

1998

Mathie v. Gough : Brief of Appellant

Utah Court of Appeals

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Twila Gough; Defendant Pro Se.

David R. Maddox; Attorney for Appellant.

Recommended Citation

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BRIEF

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Appellate Court No. 981452CA

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Priority # 4

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Utah Court of Appeals

FEB 17 1999

Julia D'Alesandro
Clerk of the Court

GARY MATHIE,)	
)	APPELLANT'S BRIEF
)	
Plaintiff and Appellant,)	
)	Appellate Court No. 981452CA
-vs-)	
)	Civil No.944701877
TWILA GOUGH,)	
)	Priority # 4
Defendant and Appellee.)	
)	

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PARTIES TO THE APPEAL

The parties to this Appeal are Gary Mathie (hereinafter “Appellant”), the Plaintiff in the original action and Twila Gough (hereinafter “Appellee”), the Defendant in the original action.

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JURISDICTION

This is an appeal to this Court taken from the trial court's grant of permanent physical custody of the parties minor child to Respondent entered on January 31, 1997.

The jurisdiction of this Court is invoked pursuant to Section 78-2a-3(2)(h) Utah Code Ann. 1953, as amended.

ISSUES FOR REVIEW

A. Did the trial court abuse its discretion by giving give undue significance to Respondent as the primary caretaker of the parties' minor child in determining permanent custody when both parties had been co-caretakers of the child before the Respondent was granted temporary custody by the trial court and the reason Appellant did not have custody during that time was because of the temporary order?

Grounds for Review and Standard of Review

Appellant appeals the final order granting permanent custody to Respondent at a domestic trial held on January 31, 1997.

Trial court Judges are accorded broad discretion in determining the permanent physical custody of a minor child. *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996). Therefore, the standard of review of the Court is limited to a review of the trial court's findings of fact for an abuse of discretion.

Additionally, the issue was preserved at trial. *See Record* at 226-227.

B. Did the trial court abuse its discretion when it weighed the Appellants prior criminal history against him and for the Respondent in determining his fitness as a father when the criminal incidents occurred before the child was born and the Appellant has no criminal history after the birth of the child?

Grounds for Review and Standard of Review

Appellant appeals the final order granting permanent custody to Respondent at a domestic trial held on January 31, 1997.

Trial court Judges are accorded broad discretion in determining the permanent physical custody of a minor child. *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996). Therefore, the standard of review of the Court is limited to a review of the trial court's findings of fact for an abuse of discretion.

STATUTORY PROVISIONS

There are no statutory provisions related to the issues at hand. However, an analogous statute is found in Utah Code Ann. § 30-1-3(2):

In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of an order granting permanent custody of the parties' minor child to Respondent entered by the Honorable Jon M. Memmott on January 31, 1997. This case is before the Court today because the trial court relied on a finding of fact concerning Respondent's role as the primary care taker of the minor child for the two and a half years prior to the trial. However, up to the time that the parties separated both parties shared in the raising and care of their child. After separation, Respondent was granted temporary custody which forbade Appellant from continuing as a caretaker to his daughter.

Also, the court weighed Appellants prior criminal history against him when the incidents occurred before the birth of the parties' child.

B. Course of Proceedings and Disposition in Court Below.

The case came before the Honorable Jon M. Memmott at a Domestic Trial held November 22, 1996 and January 31, 1997. At which time, the court, "by the slimmest of margins," granted custody to Respondent. *Record* at 235.

C. Statements of the Facts

1. Appellant and Respondent had a child born June 4, 1994 out of wedlock and have never been married to each other.

2. Appellant has never denied and has admitted paternity during the entire course of the child's life.

3. Appellant and Respondent shared caretaking responsibility of their minor child until November 1995. During this time Appellant would care for their child from noon until midnight while Respondent worked and at other times convenient to the parties.

4. Appellant is and was at all times on permanent disability which allowed him to provide personal care to the child and Appellant provided care whenever it was needed.

5. The parties broke off their relationship in November 1995.

6. After breaking off the relationship, Respondent denied Appellant visitation, forcing Respondent to have to resort to legal action.

7. In January 1996, Commissioner Allphin, granted custody to Respondent and ordered that Appellant be granted visitation which was to be gradually increased over the next 90 days to the point that Appellant had overnight visitation.

8. In March 1996, just a few weeks before the 90-day period ordered by the Court, Respondent decided to move to Idaho under the pretext of being closer to her family rather than comply with overnight visitation.

9. The Commissioner ordered overnight visitation in favor of Appellant.

10. Respondent would only allow overnight visitation one or two days at a time causing much disruption in the child's life as she was constantly being driven back and forth between Utah and Idaho several times a month.

11. In May 1996 the Court ordered week long visitations.

12. During the time that Appellant did not have visitation he made numerous attempts to contact his child by telephone. Some times he would hear his child playing in the background, but Respondent would deny him contact with their child.

13. At trial Appellant testified to several alcohol related offenses occurring prior to the birth of the parties' child. *See Record* at 65-70.

