase her present income if she invests it all or elects to pay off the debts on her condominium it would reduce her needed living expenses. There is still a substantial disparity in the income of plaintiff and defendant. The plaintiff having a gross income of \$100,000.00+ per year. There are two factors to be considered, however, in this disparity. One, is that his income places him in an income tax bracket where the percentage deducted from his gross income is considerably more than the percentage deducted from the defendants gross income. The second factor is that the full burden of the minor child is upon the plaintiff. The plaintiff testified that his take home income after taxes is in the neighborhood of \$4,500.00 to \$5,000.00 per month. Even with the requirement of his providing the full support for the child, it still results in a noticeable disparity in incomes. If you reduced his income by \$750.00 and increased the income of the defendant by \$750.00, it would put them in a more equal position. Therefore, the Court awards \$750.00 per month alimony to the defendant.

The next question is attorney's fees. There are factors to be considered as guides in determining the reasonableness of the fee which include the following:

1: The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

2: The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3: The fee customarily charged in the locality for similar legal services.

4: The amount involved and the results obtained.

5: The time limitations imposed by the client or by the circumstances.

6: The nature and length of the professional relationship with the client.

7: The experience, reputation and ability of the lawyer or lawyers performing the services.

8: Skill and eminence of opposing council.

9: The importance of issues litigated.

10: Results accomplished by the attorney that is, the benefit enuring to the client as a result of the services, the financial condition of the parties or their ability to pay, current price trends as reflected in the cost of living.

11: Were the services part of an ongoing relationship.

In this case, the defendant has asked for attorney's fees for

both the efforts of counsel in the 60(b) motion and the present divorce trial. The defendant is seeking some \$36,000.00 in attorney's fees. Evidence to support the same was by proffer that if called upon to testify this would be the testimony of the counsel for the defendant and that it would be based upon time spent at the rate of \$100.00 an hour and also hours at \$65.00 per hour. Counsel for the plaintiff accepted the proffer and had no quarrel with the hourly rate, but had serious objections to the reasonableness of the fee by reason of the necessity of the time spent in this action. With these objections, the Court heartily agrees. With a comment that counsel for the plaintiff also indulged in unnecessary and time consuming procedures mainly in the area of discovery that contributed to the apparent time spent by counsel for the defendant. Both counsel abusing the discovery process and causing far more time to be expended than this kind of a case merits. The Court finds the requested fees are totally unreasonable. If calculated at \$100.00 an hour for the amount requested this would be 45 full 8 hour days of time devoted to this case which is absolutely ridiculous. Even Considering the time on the 60(b) motion and this case, it is still terribly ridiculous. There are no complicating or involved issues in this case either legal or factual. There were some 14 dispositions taken. As far as this Court could tell, during the process of the trial, none of them were necessary. As to the time devoted to the trial, the major portion was of no value especially in the area of counsel arguing with expert witnesses

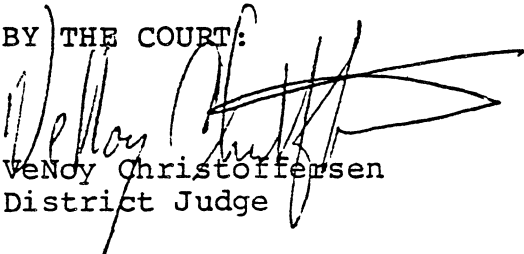
as to the validity of psychological reports on which none of the experts could agree either. Most of the facts were known by the parties or easy ascertainable, obviously there was disagreement by the parties as to some of these facts. Especially in a situation involving child custody where both parties are sincerely desirous of being the custodial parent because they obviously both deeply love the child. The Court feels that any attorney who competently and efficiently uses their time in a matter such as this which is essentially routine and involves no complex or involved legal or factual problems, anything over 15 hours on the 60(b) motion would be excessive. Anything over 20 hours on the divorce trial would be excessive. At \$100.00 an hour, any charge over \$3,500.00 would be excessive. The Court feels attorney's fees are appropriate by reason of the necessity of the defendant to bring the 60(b) motion as the Court previous indicated under the circumstances of the original divorce, the defendant was taken advantage of by reason of her mental condition having no legal advice and entirely disproportionate division of property. But, the Court believes what she is entitled to should only be reasonable attorney's fees. No novel or difficult questions were involved while the issues litigated were certainly of importance they were not novel nor did they require extensive preparation or discovery. Therefore, the Court will award to the defendant attorney's fees in the amount of \$3,500.00. The Court suggests counsel for the

Davis v. Davis  
Civil #89675  
Page Ten

plaintiff to prepare findings and decree consistant with this memorandum decision and submit the same to opposing counsel at least 5 days before submitting them to the Court for any suggested modification or objections.

Dated this- \_\_\_\_\_ day of November, 1985.

BY THE COURT:

  
Venoy Christoffersen  
District Judge

B. L. DART (818)  
Attorney for Plaintiff  
Suite 1330  
310 South Main  
Salt Lake City, Utah 84101  
Telephone: (801) 521-6383

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

---oooOooo---

JAMES Z. DAVIS,	:	
Plaintiff,	:	STATEMENT OF
	:	PROPERTY SETTLEMENT
v.	:	
PENNY A. DAVIS,	:	Civil No. 89675
Defendant.	:	Judge VeNoy Christofferson
	:	by designation

---oooOooo---

The parties have agreed as follows:

1. Defendant will receive from plaintiff the following items located in the home:

Antique desk in library  
Blue satin chair, living room  
Gold leaf mirror  
Black marble stand  
Two crystal chandeliers  
Two crystal lamps  
Dining room table and chairs  
Blue flower picture  
Silverware

Crystal

China

Mirror in master bedroom

Leather desk chair in library

Silver items given as wedding presents

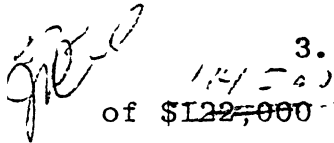
Clothing

Baby grand piano

1977 Lincoln

Except as provided above, each party will be awarded any other item of personal property currently in his or her possession except as hereinafter provided.

2. Plaintiff will be awarded the equity of the parties in the house and real property at 2545 Bonneville Terrace Drive, Ogden, Utah, and defendant will be awarded her interest in the condominium purchased since the separation of the parties.

 3. Plaintiff will transfer to defendant savings funds of ~~\$122,000~~<sup>147,500</sup> by assignment of existing certificates where penalty would occur if cashed at present time, otherwise each party will retain any savings accounts, retirement entitlements or other intangible assets in his or her own name, except as hereinafter provided.

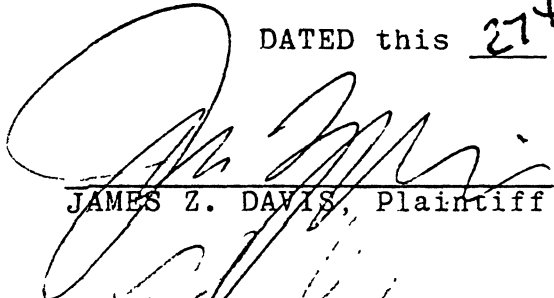
4. Defendant will be awarded items 5, 6, 10 and 12 on Farr Jewelry appraisal of July 21, 1984. All other items of jewelry listed on said appraisal will be sold by plaintiff within 90 days with proceeds to be divided between parties. Defendant

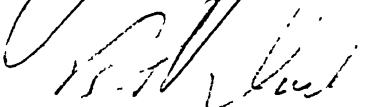


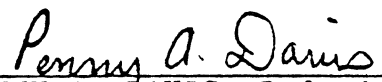
will have first right of refusal and plaintiff will have second right of refusal.


5. Stock in Utah Power & Light, Southern Company and Sierra Resources will be divided with transfer to occur within 30 days.

DATED this 27<sup>th</sup> day of November, 1985.

  
\_\_\_\_\_  
JAMES Z. DAVIS, Plaintiff

  
\_\_\_\_\_  
B. L. DART  
Attorney for Plaintiff

  
\_\_\_\_\_  
PENNY A. DAVIS, Defendant

  
\_\_\_\_\_  
BARBARA K. POLICH  
Attorney for Defendant


B. L. DART (818)  
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310 South Main  
Suite 1330  
Salt Lake City, Utah 84101  
(801) 521-6383

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

-----ooo0ooo-----

JAMES Z. DAVIS,	:	
Plaintiff,	:	FINDINGS OF FACT
	:	AND
v.	:	CONCLUSIONS OF LAW
PENNY A. DAVIS,	:	Civil No. 89675
Defendant.	:	Judge VeNoy Christoffersen, by designation

-----ooo0ooo-----



The above-entitled matter came for a bench trial on the 25th, 26th and 27th days of November, 1985, with the parties and other witnesses having testified and various exhibits having been entered and certain stipulations having been reached and the matter having been argued and submitted and the Court having considered all of the evidence in the case and having considered the stipulations of the parties and being fully advised hereby makes the following:

FINDINGS OF FACT

1. Both plaintiff and defendant are actual and bonafide residents of Weber County, State of Utah and have been

for more than three months immediately prior to the filing of this action for divorce.

2. Plaintiff and defendant were married in Salt Lake City, Utah on the 19th day of December, 1970 and since that time have been husband and wife.

3. During this marriage defendant has treated plaintiff cruelly causing him great mental suffering and distress. Among other things defendant indicated to plaintiff through her words and actions that she no longer loved him or wanted to be married to him making it impossible for plaintiff to continue with the marriage relationship.

During this marriage plaintiff has treated defendant cruelly causing her great mental suffering and distress. Among other things plaintiff failed to meet defendant's emotional needs and be sensitive to her concerns and desires making it impossible for defendant to continue with the marriage relationship.

The Court finds that each of the parties has sufficient grounds for divorce one from the other on the grounds of mental cruelty.

4. The parties entered into a Stipulation relating to the marital property, and pursuant to the terms of the Stipulation the property of the parties should be awarded with

the value for each item reflected in parentheses.

In reaching the distribution valuations, the Court has taken into consideration the value of \$5,000 given to the parties by defendant's parents and \$6,000 in values brought by plaintiff into the marriage.

a. Plaintiff should be awarded the equity of the parties in the house and real property at 2545 Bonneville Terrace Drive, Ogden, Utah, (\$111,000); his retirement at Ray, Quinney & Nebeker, (\$6,000); the savings awarded to him at the time of the original divorce hearing in August of 1984, together with accruals thereon to the present time, (\$159,304); VanCott Bagley receivable, (\$5,000); and assorted vehicles including 1980 Chevrolet pickup truck, 1985 Buick, 1971 Corvette, 1981 Suzuki motorcycle, 1980 Honda motorcycle and 1980 Chevrolet Citation, (\$32,000).

b. Defendant should be awarded the equity in her condominium at 852 East 5500 South, Ogden, Utah, (NV); her retirement with Weber County School District, (\$17,000); savings received by her at the time of the original divorce hearing in August of 1984, together with accruals thereon to the present time, (\$56,275); her IRA account, (\$7,866); Honda, (\$1,900); 1977 Lincoln automobile (gift).

c. The furniture, furnishings, appliances and other items of personal property should be awarded to each party

as they currently have possession except that defendant should receive from plaintiff the following items of personal property located in plaintiff's residence:

- Antique desk in library
- Blue satin chair, living room
- Gold leaf mirror
- Black marble stand
- Two crystal chandeliers
- Two crystal lamps
- Dining room table and chairs
- Blue flower picture
- Silverware
- Crystal
- China
- Mirror in master bedroom
- Leather desk chair in library
- Silver items given as wedding presents
- Clothing
- Baby grand piano

d. Defendant should be awarded items 5, 6, 10 and 12 on the Farr Jewelry appraisal of July 21, 1984. All other items of jewelry listed on said appraisal should be sold by plaintiff within 90 days from the 25th day of November, 1985,

with the proceeds to be divided between the parties. Defendant should have the first right of refusal and plaintiff should have the second right of refusal upon the sale of each item of jewelry.

e. The stock in Utah Power & Light Company, Southern Company and Sierra Resources should be divided with the transfer to occur within thirty days from the 25th day of November, 1985.

f. To equalize the values of properties awarded between the parties, plaintiff should transfer to defendant savings funds of \$114,500 by assignment of existing certificates where penalty would occur if cashed at the present time. Otherwise, each party should retain any savings accounts, retirements, entitlements or other intangible assets in his or her own name.

5. Plaintiff should assume and pay the first mortgage obligation on the house and real property at 2545 Bonneville Terrace Drive, Ogden, Utah; and defendant should assume and pay the first mortgage obligation and the obligation to her father on the condominium at 852 East 5500 South, Ogden, Utah. Each of the parties should assume and pay any obligations which he or she has individually incurred since their separation in August of 1984.

6. One child has been born as issue of this marriage, to wit: James Z. Davis, III, born on February 28, 1982. In


considering the question of custody of said child, the Court looks to such factors as the child's feelings or special needs, the preference of the child, relative strength of the child's bond with one or more of the parents, the general interest and continuing previously determined custody arrangements where the child is happy and well adjusted, capacity and willingness of the parties to function as parents, their moral character and emotional stability, depth and desire for custody, their ability to provide appropriate child care, the question of surrogate care, reasons for having released custody in the past, and religious compatibility.

There was an original decree in August, 1984, and a subsequent 60(b) motion made by the defendant to set aside that judgment and decree. Hearing was held in Spetember of 1985 and that judgment and decree was set aside hence this hearing now is for an original determination of custody.

A major factor in the determination of the Court in setting aside the decree, although not the only one, was the psychological condition of the defendant at the time of the first divorce. There was a mental upset that existed at the time of separation and this divorce, an inability of the defendant to logically look toward her own interest. She, at that time, being in a state of mind where she was willing to do anything to get

out of her situation, and agreed to many things to her disadvantage, which this Court felt she would not otherwise do and the Court found that plaintiff had notice of her mental upset and changed personality as he testified to this at the Rule 60(b) motion hearing.

There has been a continuing question of the defendant's mental stability during the year of 1984. There has been subsequent testimony at this trial that the defendant has made an extremely good recovery. But, according to her psychiatrist, Dr. Summers, she still is in a period of reconstruction from her mental problems of 1984.

The independant evaluator stipulated to by the parties, Kim Peterson, M.S.W., stated in his report that of the two parents plaintiff appeared to be the more stable and capable. There was no indication of any significant pathology and he has functioned well in his various life roles. He further found that although defendant has made some significant gains emotionally over the past year, she was still seen as fragile and at risk for further emotional problems. He concluded by stating that he felt that the minor child's needs would best be served if custody remained with his father, with visitation to his mother.

There were a number of psychologists called to testify after they had given various tests to the parties. About the only they could concur upon is that they felt both parents would



be adequate parents for custody of the child and neither are psychologically unfit to give parental care. They did disagree as to the effect of psychological testing and the values to be assigned to the same in reaching their conclusions.

There seems to be no disagreement that the child has adjusted as well as possible to the fact his parents are separated. He is a happy, intelligent child and has no problems with his present circumstances wherein he has resided with his father as the custodial parent since the separation in August, 1984. The child will be four years old in February, 1986, and will be starting school in the fall of 1987. The parents are geographically located so they are not too far apart and the child will be going to the same school regardless of who has custody. In fact, his mother will be teaching at the school he is to attend. Since the child is happy and well adjusted in his current circumstances, the Court feels that there will be some detriment in changing his present home living environment. This is partially corroborated by the view of some of the experts in testifying in the case. Both parents will be required to provide surrogate care since they are both employed. This will be less on the part of the mother because she will have the summer off as a school teacher. There is no evidence to show his present situation with his father is detrimental or that his father is

not providing adequate parental care or that he cannot continue to do so. The Court believes that his mother can also do the same.

The fact his mother is still in a reconstruction process from her past mental difficulties and the possible detriment to the child of changing his present environmental condition, together with the other factors mentioned above, makes the Court feel and it is the finding of the Court that it is in his best interest that his father remain his custodial parent.

As to visitation, it should be reasonable and liberal. It is important in this case that visitation should be regular, frequent and predicable. Geography apparently presents little or no problem. Visitation should also be flexible. Therefore, the Court is not fixing specific hours or days concerning visitation, but reiterates that the visitation should be liberal and that the parents should set aside their personal differences and cooperate in seeing that the child maintains a wholesome relationship with both parents. The minimum visitation should include the following based upon the supposition that it will not be too long until the child is entering school and visitation should be based upon this understanding. There should be visitation of at least every other weekend, alternate holidays, such as Thanksgiving, any spring vacations (when he enters school), a minimum of 45 days visitation during the summer

either all at once or split, Christmas vacation to be split as determined by the school release time during that time with the plaintiff having the first half of that vacation and the defendant the second half. These would be minimum requirements for visitation. It would be in effect now even though the child is not yet in school. This type of visitation should go into effect now in order to prepare for this eventuality. The parents should look toward flexibility in a visitation schedule so as to adjust for any planned events that are for the benefit of the child. They should not plan, however, events simply for the purpose of frustrating the intended liberal visitation rights.

7. As to the child support, both parents have an obligation to support their children. There is a relative disparity in the parties income. The Court feels it is equitable that the plaintiff provide the support for said child maintaining the necessary medical and dental care and no support should be awarded at this time from defendant.

8. As to the question of alimony, the purpose of alimony is to provide support as nearly as possible at the standard of living the defendant enjoyed at the time of marriage. The factor of receiving a divorce where there are now two households to consider instead of one reduces the expected standard of living for both parties, so the defendant cannot

expect an alimony provision to place her in the same standard of living she had before the marriage. In order to reach the objective of alimony, the Court considers the financial conditions and needs of the wife; the ability of the wife to produce sufficient income for herself; and the ability of the husband to provide support. The defendant, in her testimony and exhibits, indicated her past needs for the month of October 1985 of \$4,505.00 and November of \$4,117.00. However it is to be noted in the breakdown of those needed expenses that the present Court costs constituted the bulk of those expenses. This is not an ongoing expense and would not be normally part of her needed monthly expenses. Her answers to Interrogatories, which were introduced as Exhibit 20, would appear to be more likely reflective of those expenses plus the payments to her parents would place the needed expenses in the neighborhood of \$2,000.00 to \$2,400.00 maximum. The defendant also has an ability to produce income having a masters degree in education and is teaching at an elementary school receiving a gross salary of \$2,290.00 a month. In addition, she will have cash from the property settlement agreement in the amount of \$114,500.00, which if conservatively invested would increase her present income if she invests it all or elects to pay off the debt on her condominium it would reduce her needed living expenses. There is still a substantial disparity in the income of plaintiff and

defendant. The plaintiff having a gross income of \$110,000.00+ per year. There are two factors to be considered, however, in this disparity. One, is that his income places him in an income tax bracket where the percentage deducted from his gross income is considerably more than the percentage deducted from the defendant's gross income. The second factor is that the full burden of the minor child is upon the plaintiff. The plaintiff testified that his take home income after taxes is in the neighborhood of \$4,500.00 to \$5,000.00 per month. Even with the requirement of his providing the full support for the child, it still results in a noticeable disparity in income. If you reduced his income by \$750.00 and increased the income of the defendant by \$750.00, it would put them in a more equal position. Therefore, this Court finds that plaintiff should pay \$750.00 per month alimony to the defendant until such time as she remarries or dies.

9. The next question is attorney's fees. There are factors to be considered as guides in determining the reasonableness of the fee which include the following:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation and ability of the lawyer or lawyers performing the services.

8. Skill and eminence of opposing counsel.

9. The importance of issues litigated.

10. Results accomplished by the attorney that is, the benefit enuring to the client as a result of the services, the financial condition of the parties or their ability to pay, current price trends as reflected in the cost of living.

11. Were the services part of an ongoing relationship.

In this case, the defendant has asked for attorney's fees for both the efforts of counsel in the 60(b) motion and the present divorce trial. The defendant is seeking some \$36,000.00 in attorney's fees. Evidence to support the same

was by proffer that if called upon to testify this would be the testimony of the counsel for the defendant and that it would be based upon time spent at the rate of \$100.00 an hour and also hours at \$65.00 per hour. Counsel for the plaintiff accepted the proffer and had no quarrel with the hourly rate, but had serious objections to the reasonableness of the fee by reason of the necessity of the time spent in this action. With these objections, the Court heartily agrees. With a comment that counsel for the plaintiff also indulged in unnecessary and time consuming procedures mainly in the area of discovery that contributed to the apparent time spent by counsel for the defendant. Both counsel abused the discovery process and caused far more time to be expended than this kind of case merits. The Court finds the requested fees are totally unreasonable. If calculated at \$100.00 an hour for the amount requested this would be 45 full eight hour days of time devoted to this case which is absolutely ridiculous. Even considering the time on the 60(b) motion and this case, it is still terribly ridiculous. There are no complicating or involved issues in this case either legal or factual. There were some 14 depositions taken. As far as the Court could tell, during the process of the trial, none of them were necessary. As to the time devoted to the trial, the major portion was of no value especially in the areas of counsel arguing

with expert witnesses as to the validity of psychological reports on which none of the experts could agree either. Most of the facts were known by the parties or easily ascertainable, obviously there was disagreement by the parties as to some of these facts. This is especially true in a situation involving child custody where both parents are sincerely desirous of being the custodial parent because they obviously both deeply love the child.