A. Appellant was arrested for DUI on May 16, 1985.

B. Appellant was arrested for DUI on December 12, 1986.

C. Appellant was convicted of alcohol related reckless driving on April 21, 1989.

D. Appellant was convicted of having an open container of alcohol on February 25, 1992.

E. Appellant was convicted of Alcohol Related Reckless on February 25, 1994.

14. On January 31, 1997 after concluding the domestic trial, the Court issued its findings of facts and analyzed seven factors.

A. The Stability of the Parties.

i. Both parties have exhibited a high degree of immaturity.

“[A]s to the stability of both parties, I think particularly as to issues of maturity, I think both parties show a fairly high degree of immaturity for their age.” *Record* at 228. *See Also Findings of Fact and Conclusions of Law* at ¶ 10 (A)

ii. That both parties are able to provide a suitable environment and are relatively equal under a review of the standard concerning the stability of their financial condition and lifestyle. *See Record* at 228-229 and *See Findings of Fact and Conclusions of Law* at ¶ 10(A).

B. The effect of maintaining the primary custodial relation.

i. “Over the past 2½ years, the life of the child, the Defendant has provided more of the minor child’s primary care than the Plaintiff. As a result it is in the child’s best interests to maintain the Defendant’s primary custodial relation with the child” *Findings of Fact and Conclusion of Law* at ¶ 10 (B) *See also, Record* at 232.

ii. “I think it was clearly demonstrated in this case, however, that the plaintiff has done more primary care taking in a

significant factor than most fathers would in this case and has the ability and skill to provide primary care and has in the past.” *Findings of Fact and Conclusions of Law* at ¶ 10 (B), *See also Record* at 232.

- C. Relative strength of the parties bonds with the child.
 - i. Both parties have an equally great love and bond with the child. *Findings of Fact and Conclusions of Law* at ¶ 10(C).
- D. Relative ability of the parties to provide a suitable environment for the child.
 - i. The parties are of relatively equal ability to provide a suitable environment for the minor child. *Findings of Fact and Conclusions of Law* at ¶ 10(D).
- E. Character and emotional stability of each party.
 - i. The Plaintiff’s five alcohol related traffic offenses cast a negative light on his character.
 - ii. The Defendant’s character is more favorable when compared to Plaintiff’s in relation to the child’s best interest. *Findings of Fact and Conclusions of Law* at ¶ 10(E).

F. Commitment to provide care for the child and the relative parenting skills of the parties.

i. This factor favored neither party. *Findings of Fact and Conclusions of Law* at ¶ 10(F).

G. Ability and willingness of each party to facilitate the visitation of the minor child with the noncustodial parent.

i. “The ability and willingness to provide visitation would clearly favor the plaintiff in this case.” *Record* at 234. *See also Findings of Fact and Conclusions of Law* at ¶ 10(G).

15. In summing the factors the court reasoned that “. . . two of the factors [favor] the mother probably more than the father. One factor favors the father probably at a significant level and all other factors being equal.” *Record* at 234-235.

16. After weighing the relative factors the found made its ruling: “Given those, the Court would find, and by the slimmest of margins in this, that the mother is more suitable on the factors and would award custody to the mother in this case with liberal visitation.” *Record* at 235.

SUMMARY OF THE ARGUMENT

The District Court abused its discretion in awarding permanent custody of the parties minor child to the Respondent. There were two ways in which the court abused its discretion. First, the court used the effects of a temporary custody order and gave weight to Respondent having custody of the child prior to the trial. The sole reason that Appellant was unable to share in the custody of his daughter during the two and a half years prior to trial was because of the temporary order. From the time that his daughter was born to the date that temporary custody was awarded, Appellant shared in the upbringing and raising of his daughter as an equal caretaker. Utah case law prohibits the reliance on a temporary order when issuing an order of permanent custody. As the court should not have relied on the effects of the temporary order and the parties shared in the caretaking of the child before the issuance of the order, the trial court abused its discretion.

A second abuse of discretion came when the trial court placed undue weight on the Appellant's prior alcohol related offenses. Offenses which occurred before the Appellant knew that Respondent was pregnant with his daughter. Upon learning of the impending birth of child, Appellant turned his life around and had no further offenses related to alcohol. The failure of the trial court to take note that Appellant had no alcohol related offenses in the two and a half years between the birth of child and the date of trial was an abuse of discretion. The weight that the court put on this issue went directly to the court finding that the factor of character favored the Respondent.

A review of the factors taking account the abuse of discretion by the trial court, leaves six factors favoring neither party over the other and one factor favoring Appellant. Therefore the case should be remanded to the District Court to review the issue of permanent custody.

ARGUMENT

B. Custody Under a Temporary Support Order.

The trial court abused its discretion in using the factor that Respondent had been the primary caretaker when the sole reason she was the primary caretaker was because she had been awarded custody under a temporary court order. Up until the time that the trial court granted temporary custody, both parties shared in raising their child. Effectively, the parties were joint caretakers until they separated.

The Utah Supreme Court has clearly ruled that temporary custody orders are not to be treated as permanent custody. As the Court held in *Tucker*: “A temporary custody order is only that, temporary. . . . It is not to be treated as permanent custody. . . . Accordingly, this court has held that a temporary order should not be given the weight of a permanent order.” 910 P.2d at 1215-1216. The rationale for not giving a temporary order the same weight as a permanent order is quite clear:

If a temporary order of custody were to be given permanent status subject to *Hogge*’s changed-circumstances test, no party would ever stipulate to a temporary arrangement and every hearing on temporary custody would involve time-consuming presentation of witnesses, both expert and lay, as

well as other types of evidence. In short, a temporary custody hearing would become a permanent custody hearing.