The Court feels that any attorney who competently and efficiently uses their time in a matter such as this which is essentially routine and involves no complex or involved legal or factual problems, anything over 15 hours on the 60(b) motion would be excessive. Anything over 20 hours on the divorce trial would be excessive. At \$100.00 an hour, any charge over \$3,500.00 would be excessive.

The Court feels attorney's fees are appropriate by reason of the necessity of the defendant to bring the Rule 60(b) motion. As the Court previously indicated, under the circumstances of the original divorce, the defendant was taken advantage of by reason of her mental condition, having no legal advice, and the entirely disproportionate division of property. But the Court believes that she is entitled to only reasonable attorney's fees. No novel or difficult questions were involved. While the issues litigated were certainly of importance, they



were not novel nor did they require extensive preparation or discovery. Therefore, the Court finds that defendant is entitled to, and should be awarded, attorney's fees in the amount of \$3,500.00.

11. Based upon the motion of plaintiff's attorney and the stipulation of defendant's attorney, the Court finds that the file in this action should be sealed upon payment of a \$5.00 fee and should be available to the public only upon an order of the Court.

From the foregoing Findings of Fact, the Court now makes the following:

#### CONCLUSION OF LAW

1. Plaintiff and defendant are each entitled to a Decree of Divorce one from the other on the grounds of mental, which Decree shall become final upon signing and entry.

2. The property of the parties is awarded as provided in paragraph 4 of the Findings of Fact.

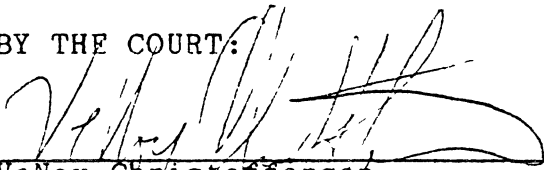
3. The obligations of the parties are to be assumed and paid as provided in paragraph 5 of the Findings of Fact.

4. Plaintiff is awarded the care, custody and control of the minor child of the parties, James Z. Davis, III, subject to defendant's reasonable and liberal rights of visitation as more fully set forth in paragraph 6 of the Findings of Fact.

5. No support is awarded.
6. Defendant is awarded alimony in the sum of \$750 a month until such time as she remarries or dies.
7. Defendant is awarded attorney's fees in the sum of \$3,500.00
8. The file in this case shall be sealed in accordance with the provision of Title 30-3-4, Utah Code Annotated, upon the payment of a \$5.00 fee to the Clerk of the Court and shall be available to the public only upon further order of this Court.

DATED this 26 day of December, 1985.

BY THE COURT:

  
\_\_\_\_\_  
VeNoy Christoffersen  
District Court Judge

#### MAILING CERTIFICATE

I hereby certify that on the 23rd day of December, 1985, I mailed a copy of the foregoing Findings of Fact and Conclusions of Law to:

Barbara K. Polich  
Parsons, Behle & Latimer  
P. O. Box 11898  
Salt Lake City, Utah 84147

Attorney for Defendant.

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DP

B. L. DART (818)  
 Attorney for Plaintiff  
 310 South Main  
 Suite 1330  
 Salt Lake City, Utah 84101  
 (801) 521-6383

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 IN AND FOR WEBER COUNTY, STATE OF UTAH

---oooOooo---		
JAMES Z. DAVIS,	:	
Plaintiff,	:	DECREE OF DIVORCE
v.	:	
PENNY A. DAVIS,	:	Civil No. 89675
Defendant.	:	Judge VeNoy Christoffersen, by designation
---oooOooo---		

5/1/82

The above-entitled matter came for a bench trial on the 25th, 26th and 27th days of November, 1985, with the parties and other witnesses having testified and various exhibits having been entered and certain stipulations having been reached and the matter having been argued and submitted and the Court having considered all of the evidence in the case and having considered the stipulations of the parties and having made and entered its Findings of Fact and Conclusions of law, now, therefore,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

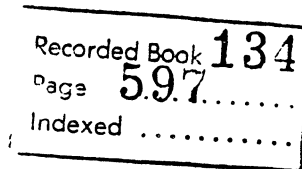
1. Plaintiff and defendant are each awarded a Decree of Divorce one from the other on the grounds of mental cruelty which Decree shall become final upon signing and entry.

2. The property of the parties is awarded as follows:

a. Plaintiff is awarded the equity of the parties in the house and real property at 2545 Bonneville Terrace Drive, Ogden, Utah, his retirement at Ray, Quinney & Nebeker, the savings awarded to him at the time of the original divorce hearing in August of 1984, together with accruals thereon to the present time, VanCott Bagley receivable, and assorted vehicles including 1980 Chevrolet pickup truck, 1985 Buick, 1971 Corvette, 1981 Suzuki motorcycle, 1980 Honda motorcycle and 1980 Chevrolet Citation,

b. Defendant is awarded the equity in her condominium at 852 East 5500 South, Ogden, Utah, her retirement with Weber County School District, savings received by her at the time of the original divorce hearing in August of 1984, together with accruals thereon to the present time, her IRA account, Honda, and the 1977 Lincoln automobile.

c. The furniture, furnishings, appliances and other items of personal property are awarded to each party as they currently have possession except that defendant is



awarded and shall receive from plaintiff the following items of personal property located in plaintiff's residence:

Antique desk in library  
Blue satin chair, living room  
Gold leaf mirror  
Black marble stand  
Two crystal chandeliers  
Two crystal lamps  
Dining room table and chairs  
Blue flower picture  
Silverware  
Crystal  
China  
Mirror in master bedroom  
Leather desk chair in library  
Silver items given as wedding presents  
Clothing  
Baby grand piano

d. Defendant is awarded items 5, 6, 10 and 12 on the Farr Jewelry appraisal of July 21, 1984. All other items of jewelry listed on said appraisal are ordered to be sold by plaintiff within 90 days from the 25th day of November, 1985, with the proceeds to be divided between the parties. Defendant shall have the first right of refusal and plaintiff shall have

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the second right of refusal upon the sale of each item of jewelry.

e. The stock in Utah Power & Light Company, Southern Company and Sierra Resources is ordered to be divided with the transfer to occur within thirty days from the 25th day of November, 1985.

f. To equalize the value of properties awarded between the parties, plaintiff is ordered to transfer to defendant savings funds of \$114,500 by assignment of existing certificates where penalty will occur if cashed at the present time. Otherwise, each party is awarded any savings accounts, retirements, entitlements or other intangible assets in his or her own name.

3. Plaintiff is ordered to assume and pay the first mortgage obligation on the house and real property at 2545 Bonneville Terrace Drive, Ogden, Utah; and defendant is ordered to assume and pay the first mortgage obligation and the obligation to her father on the condominium at 852 East 5500 South, Ogden, Utah. Each of the parties is ordered to assume and pay any obligations which he or she has individually incurred since their separation in August of 1984.

4. One child has been born as issue of this marriage, to wit: James Z. Davis, III, born on February 28, 1982.

Plaintiff is awarded his care, custody and control subject to defendant's reasonable and liberal visitation rights which should be regular, frequent and predictable. The Court is not fixing specific hours or days concerning visitation, but it is ordered that the minimum visitation shall include visitation of at least every other weekend, alternate holidays, such as Thanksgiving, any spring vacations (when he enters school), a minimum of 45 days visitation during the summer either all at once or split, Christmas vacation to be split as determined by the school release time with the plaintiff having the first half of that vacation and the defendant the second half. The parents are to look toward flexibility in a visitation schedule so as to adjust for any planned events that are for the benefit of the child. However, they are not to plan events simply for the purpose of frustrating the intended liberal visitation rights.

5. Based upon the relative financial circumstances of the parties, plaintiff is ordered to provide the support for the minor child of the parties maintaining the necessary medical and dental care and no support is awarded at this time from defendant.

6. Defendant is awarded alimony from plaintiff in the sum of \$750.00 per month until such time as defendant remarries or dies.

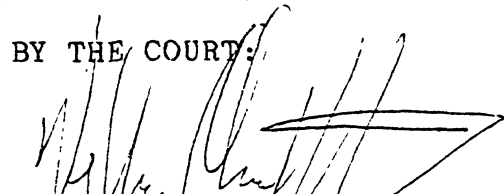
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7. Defendant is awarded attorney's fees in the sum of \$3,500.00.

8. The file in this case is ordered sealed in accordance with the provisions of Title 30-3-4, Utah Code Annotated upon the payment of a \$5.00 fee to the Clerk of the Court and shall be available to the public only upon further order of this Court.

DATED this 26 day of December, 1985.

BY THE COURT:

  
\_\_\_\_\_  
VeNoy Christoffersen  
District Court Judge

#### MAILING CERTIFICATE

I hereby certify that on the 23rd day of December, 1985, I mailed a copy of the foregoing Decree of Divorce to:

Barbara K. Polich  
Parsons, Behle & Latimer  
P. O. Box 11898  
Salt Lake City, Utah 84147

Attorney for Defendant.

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# CONSULTING SERVICES

Dennis A. Giles, MSW, LCSW  
Kim Peterson, MSW, LCSW

10185 S. Millbury Way  
Sandy, Utah 84092  
(801) 571-5326

CHILD CUSTODY EVALUATION  
(Confidential)

Exhibit 5  
CASE # 89675  
DATE 11-25-85

Plaintiff: Jim Davis

Defendant: Penny Davis

Case Number: Current Number 89675

Date: September 5, 1985

## I. IDENTIFYING DATA

The plaintiff, Jim Davis, is a 40-year-old Caucasian male. He lives in Ogden, Utah with his son, James Zimmiri, known as J.Z. (DOB: February 28, 1982). The defendant, Penny Davis, is a 36-year-old Caucasian female. She also lives in Ogden, Utah.

The plaintiff and defendant were married December 19, 1970. They separated and were divorced August, 1984.

## II. BACKGROUND INFORMATION

Plaintiff: Jim Davis was raised in Salt Lake City, Utah. He is the oldest of two children in a "fantastic" family. His parents had a good marriage, and he got along well with both. Jim denied any history of psychiatric problems in himself or other family members. Jim denied any history of being a problem drinker as Penny has claimed; rather he felt it was a matter of her LDS perspective. Jim served two years in the military. He holds a J.D. degree and married when age 27.

Jim rated his marriage very high. He said, "I've never been so taken by anyone before or since." He felt they had been very compatible. Penny seemed happy and never complained seriously about anything. The first sign of any tension occurred five years ago, but "it really wasn't bad." November, 1983 was the first time Penny had expressed overt hostility toward him. He later found out Penny had told Jim's brother at about this same time she wanted to date other guys. Later, she, in fact, began seeing a guy from her aerobics class, but Jim said he was naive and didn't know what was going on. In May, 1984, Penny "dropped the bomb." She announced a desire to be free and independent and to experience the single life. She asked for a separation and said she wanted to date other men. Jim would not agree to a separation and did everything he could to be more romantic. However, it seemed she had already made up her mind about a divorce.

Eventually, it became clear the relationship would not work and so Jim consented to a divorce. She wanted to get it over with as quickly as possible, and

so Jim made arrangements through a fellow attorney and had their divorce finalized in a short period of time. Penny seemed very rational in making her decision, and she voluntarily gave Jim custody.

Penny has since claimed she was depressed and irrational at the time of the divorce, but Jim felt she is now putting on a phony act by claiming she was depressed at the time. Penny became very depressed, but it was not until after the divorce and was largely the result of pressure placed on her by her parents, particularly her father. He said, 'Penny's parents have always been very controlling. "Her father was like god to her," and she said if it were possible, she would marry her father. She consequently has spent her entire life trying to please her parents and be the perfect child. Love was reportedly very conditional in Penny's family, and her parents were demanding, inconsistent, and hostile. For example, they pressured her a great deal about her weight, and they were the ones who gave her the idea of having her stomach stapled. He said, "they took over." Consequently, when her father found out about Penny giving custody of J.Z. to Jim, his reaction was that Penny should be killed for doing such a thing. Thereafter, Penny was bombarded by pressure from her parents which led to serious depression and eventually hospitalization for suicidal ideation.

Concerning her role as a parent, Jim said that basically Penny does not like little children, and after J.Z. was born, she did not seem to know what to do. She took care of all his physical needs, but she was overly concerned about making a mistake. She did a lot of developmental things with him, but she gradually became indifferent to him. Sometimes she wouldn't give him his bottle when he was a baby because she was afraid he would develop "fat cells." Thus, when she tried to get J.Z. onto solid food, he was often not hungry, and she got into a power struggle with him over eating. J.Z. got on her nerves, and she became more and more frustrated with him. By the time of the divorce, Penny was adamant about not wanting custody, and she even told Jim's mother she hated J.Z. However, since the divorce, Penny has been putting on an act. She tries to be overly concerned over schedules for J.Z. and doesn't allow him to be a child.

Jim saw himself as a very good father. When J.Z. was a baby, he would help some, but Penny jealously guarded her role as his caretaker and would not let him do much. As time progressed, especially after Penny began having trouble getting along with J.Z., Jim began taking more and more responsibility. Jim said he and J.Z. do many things together including sports, reading, riding motorbike, and hiking in the canyons. Jim said he had been reading books on parenting, and he has been working hard at being consistent with J.Z.

Defendant: Penny Austad Davis was raised in Washington, D. C. She is the second of three children in a family described as really close. She had a good relationship with her parents. Their marriage had a lot of love but also a fair amount of anger. Penny saw herself as a well-behaved child. Penny reported a recent history of depression in herself. She denied the existence of any psychiatric disorders in other family members. When age 16, she was sexually assaulted by a stranger. Thereafter, Penny withdrew from dating until she met Jim. Penny has a Master's Degree in education. She married Jim when age 20.

Penny felt her marriage to Jim had gone well for many years. She said, "he was so kind." Their major differences were lack of interest in sex on Jim's part and religion. Penny is LDS and Jim was described as an atheist. Alcohol was also somewhat of a problem with Jim. About one year after J.Z. was born, Penny

became depressed which she felt was the major cause of their divorce. Penny said she had gained a lot of weight during their marriage, and she weighed nearly 300 pounds. She had her stomach stapled and also became an obsessive exerciser and eventually got down to 125 pounds. It was after she lost weight that Jim seemed to lose interest in sex, and Penny felt unloved. She became very irritable with Jim and J.Z. She had difficulty sleeping and was not eating anything but junk food. She had feelings of wanting and needing to get away. She said, "I needed some peace and space." Beginning May, 1984, Penny said she began feeling she wanted out of the marriage. She reported being interested in another man briefly, but she was never unfaithful. She reported loss of memory regarding many of the events at the time she and Jim separated and divorced, but "they claim I said some pretty outrageous things," i.e. wanting to go out with every man in town, hating J.Z., etc.

Penny said that when Jim finally consented to a divorce, he insisted on pushing it through quickly, and by using his influence as an attorney, he was able to get their divorce finalized in a couple of days. She did not have legal counsel and was in no condition to make a rational decision at the time and agreed to give Jim custody of J. Z. She also felt her property settlement to be grossly unfair. After the divorce, Penny said she fell completely apart and became suicidal, requiring hospitalization.

Penny complained that Jim never helped much with child rearing. About all he ever did was take J. Z. to his mother's when Penny went to aerobics on Saturday morning. Towards the end, he also began helping with J.Z.'s feeding. Penny always felt Jim was not very interested in J. Z., and he seemed more concerned about reading the newspaper. Jim never did much with J. Z. during the marriage, but since the divorce, they have done much more together. She acknowledged, though, that J. Z. and Jim had a good relationship.

Penny saw herself as a very involved parent. She took care of all his physical needs and played with him all the time. ~~She worked with him on developmental tasks and had him on a schedule.~~ Penny acknowledged that her depression interfered with her parenting. She said she did not know why she said things about not loving him because, "I adore him." Once she shook him, "and that just wasn't me." Penny reported that when J. Z. was about 18 months, he was not eating very well and was losing weight. Penny got into a power struggle with him over food, and she felt rejected by him. She said, "I felt I was failing him," and she has felt she needed space from J. Z. Penny felt that since her depression has improved, her relationship with J. Z. has become very strong, and she is once again spending quality time with him.

### III. CURRENT SITUATION

Plaintiff: Initially after the divorce, things were very cordial between Penny and Jim. Eventually, though, she began parroting her parents' feelings and hostilities began to build between them. There have been many occasions when Penny would call and yell and scream or would make a scene when Jim went to pick up J. Z. Jim did not feel Penny would be fighting for custody if it were not for pressure from her father. He said Penny is trapped, and if she doesn't fight for J. Z., she feels her father won't love her anymore. Her father has claimed conspiracy, and he has threatened to ruin Jim's career.

After the divorce, Penny was seeing J. Z. every other weekend. She then claimed her psychiatrist felt it would be therapeutic for her to see J. Z., a few

afternoons during the week as well. It got to the point she wanted to see him every day, but it was too disruptive to J. Z., and so Jim said no after consulting with the child psychologist. Eventually, a compromise was worked out where Penny would have J. Z. four days every other weekend.

Jim felt he had done a good job with J. Z. over the past year. He uses a sitter J. Z. has had since age six months. He is usually home by 5:30 p.m. and devotes the rest of his time to J. Z. Jim felt he should continue to have custody as, "I have a consistent and stable personality." He would, therefore, be a better model to J. Z. Jim said he did not need J. Z. for therapy or to please anyone else, and his desire to keep J. Z. was based on love and his belief he was the better parent. He said, "I can give him everything Penny can give him and more." He felt he had a broader range of interests, and he denied being an atheist. He described himself as Episcopal but agnostic. However, he felt it was important to have J. Z. involved in organized religion.

Jim denied any problems with depression over the past year although there have been a lot of hurt and stress. He said depression was a luxury he could not afford. Jim said he does not have much social life and has not dated, and he said that frankly he really didn't know how to get started. He would like to get remarried someday, and he said, "I want what I had." Jim denied using much alcohol. He reported spending his time cooking, working on cars, building things, and yard work.

Jim is an attorney for Ray, Quinney, and Nebeker. He practices commercial law and earns \$100,000 per year. He expects his income to drop somewhat as he has cut back his work load 17-18%. Jim has remained in the family home. It has three bedrooms. It appeared as though Jim is an adequate housekeeper.

Defendant: Penny said that when she agreed to give Jim custody, it was with the understanding she could see J. Z. whenever she wanted. Initially, she was seeing him nearly every day, but one day when she went to the house, she found Jim had changed the locks. He then cut her visits back to every other weekend. There were, consequently, many disagreements between her and Jim. She would plead with him for more time, but his attitude was she was unstable and crazy, and, therefore, should not have much visitation. He would not even let her see J. Z. on Mother's Day. Penny felt Jim was merely trying to get back at her rather than considering J. Z.'s best interests, as he has claimed. She said Jim's motto in his dealings with others in the past has been "don't get mad, get even."

Penny said she has tried to reconcile with Jim on seven to eight occasions. For a long time, he led her on giving her hope they would get back together. Therefore, she did not fight for custody for a long time.

In September, 1984, Penny began seeing a psychiatrist, Dr. Clark Summers. He has provided psychotherapy and has also put her on antidepressants (Imipramine, 75 mg.). The first six months after the divorce were a "living nightmare." Her parents moved to Salt Lake City to support her. Penny said, "I needed someone all the time." She felt intense pain over being separated from J. Z., and she could not stand to stay alone in her apartment. Penny said when she finally realized there was no hope for reconciliation, she began picking herself up. She became more involved in her career and church work, as she wanted to get her mind off her problems. Penny felt that over the past six months, her depression has improved greatly, and she has begun to deal with past problems, i.e., the sexual assault, and feels better about herself than ever before. This past month, she

even went to a singles dance at church. This summer, Penny was granted two months visitation, and she realizes how much love there is between her and J. Z.