Id. at 1216

In the present case now before the court, the trial court clearly abused its discretion by relying on the Respondent's temporary custody contrary to the rule in *Tucker*. In reviewing the factors it considered in determining custody, the court ruled that for the most part the parties were equal in all but three factors (*See Record* at 228-235). The two facts that favored Respondent were:

- 1) Respondent's custodial relationship with the child, and
- 2) Respondent's character and emotional stability. *See Record* at 234.

With regards the first of these factors, clearly, the court should not have favored the Respondent because she was the primary caretaker. As the Court acknowledged, prior to the District Court granting Respondent temporary custody, both parties shared equally in providing care for the minor child. Appellant did not choose to forego custody of the child. In fact, he did all there was in his limited power to be an active part of his child life. As the trial court pointed out, Appellant "...has done more primary care taking in a significant factor than most fathers would in this case and has the ability and skill to provide primary care and has in the past." *Record* at 232. Appellant's hands were tied by the temporary order. The Court in effect issued a temporary order, without benefit of a full evidentiary hearing and custody evaluation which gave one party *temporary* and

then used the temporary order as one of the basis for denying him visitation. In effect, it is the concern expressed in *Tucker, supra* to life.

The appropriate way for the trial judge to have addressed the issue of custody was set forth in *Tucker*. After the expiration of the temporary custody period,

[a]ssuming each party remains fit and proper to serve as the custodial parent, in order for plaintiff to be successful in seeking custody, she need not make a showing of changed circumstances in the usual sense that is required to modify an order of *permanent* custody. She need only make a showing that an award of custody to her would best serve the interests of the child.

Tucker at 1216 citing *Boals v. Boals*, 664 P.2d 1191, 1194 (Utah 1983) (emphasis in original). Therefore, all Appellant had to show was that it would be in the best interest of the child for him to be granted custody. The Court should not have found that the Respondent was the primary caretaker. The evidence was that before the Court intervened, the parties were equal in providing care for the minor child.

If the factor of temporary custody is given its proper weight, that is, equal to both, Respondent is left with only the factor of her character and emotional stability in her favor. She wins the benefit of the doubt in this case because she does not have the history of alcohol offenses that the Court notes exist on Appellant's record. This is, in effect, the flip side of that issue, which is addressed later.

The Court listed one factor in Appellant's favor. The court found that Appellant would be able and willing to provide visitation to Respondent. *See Record* at 234. The

Court recognized that the Respondent had systematically attempted to deny Appellant visitation and tried to deny him the father/daughter relationship he was entitled to enjoy. This was summed up by Appellant when he testified that the Respondent had wanted to know when he would accept the fact that he was nothing more than a sperm donor. *See Record* at 47-48.

Even with the errors by the Court indicated above, the court recognized and expressed its knowledge of the relatively equal position of the parties. After addressing and weighing the relative factors the court ruled, “Given those, the Court would find, and *by the slimmest of margins* in this, that the mother is more suitable on the factors and would award custody to the mother in this case with liberal visitation.” *Record* at 235 (emphasis added). Taking out the court’s reliance on the temporary custody order, it is possible that the court would have come to a different outcome on the issue of custody.

The court in determining custody should look to the reason why one party that had been a caretaker in the past had his or her caretaker status changed. Specifically, the court should look at the “...reasons for having relinquished custody in the past.” *Sukin v. Sukin*, 842 P.2d 922, 924-925 (Utah App. 1992). Appellant in the present case, had shared in the care taking of the minor child prior to the order of the court granting temporary custody to Respondent. From the time that the child was born to the issuance of the temporary order, Appellant took an active role in the caretaking of his daughter. The present factual situation is not one where the Appellant decided to have nothing to

do with his daughter. Instead he fought the entire time for custody and access to his daughter. Had the court not granted temporary custody to the Respondent, Appellant would have continued to take an active role as a caretaker of his daughter.

Additionally, the trial court failed to take into account the fact that Appellant was on permanent disability and would be able to provide personal rather than surrogate care to their child. In *Sukin*, this Court stated that the court should consider the relative position of the parties to provide personal rather than surrogate care. 842 P.2d at 924-925. In the present case, Appellant would clearly be able to provide twenty four hour a day care for his daughter. He is on disability and is unable to work. This disability allows him to stay at home and be with his daughter. On the other hand, Respondent either works or is seeking employment as a nurse and is unable to provide the attention that Appellant can provide.

Considering the Court found for the Respondent by only the slimmest of margins found in favor of Appellant on the custody issue, it is clear that the balance would have shifted if the Court had not erred in viewing the Respondent as the primary caretaker and failed to take into account that the Appellant could provide personal care, whereas Respondent would need surrogate care

C. Appellant's Prior Criminal History.

In addition to the reliance on the temporary support order, the trial court also weighed heavily Plaintiffs prior alcohol related traffic offenses. *See Findings of Fact and Conclusions of Law* at ¶10(E). This is in fact the basis for the Court finding that the “character issue” was in balance in favor of the Respondent. The Court erred in giving weight to these old offenses. The dates of those offenses had an eight-year time span from 1986 to 1994. The last offense occurred several months before the birth of Appellant’s daughter. After learning that Respondent was pregnant with his child, Appellant actively sought and in fact did turn his life around to become more responsible. No offenses occurred between birth and trial, a period of almost three years.

The use of the offenses by the trial court was an abuse of discretion as it related to Appellant’s ability to provide care for his child. In fact, the Court, as noted above stated that Appellant did an exceptional job in that area. After the birth of the child, Appellant kept his record clear of any similar offense in order to be a good father. He learned responsibility for his actions. Appellant had no offenses between 1994 and 1997.

The reason for the court to consider alcoholic offenses is clear. In *Sukin*, this Court stated that the trial court should consider the “. . .significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause . . .” 842 P.2d at 924. Appellant’s prior offenses do not effect or impair his ability to function as a father. In fact the trial court specifically stated that Appellate was a adequate father and at least as suitable a parent as the Respondent. As the trial court Judge stated: “I think it

was clearly demonstrated in this case . . . that the plaintiff has done more primary care taking in a significant factor than most fathers in this case and has the ability and skill to provide primary care and has in the past.” *Findings of Fact and Conclusions of Law* at ¶ 10(B), *see also, Record* at 232.

Also, both parties were found to be able to provide a suitable environment and were found relatively equal under a review of their financial condition and their lifestyle. *See Record* at 228-229; *see also, Findings of Fact and Conclusions of Law* at ¶10(A). The court clearly viewed the parties as equal in their ability to care for their daughter. The court admitted that Appellant had given primary care to his daughter in the past. But for the temporary order, he would have continued this level of care. The above statements are inconsistent with finding the character issue favored Respondent and should have been held against Appellant. Without the character issue, the Court had to find that the parties had one factor favoring each party. However, as shown above, the primary caretaker issue is a red herring and should not have been considered as a factor in favor of Respondent. Appellant and Respondent are therefore equal in their ability to care for the minor child. In effect, there is no evidence showing indicating where it would be in the best interest of the child to reside. The matter is evenly balanced, except for one factor. The Respondent repeatedly interfered with the relationship between Appellant and Respondent. The opposite was not found to be true. Therefore, with proper evaluation,

all factors are in balance between the parties except the last. Appellant should have been awarded custody “by the slimmest of margins.”

CONCLUSION

The trial court abused its discretion in awarding permanent custody of the parties minor child to the Respondent. In analyzing seven factors, the court found that in all but three, the parties were equal. The court found that two factors favored Respondent: the effect of maintaining the custodial relationship and the character and emotional stability of the parties. One factor was found to favor Appellant: the ability and willingness to facilitate the visitation of the minor child with the other parent.

The Court erred in finding that those two factors favored the Respondent. The Court erred when it used the effects of a temporary custody order and gave weight to Respondent having custody of the child prior to the trial for the reasons set forth above.

As the foregoing discussion shows, Utah case law prohibits the reliance on a temporary order when issuing an order of permanent custody. As the court should not have relied on the effects of the temporary order and the parties shared in the caretaking of the child before the issuance of the order, the factor of maintaining the custodial relationship should favor neither party. Removing this factor, the court is left with one factor in favor of each party.

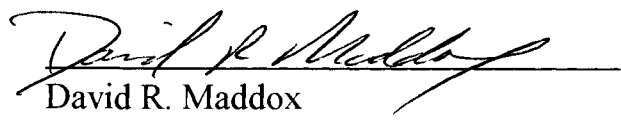
The second was also erroneously found to be in favor of Appellant when the trial court placed undue weight on the Appellant’s prior alcohol related offenses. The offenses

occurred before the Appellant knew that Respondent was pregnant with his daughter. After learning of the impending birth of child, Appellant strove to and did in fact turn his life around. The trial court erroneously put weight on historical behavior not supported by the recent behavior and failed to properly consider that Appellant had no alcohol related offenses in the two and a half years between the birth of child and the date of trial was an abuse of discretion. The weight that the court put on this issue went directly to the court finding that the factor of character favored the Respondent.

Removing the weight put on the alcohol offenses and the primary custody issue the trial court would be left with one solitary factor favoring one party over the other. Clearly based on the ruling of the court and which is uncontested, the factor of which parent would better provide access to the other party to the child for visitation favors Appellant.

A review of the factors taking account the abuse of discretion by the trial court, leaves six factors favoring neither party over the other and one factor favoring Appellant. Based on the foregoing, Appellant respectfully asks this Court to remand the issue of permanent custody to the District Court.

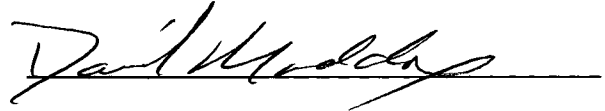
Respectfully submitted this 11 day of February 1999.


David R. Maddox
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of February 1999 I served a true and correct copy of the foregoing Reply Brief to the persons at the address listed below by depositing a copy in the United States Mail, postage prepaid.