Penny did not feel Jim had gone out of his way for J. Z. over this past year. He put himself first and does not meet all of J. Z.'s needs. Rather, he relies a great deal on his mother and sitters. Penny felt herself perfectly capable of taking on full time custody. She saw herself as a better choice than Jim, because she could devote her time more to J. Z. Because she is off work by 3:30 and has summers and other school holidays off, she would be able to spend much more time with him. Penny said, "I feel my baby really needs me." She was also concerned that Jim would raise J. Z. to be an atheist, and he has been opposed to her raising him to be LDS.

For the past year, Penny has lived in a two-bedroom apartment. She plans on shortly moving into a three-bedroom condominium around the corner from her work. Penny has been employed by the Weber School District for 14 years. She currently teaches the sixth grade and her income is \$27,000 per year. She is also receiving \$500.00 a month in alimony.

#### IV. CHILD (To be kept strictly confidential from parents)

When observed with his mother, J. Z. behaved well, and his development appeared normal. J. Z. related well to his mother, and he often sought her attention. He was affectionate with her, seemed secure, and smiled frequently. Penny's behavior toward J. Z. also seemed appropriate. She used positive reinforcement, and her play with J. Z. reflected her teaching background. She presented as patient and at no time did she appear irritated. Her limit setting was felt to be appropriate.

When with his father, J. Z.'s behavior was also appropriate. At times, he seemed tired, and at one point, he whined, but Jim set limits appropriately, and the behavior ceased. J. Z. appeared secure and quite happy with his father. He sought his father's attention frequently, and they appeared to have a good relationship. Jim seemed very relaxed in his parenting role, and he was affectionate with J. Z. who often climbed up in his lap. Jim also used positive reinforcement.

#### V. COLLATERAL INFORMATION

Several friends and relatives were contacted for their impressions.

David Roth, one of Jim's friends who is married to Penny's sister, felt Jim should have custody, as he was viewed as more stable than Penny. He is a warm and caring person. He shows no evidence of psychological problems, and when something bothers him, he talks about it and gets it out in the open. Penny had the primary caretaking role until the time of the divorce, but Jim was always an involved parent, and since having custody, he has handled the responsibility well. He has remained stable and calm and has provided a consistent environment for J. Z. The only criticism he had of Jim was that he should "put his foot down more." However, J. Z. has been calmer around him and less hyper than he was around Penny.

David reported that he and Penny's sister, Nancy, were present when Penny made the announcement about wanting a divorce. She said she had been unhappy with the marriage, and she made numerous references to conflict with J. Z. and expressed dislike for him. She felt J. Z. belonged with Jim. She had lost weight and was feeling that men were noticing her. She spoke of wanting to go to bars and pick

up as many men as possible. Penny seemed to be rational, and for the first time since David had known her, she seemed to have some goals and direction. She had always hidden her feelings and had always been content to stay in Jim's shadow. For the first time, she seemed really honest with her feelings. She wanted to push the divorce through as soon as possible. The property settlement was what she asked for even though both Jim and Nancy told her she was entitled to more. After the divorce, Penny seemed to feel quite good. However, after her parents began pressuring her, she became depressed.

It was reported that Penny had problems relating to J. Z. for quite some time before the divorce. The major conflict was over feeding. She seemed to over-react to normal behavior, and she became frustrated and angry easily. J. Z. would react to her with fright, and at times he would cower.

LaRee West, a co-worker for five years, said she hasn't socialized with Penny, but she has seen her with J. Z. She stated, "she is so sweet with him and is such a good mother." He was well behaved and seemed devoted to her. Penny was described as a sweet person, easy to work with, and dependable. She handles pressure well, and there has been no indication of instability. She was upset and nervous last year after the divorce, but she never seemed irrational or had problems with her memory. She did not seem any more depressed than anyone would after a divorce. Since then, Penny has really blossomed and has become more relaxed and confident. She said, "spending time with J. Z. has been marvelous for her."

Roberta Frow, a co-worker for the past three years, described Penny as an excellent teacher who, on a professional level, really cares about her students. This past year, she was closed mouthed about her problems. She did express concern about not having J. Z., but she did not appear unstable. She has seen Penny with J. Z. on three occasions, and there was "total adoration on her part." She has been very concerned about him and has always spoken positively of him.

Linda Paolette, who has known Jim and Penny for 13 years, indicated Jim was responsible and very much a family man. He is bright, cares about others, and is fun to be with. He has always seemed stable. He seems to be a caring parent and is gentle with J. Z. He has always seemed relaxed and comfortable in his parental role.

Linda said her opinion of Penny has changed over the past year and one-half. She confided some things to Linda which she now denies saying. In the past, Penny presented as responsible and a good parent, but she lacked confidence in herself. Penny stated she had not loved J. Z. since his birth, and she had not learned to love him until after he became sick. She indicated feeling uncomfortable as a parent, and she had felt very frustrated over feeding problems with J. Z. After the divorce, Penny again reported she did not love J. Z., and she was seeing a psychiatrist to try to learn to love him. She indicated the divorce had been her idea, and she had wanted to get it over with before her parents returned to Utah and talked her out of it. She said she had always felt her parents did not love her, and they always wanted her to do things that reflected positively on them. Incidentally, Linda said this was not the first time Penny had spoken of problems in her relationship with her parents.

She did not feel Jim had manipulated or had taken advantage of Penny in the divorce settlement. In all of his conversations about Penny, he seemed sincere and was upset about the divorce but did not appear vindictive.

Lois Richins, one of Penny's co-workers, said she was a caring person. She values others' opinions and is easy to get along with. She adjusts easily to difficult situations and seems stable. She is a very responsible teacher. Penny seemed stressed last September and was tearful, but she is now back to normal and stronger than ever, and she seems more comfortable with herself. Whenever she has seen Penny with J. Z., they have had a very good relationship. She has been very patient and talks to him softly.

Wendy Durfee, Penny's sister who lives in New Hampshire, felt Penny to be an excellent parent. She loves and cares for J. Z. and puts forth a lot of effort to teach him things. She has never heard Penny say anything negative about J. Z. Two summers ago, there seemed to be problems between Penny and J. Z. over meals, but this past summer, there were no problems at all. The summer of 1984 when Penny visited, she never said anything about marital problems, yet she gave the impression something was wrong. This past summer, however, she had "peace of mind," and she seemed much happier.

Melisse Dee, who has tended J. Z. since age six months, said in the past Penny had many problems in her relationship with J. Z. She would come home very frustrated over the children she was teaching, and she was also very stressed over feeding J. Z. She has said she did not think she was a good mother. Since the divorce, there has been a drastic change in Penny. She has become very over-protective of J. Z. and has begun "holding onto J. Z. for dear life." Melisse said she had the feeling Penny was "playing a role," for J. Z. She also became jealous of Melisse's role with J. Z., and she seemed hostile. J. Z. several times makes statements such as "Mommy said I am not supposed to love you." Melisse said until the end of May she continued to tend J. Z. during the times Penny had him. As time went on, J. Z. seemed more and more listless at his mother's. Penny was quite permissive and wouldn't set limits and after J. Z. returned to Jim, he would be cranky and would tantrum and was harder to handle for about four days.

Jim was seen as a very good parent. He is very consistent and also was emotionally stable. He is very loving with J. Z. Since the divorce, Jim has spent a lot of time with J. Z., and they have done many activities together. He was felt to be better at setting limits.

William McVaugh, Ph.D., said Jim consulted him with concerns over visitation and custody. He presented as appropriately concerned and was interested in learning what to do in J. Z.'s best interest. Jim was seen as straight forward and honest. He thinks things through carefully and his decision-making process is good. He did not see Jim as manipulative. He seems very willing about visitation and his first question was whether he should increase visitation. Dr. McVaugh stated he advised Jim not to increase visitation as it may prove harmful to J. Z. due to his need for stability. When J. Z. was interviewed, he did not show evidence of being pressured by Jim.

An effort was made to contact Clark Summers, M. D., but as of this date, he has not yet returned my calls.

Both Penny and Jim were referred to Ralph Gant, Ph.D. for psychological testing. Of the two, Jim presented as more healthy and stable. (See attached report.)

## VI. SUMMARY AND RECOMMENDATIONS

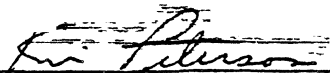
Of the two parents, Jim presents as more stable and capable. There is no indication of any significant pathology, and he has functioned well in his various life roles.

Penny is seen as bright and capable, but she has apparently lacked confidence in herself and has tended to be emotionally dependent upon others. It appears as though Penny has been unhappy in her marriage for years. This, plus the crisis she went through over feeding J. Z., exacerbated her symptoms to the point of "needing to escape" from the stress she was experiencing. After the divorce, she was not able to live with her decision and became quite depressed. Although Penny has made some significant gains over the past year, she is seen as fragile and at risk for further psychiatric problems. Penny's current relationship with J. S. appears much better than it did in the past, but there is a good possibility of further conflict in the future. The way Penny's relationship with J. Z. has been up and down is seen as unstable and probably confusing to him.

Although Penny was the primary parent until the time of the divorce, Jim has taken over that role in an admirable fashion. His care of J. Z. has been appropriate and thoughtful, and he has provided consistency and stability.

It is felt that J. Z.'s needs will best be served if custody remains with the father. The current visitation schedule should be maintained. However, two months during the summer is felt to be too long for a child of J. Z.'s age.

Penny should continue in therapy with Dr. Summers, and it is advisable that some of their sessions touch on how to keep J. Z. out of the middle. It would be helpful for Jim to see either Dr. McVaugh or Dr. Summers for the same purpose.

  
\_\_\_\_\_  
Kim Peterson, M.S.W.  
Clinical Social Worker



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Psychiatric Consultant

C O N F I D E N T I A L

PSYCHOLOGICAL EVALUATION REPORT: LEVEL II

NAME: James Z. Davis                      AGE: 41              BIRTHDATE: 12/16/43  
REFERRAL: Kim Petersen, MSW                      DATE: 9/3/85

TESTS ADMINISTERED:

(X) COMPREHENSIVE INTERVIEW.

An in-depth interview of the subject, exploring the family constellation, home situation, nature and extent of the problems involved, etc.

(X) WECHSLER ADULT INTELLIGENCE SCALE-REVISED (WAIS-R).

An individually-administered intelligence test which provides important information relative to the level, quality, and way an individual responds to structured intellectual tasks.