TWILA GOUGH
Defendant Pro Se
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Idaho Falls, ID 83406

A handwritten signature in cursive script, appearing to read "David M. Maddy", is written over a horizontal line.

**IN THE
COURT OF APPEALS
OF THE STATE OF UTAH**

GARY MATHIE,

Plaintiff and Appellant,

-vs-

TWILA GOUGH,

Defendant and Appellee.

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**ADDENDUM TO
APPELLANT'S BRIEF**

Appellate Court No. 981452CA

Civil No.944701877

Priority # 4

TWILA GOUGH
Defendant
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FILED

Utah Court of Appeals

FEB 17 1999

Julia D'Alesandro
Clerk of the Court

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<i>Mathie v. Gough, Transcript of Record</i> , Civil No. 944701877PA (2 nd Dist. Court, Stat of Utah, May 7, 1998)	Exhibit C

Exhibit A

Mathie v. Gough, Findings of Fact and Conclusions of Law, Civil No.

944701877PA, (2nd Dist. Court, State of Utah, May 7, 1998)

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FILED IN / FRANK OFFICE
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
DAVIS COUNTY, STATE OF UTAH

GARY MATHIE,)	
)	DECREE OF PATERNITY,
Plaintiff,)	CHILD CUSTODY, CHILD
)	SUPPORT AND VISITATION
v.)	
)	
TWILA GOUGH,)	Civil No. 944701877 PA
)	
Defendant.)	Judge: Jon M. Memmott

The above-entitled matter came before this Court for a trial heard by the Honorable Jon M. Memmott on November 21, 1996. This matter was not concluded on that date so that Plaintiff would have an opportunity to present additional expert testimony. Plaintiff's expert was unavailable on the aforementioned date. This matter reconvened on January 31, 1997, at 1:00 p.m., and additional testimony was presented. The Court having considered the parties stipulation concerning child support, having reviewed documents, testimony and evidence on the issue of child custody and having made its Findings of Fact and Conclusions of Law, hereby, ADJUDGES, DECREE AND ORDERS as follows:

Mathie v. Gough
Decree of Paternity, Child Custody,
Child Support and Visitation

1. The Plaintiff is adjudged the natural father of McKinlee Marie Mathie, born to the Defendant on June 4, 1994.

2. The care, custody and control of the parties minor child is awarded to the Defendant with liberal visitation rights awarded to the Plaintiff as follows:

Telephone visitation between the child and the noncustodial parent, here the Plaintiff, should occur once during the work week and once during the weekend. The time for such telephone contact should be as the parties agree, or 8:30 p.m.

The Plaintiff's visitation with the minor child should consist of the first full week of each month for the calendar year 1997 and 1999, until the child enters public school, and the second full week of each month for calendar year 1998. Holiday visitation is to follow this jurisdictions standard visitation schedule. For every month that contains a holiday on which the noncustodial parent is entitled to visitation, the one week visitation period with in that month will be enlarged to incorporate another day, making the period of visitation for that month eight (8) days, unless the noncustodial parent elects to provide all necessary transportation of the child incident to

Mathie v. Gough
Decree of Paternity, Child Custody,
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visitation on the actual date of the holiday. Christmas visitation should consist of one week before or one week after Christmas, either termination or beginning on Christmas day at 1:00 p.m. Summer visitation shall be for the period of six (6) weeks. During this period the custodial parent shall be allowed one weekend of visitation with the minor child. The parties are free to modify the above visitation schedule by stipulation.

The Court orders that the parties maintain the current allocation of transportation costs regarding the child's visitation. The Plaintiff should be responsible for receiving the child at the home of the Defendant and transporting her to the location of visitation. The Defendant is responsible for retrieving the child and returning her to Defendant's home following the monthly visitation period or the summer visitation period.

3. Plaintiff shall pay \$164.00 per month as and for the support of the parties' minor child, pursuant to the "Uniform Civil Liability for Support Act," Utah Code Ann. §78-45-1 et seq. (See attached Child Support Obligation Worksheet.)

Mathie v. Gough
Decree of Paternity, Child Custody,
Child Support and Visitation

a) Plaintiff shall pay child support, other than any Court-ordered child care costs, on or before the 5th of each month to the Utah State Office of Recovery Services (P.O. Box 45011, Salt Lake City, Utah 84145-0011), unless the Office of Recovery Services notifies Plaintiff that payments shall be sent elsewhere. When public assistance is being provided for the parties' minor child by the State, the ongoing child support shall be awarded to the State of Utah. When public assistance is not being provided for the parties' minor child, the ongoing child support award shall be awarded to Defendant.

b) Pursuant to Utah Code Ann. §62A-11-403, §62A-11-501 et. Seq., and §78-45-9, if the Office of Recovery Services enforces the child support order, Plaintiff's income shall be subject to immediate and automatic income withholding as of the effective date of the order, regardless of whether a delinquency exists.

c) Each party shall keep the Office of Recovery Services informed of changes in his or her address, employment, income, or medical insurance coverage.

Mathie v. Gough
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D) Pursuant to Utah Code Ann. §62A-11-320.5, each party to this action may request that the Office of Recovery Services review the Court's child support order for this action to determine whether a modification of the Court ordered child support shall be pursued.