(X) PROJECTIVE DRAWINGS.

The client may be asked to draw one or all of the following, each on a separate 8-1/2 x 11-inch sheet of paper: Human Figure Drawings (one of each sex), House, and Tree. The way the subject "projects" him/herself into this task reveals information on a number of personality variables.

(X) MINNESOTA MULTIPHASIC PERSONALITY INVENTORY (MMPI).

A widely-used and well-respected test of personality variables. The MMPI can be scored to measure personality characteristics from hundreds of different perspectives. The Clinic scores the MMPI on more than ninety different scales.

(X) SENTENCE COMPLETION TEST.

Sentence completion tests come in a variety of forms. On each form, a number of sentences begin, leaving the client to "project" himself into the response he provides to end the sentence.

(X) THEMATIC APPERCEPTION TEST (TAT).

The subject is asked to write a story for each of a number of pictures. These stories require the subject to "project" his own attitudes and feelings into his writings, revealing important information about himself in a number of areas.

## NARRATIVE PSYCHOLOGICAL EVALUATION

### I. BACKGROUND

Mr. Davis was referred to this clinic for a complete psychological evaluation in connection with a custody evaluation being conducted around his 3 and 1/2-year-old son. Mr. Davis appeared at the clinic for this evaluation as scheduled and all information contained in this report is the result of either the psychological testing or self-reported information provided during the clinical interview. No effort has been made to verify any of this information outside the clinic setting. During the evaluation Mr. Davis appeared to be open, lucid and oriented to the situation. Mr. Davis also appeared to understand the purpose of this evaluation and the intended use of its results.

#### A. Family

Mr. Davis reported that he was born and grew up in Salt Lake City as the oldest of two children. He described an excellent family relationship noting that he left home at the age of 25 when he graduated from law school. Mr. Davis stated that he was married at the age of 27, a marriage which he reported lasted for 12 years before ending in divorce. He attributed the divorce to the fact that his "wife left."

#### B. Educational History

Mr. Davis has a Juris Doctor degree from the University of Utah.

#### C. Medical History

Mr. Davis reported hypertension for which he takes an anti-hypertensive drug. He believes that his hypertension is primarily related to obesity.

#### D. Substance Use History

Mr. Davis stated that he first began to use alcohol at the age of 18 and that it had been 48 hours since his last drink when he participated in this examination. Basically his drinking seems to be confined to weekerds and he described no alcohol abuse whatsoever. He denied the use of any other non-prescription drugs.

#### E. Legal History

None reported.

#### F. History of Psychological Treatment

None reported. Mr. Davis does, however, report depression related to his divorce. At the same time, he noted that he sleeps without difficulty and has a good appetite. He reported no anhedonia.

#### ~~G. Current Living Situation~~

Mr. Davis reported that he currently lives with his son.

#### H. Military History

Mr. Davis reported that he served for two years in the Army before receiving an honorable discharge as a first lieutenant. He reported no problems in the military service.

#### I. Work History

Mr. Davis' work history consists of driving a truck while he was going through college and of practicing law since his graduation from law school.

#### J. Current Problems

Mr. Davis described his most pressing current problems as "pending legal proceedings, RE: divorce and custody."

### II. RESULTS OF PSYCHOLOGICAL TESTING

#### A. Cognitive Functioning

Mr. Davis achieved a verbal I.Q. score of 135 on the partial WAIS-R. This placed him in the very superior range of intellectual ability. There is every indication on the results of the WAIS-R that Mr. Davis is lucid, well-oriented, attentive to detail and has superior abstract and logical thinking.

#### B. Personality Integration

##### 1. ~~Sacks Sentence Completion Test~~

Mr. Davis' responses to the Sacks Sentence Completion Test were generally positive, suggesting an adequate relationship with virtually everyone in his life. He seemed to express a wish for fairness in his relationship with others and there did not seem to be any area of maladjustment reflected from these projective statements.

##### 2. Projective Drawings

Mr. Davis' projective drawings suggested insecurity, depression and some anxiety in terms of relationships with women. Mr. Davis' tree drawing suggested some emotional confusion. This is not surprising in view of the stress created by his current situation.

##### 3. MMPI

Mr. Davis produced an elevation on Scale 3 with an accompanying elevation on Scale 5. Scale 3, the Hysteria scale and Scale 5, the Masculinity-Femininity scales are usually not seen in combination and are treated individually. Mr. Davis' elevation on Scale 3 suggested that he may react to stress by developing physical symptoms. Generally such persons will be symptom-free much of the time but under stress, physical symptoms

may appear suddenly and then disappear just as suddenly when the stress subsides. They generally do not report a great deal of anxiety, tension or depression. We sometimes see a lack of insight concerning the possible underlying causes of any physical symptoms that they may see.

Persons with this profile tend to seek a great deal of attention and affection from others. On the other hand, high Scale 3 individuals tend to be emotionally involved, friendly, talkative, enthusiastic and alert. Their needs for affection and attention sometimes drive them into social interactions but their interpersonal relationships are sometimes problematic. Marital unhappiness is often seen on Scale 3 as well. Mr. Davis' elevation on Scale 5 suggested that Mr. Davis probably has a great deal of aesthetic and artistic interests, but that he would be very likely to participate in housekeeping and child-rearing activities to a greater extent than most men. High scoring males for this particular elevation are generally intelligent, capable persons who value cognitive pursuits. They are most often seen as ambitious, competitive and persevering, but they are also clear-thinking, organized and logical. They will typically show good judgment and common sense. They are also creative and imaginative and individualistic in their approach to problems. Mr. Davis produced a T-Score of 68 on the K-Scale. This is a validity scale which, when elevated, is often reflective of a defensive attitude toward the test. In other words, there is often an elevation here when the person is attempting to look good on the test. At the same time, however, when the individual is well-educated, sensitive and versatile then he is generally regarded as attempting to maintain a healthy balance between positive self-evaluation and self-criticism. In Mr. Davis' case he seems to be well-adjusted psychologically and to manifest a few signs of emotional disturbance. This also portrays him as independent, self-reliant and capable of dealing with problems in his everyday life. This is further illustrated by the Dominance-Dependency dyad in which Mr. Davis would likely take an ascendant role in his personal role in his personal relationships.

On the clinical subscales, I saw a high score (T-score of 79) on the Need for Affection Scale and the Stereotypic Feminine Interest Scale has a T-score of 74.

The only critical item on the MMPI was answered in a negative direction:

- My sex life is satisfactory.

#### 4. TAT

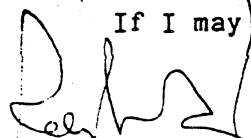
Cards #1,11,2,4,6BM,13MF,7BM,15, and 18GF were presented. Mr. Davis' responses to the TAT suggested an individual who is self-directed, whose value system seems to be quite well-developed and a person who perseveres even when things look very difficult for him.

#### IV. SUMMARY

Mr. James Davis is a 41-year-old divorced individual who underwent this psychological evaluation as part of an overall custody evaluation being conducted around his 3 and 1/2-year-old son. The results of psychological testing depict Mr. Davis as a mature, bright individual whose interests and abilities would support the notion of his being an adequate parent to his 3 and 1/2-year-old son. There was nothing in the clinical interview nor in

the results of the testing to suggest that Mr. Davis would not be an adequate parent or that he should be deprived of the custody of his son.

If I may be of further help in this matter, please contact me.



Ralph W. Gant, Ph.D.  
Psychologist, Lic. #316

RWG/tw

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Psychiatric Consultant

C O N F I D E N T I A L

PSYCHOLOGICAL EVALUATION REPORT: LEVEL II

NAME: Penny Davis                      AGE: 36              BIRTHDATE: 2/15/49  
REFERRAL: Kim Petersen, Giles Consulting Service      DATE: 9/3/85

TESTS ADMINISTERED:

(X) COMPREHENSIVE INTERVIEW.

An in-depth interview of the subject, exploring the family constellation, home situation, nature and extent of the problems involved, etc.

(X) WECHSLER ADULT INTELLIGENCE SCALE-REVISED (WAIS-R).

An individually-administered intelligence test which provides important information relative to the level, quality, and way an individual responds to structured intellectual tasks.

(X) PROJECTIVE DRAWINGS.

The client may be asked to draw one or all of the following, each on a separate 8-1/2 x 11-inch sheet of paper: Human Figure Drawings (one of each sex), House, and Tree. The way the subject "projects" him/herself into this task reveals information on a number of personality variables.

(X) MINNESOTA MULTIPHASIC PERSONALITY INVENTORY (MMPI).

A widely-used and well-respected test of personality variables. The MMPI can be scored to measure personality characteristics from hundreds of different perspectives. The Clinic scores the MMPI on more than ninety different scales.

(X) SENTENCE COMPLETION TEST.

Sentence completion tests come in a variety of forms. On each form, a number of sentences begin, leaving the client to "project" himself into the response he provides to end the sentence.

(X) THEMATIC APPERCEPTION TEST (TAT).

The subject is asked to write a story for each of a number of pictures. These stories require the subject to "project" his own attitudes and feelings into his writings, revealing important information about himself in a number of areas.

## NARRATIVE PSYCHOLOGICAL EVALUATION

### I. BACKGROUND

Mrs. Davis was referred to this clinic for a full psychological evaluation by Mr. Kim Petersen, MSW, a social worker. All of the information contained in this report is a result of psychological testing and Mrs. Davis' self-report. All testing was done within the confines of the clinic either under the direct supervision of a licensed psychologist or the supervision of a member of the clinic staff.

#### A. Family

Mrs. Davis reported that she was born and grew up in the area of Washington D.C. as the second child of three children. She described a very close and good family relationship, noting that her parents lived together and that she still remains in contact with all members of her family.

Mrs. Davis stated that she left home at the age of 18 to attend college. She was married at the age of 20, a marriage which continued for 15 years before ending in divorce. A 3-year-old boy resulted from that marriage and that child is the subject of the current custody evaluation.

Mrs. Davis reported that she was never physically abused as a child. She was, however, sexually abused at the age of 17 by a camp counselor. She did not state whether or not that incident of abuse had interfered with her adult life.

Mrs. Davis ascribed her divorce to a situation in which "I needed time, wanted separation, don't know what the problem was, needed space--overwhelming--I moved out--signed everything over to my husband."