E) The issue of any past due child support owed by Plaintiff which accrued during a period when Defendant was on public assistance shall be reserved and shall be determined by further judicial or administrative agency proceedings.

4. If medical, dental and/or optical insurance is available to either party at a reasonable cost, the party that can obtain the more favorable coverage shall maintain such insurance for the parties' minor child. Pursuant to U.C.A. §78-45-7.15 both parties shall share equally, (1) the out-of-pocket costs of such insurance premium actually paid on the child's behalf, and (2) all reasonable and necessary uninsured medical expenses including deductibles and co-payments, incurred for the dependant child.

5. If the Defendant goes back to school to acquire the necessary skills for employment or if the Defendant becomes

Mathie v. Gough
Decree of Paternity, Child Custody,
Child Support and Visitation

employed, Plaintiff shall be responsible and liable for one-half of the reasonable child care costs incurred each month as a result of Defendant's schooling or work. Plaintiff shall pay his portion of these child care costs directly to Defendant by the 5th of each month.

6. Plaintiff shall maintain life insurance on his life for the benefit of the parties' minor child, when it is reasonably available, and shall name the parties' child as the beneficiary on said life insurance policy.

7. The parties shall alternate, each claiming the child as a dependant for the tax purposes every other year.

8. The Court orders both parties to complete the Divorce Education for Parents Classes.

DATED this 7th day of ^{May}~~April~~, 1998.

BY THE COURT:


DISTRICT COURT JUDGE

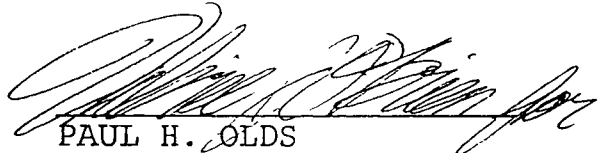
Mathie v. Gough
Decree of Paternity, Child Custody,
Child Support and Visitation

**NOTICE PURSUANT TO RULE 4-504 RULES OF
JUDICIAL ADMINISTRATION**

Pursuant to Rule 4-504 the Rules of Judicial Administration and Rule 6(e) Utah Rules of Civil Procedure, the undersigned will submit the foregoing document to the District court Judge for signature at the expiration of eight (8) days from the date this Notice is mailed to you unless written objection is filed prior to that time.

DATED this 15th day of April, 1998.

Attorney for Defendant


PAUL H. OLDS

CERTIFICATE OF MAILING

I certify that a correct copy of the foregoing **DECREE OF PATERNITY, CHILD CUSTODY, CHILD SUPPORT AND VISITATION** was mailed, via first-class U.S. Mail, postage prepaid, this 15th day of April, 1998, to the following:

David R. Maddox
Attorney for Plaintiff
9160 South 300 West
Sandy, Utah 84070

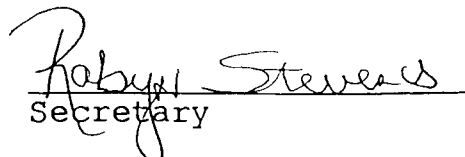

Secretary

Exhibit B

*Mathie v. Gough, Decree of Paternity, Child Custody, Child Support
and Visitation, Civil No. 944701877PA, (2nd Dist. Court, State of
Utah, May 7, 1998)*

UTAH LEGAL SERVICES, INC.
Paul H. Olds, #6777
Attorney for Defendant
550 - 24th Street, #300
Ogden, Utah 84401
Telephone: 394-9431
Fax: 394-9431

FILED IN CLERK'S OFFICE
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
DAVIS COUNTY, STATE OF UTAH

GARY MATHIE,)	
)	FINDINGS OF FACT AND
Plaintiff,)	CONCLUSIONS OF LAW
v.)	
)	
TWILA GOUGH,)	Civil No. 944701877 PA
)	
Defendant.)	Judge: Jon M. Memmott

The above-entitled matter came before this Court for a trial heard by the Honorable Jon M. Memmott on November 21, 1996. This matter was not concluded on that date so that Plaintiff would have an opportunity to present additional expert testimony. Plaintiff's expert was unavailable on the aforementioned date. This matter reconvened on January 31, 1997, at 1:00 p.m., and additional testimony was presented. The Court having received the exhibits, testimony, argument of counsel, being fully advised in the premises, and good cause appearing, hereby rules and enters its Findings of Fact and Conclusions of Law.

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Findings of Fact and
Conclusions of Law
Civil No. 944701877 PA

FINDINGS OF FACT

1. The Defendant was an actual and bona fide resident of Davis County, State of Utah, for more than three months prior to the commencement of this action.

2. Plaintiff and Defendant are not now, nor have they ever been married to each other.

3. The parties have one minor child together, to-wit: McKinlee Marie Mathie; born on June 4, 1994.

4. The parties have agreed and acknowledge in open court that Plaintiff, Gary Mathie is the father of the above mentioned minor child.

5. Plaintiff was previously ordered to pay temporary child support in the amount of \$164.00 per month, and pursuant to the "Uniform Civil Liability for Support Act", Utah Code Ann. §78-45-1 et seq. this amount will continue until modified by Court order. The above amount is based upon the income of the Plaintiff and Defendant. Said child support shall be subject to automatic withholding as a means to collect delinquent and ongoing child support, as provided by U.C.A., §62A-11-401 et seq.