#### B. Educational History

Mrs. Davis reported that she received a Masters Degree in economic education from a combined program with Utah State University and Weber College. She has also attended Brigham Young University and George Washington University. She reported a cumulative grade point average as 3.8 from her educational experience.

#### C. Medical History

Mrs. Davis stated that she was in MacKay Dee Hospital in 1981 for a

gall bladder removal. She has had other problems which caused her great discomfort such as a shoulder which has been out of joint at least 12 times and for which she finally had surgery. In the summer of 1967 she experienced a "Grand Mal seizure" and had her last seizure in December of 1984. She was on Dilantin for about four years. Mrs. Davis reported a gastric bypass in 1978 and noted that she lost 180 pounds since that experience. She has been hospitalized about five times because she could not eat.

When asked what types of problems these medical conditions had created for her, she stated "seizures started at 18-years-old-- no real problems except being faithful in taking medication-- sometimes seizures have occurred." She reported that she is currently taking Phenobarbital and Imipramine. The Imipramine, an anti-depressant medication, is taken daily.

#### D. Substance Use History

None reported.

#### E. Legal History

None reported.

#### F. History of Psychological Treatment

Mrs. Davis stated that she entered psychological treatment at the age of 35 for depression. She has been seeing Dr. Clarke Summers. She believes that counseling has been helpful with her problems. When asked if she had experienced significant depression in her life, she noted that she had and that the depression occurred "after the baby turned two years old." She believes that her depression was "possibly chemical reaction to Phenobarbital, sexual rejection and divorce, trying to be a supermom, etc." When asked about the sexual rejection she stated, "with weight loss Jim was not approaching me for sex and then only if I asked."

Mrs. Davis stated that she is currently sleeping well without difficulty. She also described her appetite as "OK."

#### G. Current Living Situation

Mrs. Davis stated that she currently lives alone.

#### H. Work History

Mrs. Davis reported that she has worked as a teacher.

#### I. Current Problems

Mrs. Davis reported that her most pressing current problem is "I am trying to get custody of my baby. At this point, nothing else is more important to me. I have undergone some serious depression in the last year, but through counseling and medication I feel very strong and in much better shape emotionally."

## II. RESULTS OF PSYCHOLOGICAL TESTING



## A. Cognitive Functioning

Mrs. Davis achieved a Verbal I.Q. score of 109. This placed her toward the upper end of intellectual functioning, but considering her Vocabulary Subtest score she appears to be much brighter and I would project her actual functional I.Q. in the Superior range. Some general observations on her subtest scores are that her long-term memory seems intact and functional. Short-term memory and, more specifically, attention seem somewhat weak, a suggestion of anxiety. Her Arithmetic Subtest score which fell slightly below the mean is relatively low compared to her other subtest scores and in combination with the Digit Span Subtest again suggested significant levels of anxiety at this time. Mrs. Davis' Vocabulary Subtest score which fell more than one standard deviation above the mean suggested a woman who is academically bright, whose abstract levels of intellectual functioning are quite high and possibly superior. The Arithmetic subtest with a raw score slightly below the mean was relatively low and in combination with the Digit Span Subtest suggested significant levels of anxiety at this time. The Comprehension Subtest with a raw score almost a standard deviation above the mean suggested that Mrs. Davis' judgment and impulse control are at least average at this time. There seem to be some relative weakness in the Similarities Subtest with a raw score slightly above the mean. Nonetheless, Mrs. Davis is at least average in her abstract and logical thinking.

The overall reaction to the WAIS-R is that the scatter we are seeing is probably an artifact of some of the current emotional problems which she is still experiencing, including depression and very possibly significant anxiety.

## B. Personality Integration

### 1. Sacks Sentence Completion Test

Mrs. Davis' responses to the Sacks Sentence Completion Test were printed in very small handwriting and were generally absent of punctuation. Her writing was very neat and careful and there seemed to be an almost compulsive quality to her writing.

In reviewing her responses to the stimulus items on the Sacks Sentence Completion Test, Mrs. Davis seemed to have had an idyllic childhood. She noted on No. 9, When I was a child, "I was happy," No. 57, When I was a child, my family "loved me." She seemed to have been happy as a child and yet her adult perceptions were the following: No. 7, I know it is silly, but I am afraid of "standing up for myself," No. 22, Most of my friends don't know that I am afraid of "standing up for myself," No. 37, I wish I could lose the fear of "standing up for myself," No. 52, My fears sometimes force me to "stand up for myself." At the same time, Mrs. Davis said: No. 2, When the odds are against me "I feel overwhelmed," No. 33, My greatest weakness is "downgrading myself." She recalled that when she was younger she felt guilty about "everything." Mrs. Davis noted that she was raped in #15 and apparently this occurred in a boat, thus there is a theme of wishing or regretting that she had never gone out in a boat alone. This is not a surprising response to that situation.

Mrs. Davis' relationship with her parents also seemed idyllic. She tends to idealize her father as she noted in No. 1, I feel that my father seldom "feels well," No. 16, If my father would only "not ever die,"

No. 31, I wish my father "would never die." On the other hand, she related to her mother as was evident in No. 14, My mother "is beautiful and wonderful and kind," No. 29, My mother and I "are extremely close," No. 59, I like my mother but "she worries about me." My overall feeling about her responses to the Sacks Sentence Completion Test are that she does feel very vulnerable and overwhelmed by her current situation. There are suggestions that her problems are indeed long-term and that they date back at least into adolescence when the rape occurred. There may be an idyllic childhood in her history, but there also seems to be a fear of making mistakes or of making herself vulnerable.

## 2. Projective Drawings

Mrs. Davis' person drawings suggested a woman who is insecure, who probably strives for precision and who very likely suffers from low self-concept and low self-confidence. There is an omission of breasts, a condition which is sometimes indicative of feelings of immaturity and on occasion an ungenerous attitude toward children. There is a suggestion of evasiveness of other people and a strong possibility that we are seeing depression in her drawings as well. In her male drawing, she seemed to feel somewhat evasive with men. Mrs. Davis' house drawing again suggested insecurity and there were some strong suggestions of withdrawal. Her tree drawing was similar to those drawn by persons who are depressed, who feel inadequate and feelings of inferiority are often observed as well. Withdrawal is also observed with this particular type of tree drawing. There were suggestions in her tree drawing that her defense system either has or may be breaking down under pressure. Oral dependency was suggested by the broad base on her tree drawing.

## 3. MMPI

Mrs. Davis produced a high 2-6 profile on the MMPI. These two clinical scales, 2 and 4, fell at a T-score of 69 and 67 respectively. ~~This placed her in the High Level of Significance category. The 2-6 profile is~~ often seen with depressed persons who are somewhat agitated. They essentially experience some self-depreciation, agitation, tension and quite often, irritability. Such individuals also tend to lack self-confidence and at times feel useless in a variety of situations. Withdrawal and social introversion are often an adaptive process. In addition to the clinical scales, there was a strong elevation on the Social Introversion Subscale, Social Maladjustment Subscale and on the Physical Malfunction subscale. Given Mrs. Davis' medical history, elevations on the Physical Malfunction Subscale are not surprising.

Critical items on the MMPI included:

- I have had periods in which I carried on activities without knowing later what I had been doing.
- I am worried about sex matters.
- I believe my sins are unpardonable.
- Peculiar odors come to me at times.

Items answered in a negative direction included:

- My sex life is satisfactory.

#### 4. TAT

Mrs. Davis responded to cards #7BM-6BM, 4, -2, -1, 43G, 12M, -11, 13MF, 12F, 15, 18GF and 8BM. Each of her responses were about eight or ten lines in length. While her responses were fairly cryptic, they were also lucid containing a plot, characters and a sense of continuity from beginning to end. The theme that was persistent from one response "story" to another was one of family devotion, particularly a tendency to idealize the parent figures. In these stories parents were variously depicted as understanding, compassionate, resourceful and protective.

I did not see any suggestions of aberrant thought processes.

#### IV. SUMMARY

Mrs. Penny Davis is a 36-year-old divorced mother of one child. Mrs. Davis is a bright woman who seems to be functioning in the superior range of intellectual ability. Her intellectual ability is demonstrated by her achievement of a Masters Degree. She is an educator.

Mrs. Davis presented at the clinic for testing noting that the psychological evaluation was to be part of a custody evaluation related to her 3-year-old son. Mrs. Davis seemed to understand the purpose of this examination and seemed completely cooperative during every aspect of the evaluation.

The results of psychological testing portrayed Mrs. Davis as an individual who has undergone significant emotional and physical trauma in her life. She was raped during mid-adolescence, an event which seemed to have had long-term emotional consequences. Mrs. Davis has also undergone surgery on a number of occasions for various physical problems. At the present time she is on medication for depression and for conditions related to a seizure disorder.

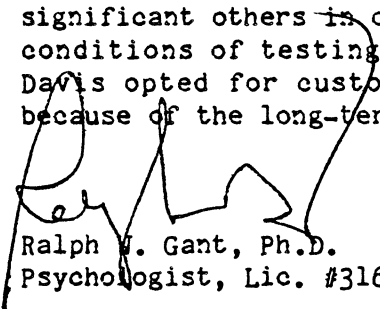
Mrs. Davis, according to her self-report, has never indulged in any use of alcohol or any illegitimate drugs and has no legal history. She has recently, since age 35, been in treatment with Dr. Clarke Summers for depression. This depression, according to her self-report, is fairly recent, having emerged since the second birthday of her son. She believes that her depression may be a chemical reaction to one of the medications but also attributes her depression to sexual rejection, her divorce and to her attempts to be a supermom.

Mrs. Davis' responses in testing suggested an individual who may be compulsive in her thinking. This is suggested by the neatness of her work, her small printing, and the length of her responses. It is also suggested by a tendency to feel low self esteem over lack of achievement or over problems in her life. Depression is probably the most common theme in the results of Mrs. Davis' drawings and this depression may actually be understated in the results of testing because she is currently on medication for depression. There seems to be a component of agitation to her depression, but this is not surprising considering her physical conditions, the types of medications which she is taking and the situation of conflict over the custody of her child. Overall, Mrs. Davis seems very dependent upon her parents whom she seems to revere and perhaps idealize. They seem to have been a very stable long-term support system, but we may also be seeing some tendency toward strong dependency in her reliance upon them for

support.