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Findings of Fact and
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6. The parties shall maintain health, optical, hospital and dental insurance for their minor child if it is reasonably available to either of them. All medical expenses not covered by said insurance shall be divided equally between the parties.

7. If Defendant goes back to school to acquire the necessary skills for employment or if Defendant becomes employed, Plaintiff shall be responsible and liable for one-half of the reasonable child care costs incurred each month as a result of Defendant's schooling or work. Plaintiff shall pay his portion of these child care costs directly to Defendant by the 5th of each month.

8. Plaintiff should maintain life insurance on his life for the benefit of the parties' minor child, when it is reasonably available, and shall name the parties' minor child as a beneficiary on said life insurance policy.

9. The parties should alternate, each claiming the child as a dependant for tax purposes every other year.

10. Concerning the issues of custody and visitation of the minor child the primary standard used herein is the "best interests of the child." In this matter a formal custody

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evaluation was not performed. In an effort to determine what custody and visitation scheme would best serve the minor child's interests the court analyzed seven (7) factors. The analysis is as follows:

A. The stability of each party.

Both parties have exhibited a high degree of immaturity, relative to their age, concerning issues of the child's welfare and neither party has exhibited strong characteristics toward work and employment. However, in general, the lifestyles of each parties is stable. The parties are relatively equal under a review of the standard concerning the stability of their financial condition and lifestyle.

B. The effect of maintaining the primary custodial relation.

Over the past 2 1/2 years, the life of the child, the Defendant has provided more of the minor child's primary care than the Plaintiff. As a result, it is in the child's best interests to maintain the Defendant's primary custodial relation with the child. However, the Plaintiff does not lack the skill

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and ability to care for the minor child and has provided more of the child's necessary care than most fathers typically provide.

C. The relative strength of the bond between the child and each of the parties.

Both parties hold genuine love and affection for the minor child. The strength of bond between each of the parties and the child is extremely strong and therefore equal.

D. The relative ability of the parties to provide a suitable environment for the child.

The Defendant's smoking is detrimental to the child's health and welfare. The Defendant's family support, due to her living in Idaho, is of benefit to the child. The Plaintiff has displayed a lack of sensitivity to the issues inherent in the raising a young lady by maintaining in his home a calendar with photographs of women that this Court deems offensive. However, the physical facilities provided by the Plaintiff at his home for the minor child are excellent. Under a review of these factors the parties are relatively equal in their ability to provide a suitable environment for the minor child.

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E. The character and emotional stability of each party.

The Plaintiff's five alcohol related traffic offenses cast a negative light on his character. Defendant has no criminal record of any kind. Under a review of this factor the Defendant's character is more favorable when compared to that of the Plaintiff's in relation to the child's best interest.

F. The commitment to provide care for the child and the relative parenting skills of the parties.

An assessment of the evidence presented relating to this factor favors neither party.

G. The ability and willingness of each party to facilitate the visitation of the minor child with the noncustodial parent.

Under a review of this factor the Plaintiff has evidenced a greater willingness to seek and maintain visitation between himself and the minor child is in the child's best interest.

11. The Court finds the Defendant to be more suitable on the above custody evaluation factors and that, it is in the best interest of the child for the Defendant to retain custody of the parties minor child.

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12. Telephone visitation between the child and the noncustodial parent, here the Plaintiff, should occur once during the work week and once during the weekend. The time for such telephone contact should be as the parties agree, or 8:30 p.m.

13. The Plaintiff's visitation with the minor child should consist of the first full week of each month for calendar year 1997 and 1999, until the child enters public school, and the second full week of each month for calendar year 1998. Holiday visitation is to follow this jurisdiction standard visitation schedule. For every month that contains a holiday on which the noncustodial parent is entitled to visitation, the one week visitation period within that month will be enlarged to incorporate another day, making the period of visitation for that month eight (8) days, unless the noncustodial parent elects to provide all necessary transportation of the child incident to visitation on the actual date of the holiday. Christmas visitation should consist of one week before or one week after Christmas, either terminating or beginning on Christmas day at 1:00 p.m. Summer visitation shall be for a period of six (6) weeks. During this period the custodial parent shall be allowed

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one weekend of visitation with the minor child. The parties are free to modify the above visitation schedule by stipulation.

14. The court finds that the parties should maintain the current allocation of transportation costs regarding the child's visitation. The Plaintiff should be responsible for receiving the child at the home of the Defendant and transporting her to the location of visitation. The Defendant is responsible for retrieving the child and returning her to Defendant's home following the monthly visitation period or the summer visitation period.

15. The parties herein should be ordered to attend the Divorce Education for Parenting Classes.

Based upon the forgoing, the Court hereby makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter herein.

2. The Defendant should be awarded the permanent care, custody, and control of the parties minor child, McKinlee Marie Mathie, born June 4, 1994.

Mathie v. Gough
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3. Plaintiff is the child's natural father and should pay child support to the Defendant in the amount of \$164.00 per month.

4. It is in the child's best interest that the Plaintiff be awarded visitation as scheduled above.

DATED this 7th day of ~~April~~^{May}, 1998.