My diagnostic impressions are that Mrs. Davis remains depressed in spite of her anti-depressant medication. There may be some component of her depression which is attributable to the anti-seizure medication, but her depression seems to be quite long-term, perhaps predating the emergence of her seizure disorder. Depression in combination with some presenting anxiety would seem to be significant in her life and may have, in fact, interfered to her life to some extent.

While she attributes the beginning of her depression to a period of her life, around the second year of her child, it was not possible to ascertain from either the testing or the clinical interview how much the advent of her child into her marriage might have contributed to her depression, or to the breakup of her marriage. Her willingness now to accept the child back into her life may be evidence of growth in terms of her sense of responsibility toward the child or there may be other factors which might be contributing toward her current motivation. Certainly one of those factors might initially have been a recognition that she was depressed and that under those conditions of depression she was not able to attend to her child's needs appropriately. Now, after having undergone significant therapeutic intervention she may be at a greater state of readiness to respond to the needs of her child. This is conjecture, but it is often the case that depressed persons must in fact have respite from the care of close significant others in order to recover from emotional conditions. Under the conditions of testing it was difficult to ascertain whether or not Mrs. Davis opted for custody in order to fulfill her own emotional needs or because of the long-term best interest of her child.



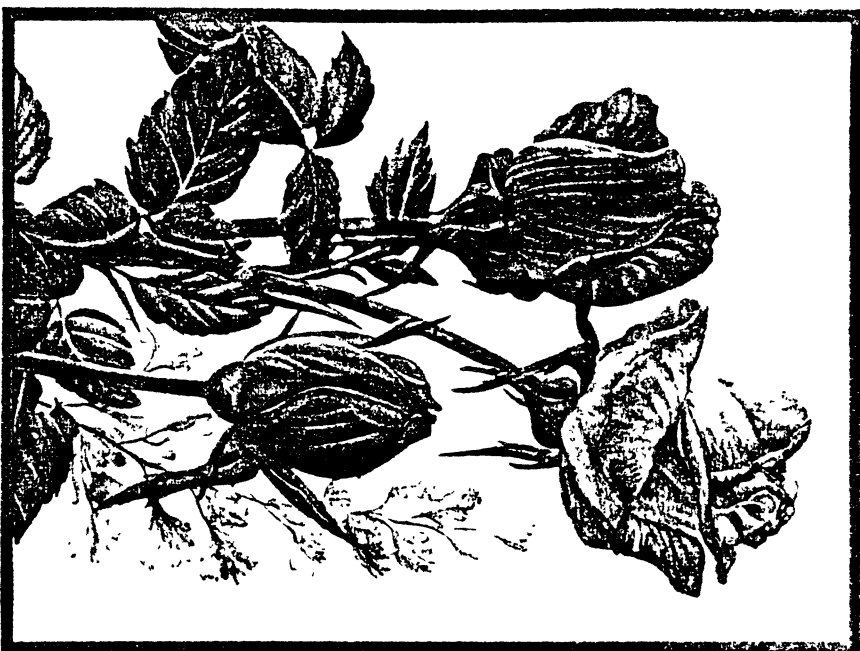
Ralph W. Gant, Ph.D.  
Psychologist, Lic. #316

RWG/tw

Brian

CASE # 89675  
DATE 9-11-85  
Exhibit 7P

# THANK YOU



It's a nicer world  
because of  
thoughtful people like you...  
Thank you.

Dear Brian, so helpful!  
I thank you extra  
for all your help  
Lenny

Feb 7 1986  
3:55 p.m. EP

IN THE SECOND JUDICIAL DISTRICT COURT, COUNTY OF WEBER  
STATE OF UTAH

-----  
JAMES Z. DAVIS,

Plaintiff

v.

PENNY A. DAVIS,

Defendant  
-----

)

)

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)

MEMORANDUM DECISION

Civil No. 89675

Defendant has filed a Motion to amend the judgment and reverse the custody ruling made by the Court at trial. One of the grounds asserted by the defendant is that there is newly discovered evidence. This is asserted in an affidavit of herself which indicates she has an intention in the future to terminate her teaching employment and therefore eliminate the necessity of surrogate care for the minor child. This is not newly discovered evidence, this is simply an indication that she possibly may change her mind about her employment role in the future.

Also the assertion that the statement of Kim Peterson after trial indicating was having marital problems does not constitute newly discovered evidence that would merit changing the judgment. There was not great reliance placed by the Court on his particular testimony but was mainly as far as the experts were concerned, relying on Dr. Summers despite his affidavit of September 25. At the trial he indicated he was still in a period of reconstruction

with the defendant. The Court was further impressed at the 60(b) hearing with the testimony of Dr. Summers as to the extent of the defendant's depression, and in fact, placed great reliance on the description of her condition to show she was taken advantage of and hence granted the 60(b) Motion.

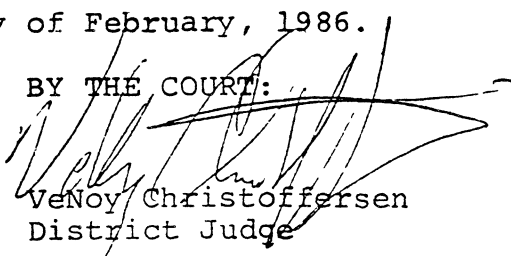
The Court did indicate that either would be adequate parents for custody of the child. The Court still feels at this time that examining all of the evidence as a whole, it is best to leave the minor child where he is and where he has lived since his birth.

The Court further feels there was no ruling that was improper as a matter of law. The Court considered decisions of the Utah Supreme Court, especially Hogge v. Hogge, 649 P.2nd 51, and the Court reviewed those principles of custody in its opinion on the custody issues.

Therefore, the Motion will be denied. Counsel for plaintiff to prepare the appropriate order.

Dated this 7 day of February, 1986.

BY THE COURT:

  
VeNoy Christoffersen  
District Judge



FEB 27 2 07 PM '86  
F. J. JY-  
WEBER COUNTY CLERK  
RICHARD R. GREENE

B. L. DART (818)  
Attorney for Plaintiff  
310 South Main  
Suite 1330  
Salt Lake City, Utah 84101  
(801) 521-6383

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

---ooo0ooo---

JAMES Z. DAVIS,	:	ORDER DENYING MOTION
	:	FOR AMENDMENT OF
Plaintiff,	:	FINDING OF FACT,
	:	CONCLUSIONS OF LAW
v.	:	AND JUDGMENT
PENNY A. DAVIS,	:	Civil No. 89675
	:	
Defendant.	:	Judge VeNoy Christoffersen,
	:	by designation

---ooo0ooo---

Defendant has filed a Motion to amend the judgment and reverse the custody ruling made by the Court at trial. One of the grounds asserted by the defendant is that there is newly discovered evidence. This is asserted in an affidavit of herself which indicates she has an intention in the future to terminate her teaching employment and therefore eliminate the necessity of surrogate care for the minor child. The Court finds this is not newly discovered evidence, and is simply an indication that she possibly may change her mind about her employment in the future.

The Court also finds that the assertion that the statement of Kim Peterson after trial indicating he was having

marital problems does not constitute newly discovered evidence that would merit changing the judgment. There was not great reliance placed by the Court on his particular testimony. As far as the experts were concerned, the Court was relying mainly on Dr. Summers despite his affidavit of September 25. At trial Dr. Summers indicated he was still in a period of reconstruction with the defendant. The Court was further impressed at the time of the Rule 60(b) hearing with the testimony of Dr. Summers as to the extent of the defendant's depression, and in fact, placed great reliance on the description of her condition to show she was taken advantage of in granting her Rule 60(b) Motion.

The Court has indicated that either of the parties would be adequate parents for custody of the child. The Court still feels at this time that examining all of the evidence as a whole, it is in the best interests of the minor child to leave his custody where he has lived since his birth.

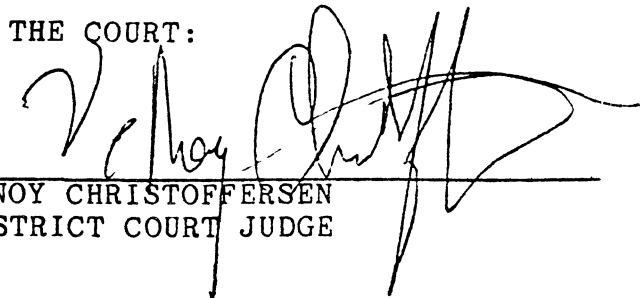
The Court further feels there was no ruling that was improper as a matter of law. The Court considered decisions of the Utah Supreme Court, especially Hogge v. Hogge, 649 P.2nd 51, and the Court reviewed those principles of custody in its opinion on the custody issues.

This matter having been submitted to the Court in accordance with Rule 2.9 of the District Court Rules of Practice, and the Court being fully advised,

IT IS HEREBY ORDERED that defendant's Motion may be and is hereby denied. Each party to bear their own costs incurred herein.

DATED this \_\_\_\_\_ day of February, 1986.

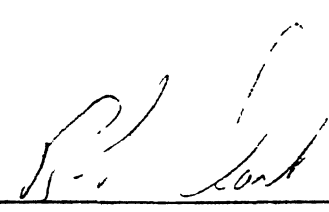
BY THE COURT:

  
\_\_\_\_\_  
VENOY CHRISTOFFERSEN  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that on the 19<sup>th</sup> day of February, 1986, I mailed a copy of the foregoing Order Denying Motion to Amend Findings of Fact, Conclusions of Law and Judgment to:

Penny A. Davis  
852 East 5500 South  
Ogden, Utah 84405

  
\_\_\_\_\_

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VAL R. ANTCHAK  
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SPENCER E. AUSTIN

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AUG 22 1986

August 22, 1986

Geoffrey Butler, Clerk  
Utah Supreme Court  
322 State Capitol Building  
Salt Lake City, UT 84112

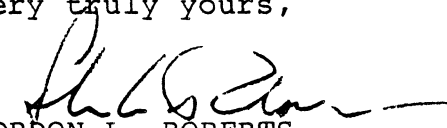
Re: Davis v. Davis, Docket #86-0134

Dear Mr. Butler:

We have just become aware of the Court's opinion in the case of Pusey v. Pusey, Case No. 20365, filed August 18, 1986. In light of that decision, we feel it necessary to request that point III of the argument section of our brief, filed in the above-referenced appeal, be stricken. We therefore request that you do so pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure.

Thank you for your assistance.

Very truly yours,

  
GORDON L. ROBERTS

GLR:ls

cc: Bert L. Dart, Esq.