BY THE COURT:


DISTRICT COURT JUDGE

**NOTICE PURSUANT TO RULE 4-504 RULES OF
JUDICIAL ADMINISTRATION**

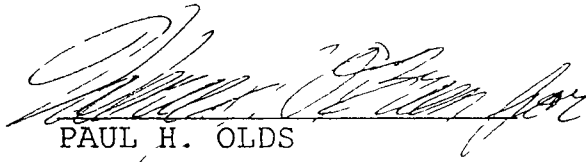
Pursuant to Rule 4-504 the Rules of Judicial Administration and Rule 6(e) Utah Rules of Civil Procedure, the undersigned will submit the foregoing document to the District

Mathie v. Gough
Findings of Fact and
Conclusions of Law
Civil No. 944701877 PA

court Judge for signature at the expiration of eight (8) days from the date this Notice is mailed to you unless written objection is filed prior to that time.

DATED this 15th day of April, 1998.

Attorney for Defendant


PAUL H. OLDS

CERTIFICATE OF MAILING

I certify that a correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** was mailed, via first-class U.S. Mail, postage prepaid, this 15th day of April, 1998, to the following:

David R. Maddox
Attorney for Plaintiff
9160 South 300 West
Sandy, Utah 84070

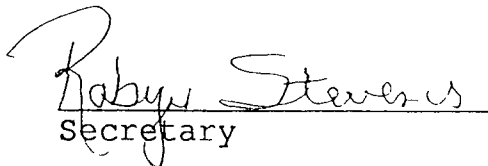

Secretary

Exhibit C

Mathie v. Gough, Transcript of Record, Civil No. 944701877PA (2nd

Dist. Court, Stat of Utah, May 7, 1998)

1 custody to her would best serve the interest of the child.
2 And it specifically said plaintiff need not make a showing
3 of changed circumstances in the usual sense. And by saying
4 that she's had the child for the last year that burden is
5 being placed back on us, your Honor, and that's what their
6 argument is. Again I heard status quo. That argument of
7 status quo is directly contradictory to the case of Tucker
8 versus Tucker, on a temporary order, your Honor, and I'm
9 hoping the Court will see that as such and view this as the
10 first permanent custody order and look only at what is in
11 the best interest of the child long term. Thank you, your
12 Honor.

13 THE COURT: Thank you.

14 The Court will make the following findings and
15 rulings in this case. The primary stand of the Court is it
16 is in the best interest of the child as was testified I
17 think significantly that there was no custody evaluation
18 done in this case. As a result, there is, really the best
19 evidence that a Court should have, particularly in the type
20 of highly contested custody case this is in which there are
21 many facts in dispute. I mean quite honestly, I had a
22 situation where the plaintiff got on and gave one set of
23 facts and circumstances and the defendant got on and gave
24 another set of facts and circumstances. And there was
25 nothing presented in a way that would establish that one's

1 credibility is substantially any better than the others.

2 In fact, I think the Court's observation is is
3 that I think both parties explained the facts as they see
4 them through their circumstances and their eyes. And I
5 think that both parties viewed themselves as a victim of
6 the other party in this case. In fact, very significantly
7 viewed, and to the point it's almost out of control.

8 Because I was amazed, I have never had a case before me
9 where I have had so many incidents of police coming in to
10 enforce visitation on both sides. Where they would go to
11 there and use the police or the police would be involved in
12 enforcing visitations or a call to the police officer to
13 enforce visitation. And that does not seem to be
14 productive.

15 As to the issues, though, with the best interest
16 of the children, as to the stability of both parties, I
17 think particularly as to issues of maturity, I think both
18 parties show a fairly high degree of immaturity for their
19 age. The behavior that is exhibited by both parties is
20 almost teenage behavior instead of adult behavior on both
21 parties in terms of how they are handling and dealing with
22 the situation involving the children.

23 There was raised certain issues, the work
24 situation, the relative abilities of the parents to provide
25 a suitable environment, I think also deals with stability.

1 The defendant, Twila Gough, has been unemployed since
2 January of 1995. Prior to that she has worked in a nursing
3 home and so she is capable of working but, but part of her
4 testimony is the primary responsibility so she could home
5 and care for the child. She moved back to Idaho so she
6 could be with her family and provide greater care for the
7 child and I think that a number of those factors are to her
8 benefit in that, for taking care of the child and I know it
9 was characterized as moving back home as to cut off the
10 child but I think there are some positive benefits from
11 moving where she has the support of a family environment.

12 MR. MADDOX: (inaudible) father (inaudible) the
13 child up.

14 THE COURT: Are we still arguing?

15 MR. MADDOX: No, your Honor, I apologize.

16 THE COURT: Thank you. That the defendant, or the
17 plaintiff in this case, his home environment, his living
18 conditions are very stable. He provides, I think the
19 physical facilities for the child is excellent. The
20 testimony was of neighbors and friends that the home
21 conditions are excellent, the yard provisions for the
22 children are excellent physical provisions for the child.

23 As to his own relative ability, he indicates that
24 he has a permanent disability. There was some concern
25 raised by the Court or raised in the mind of the Court, he

1 indicates that he does, can do, and does a considerable
2 amount of umpiring and his physical disability is such that
3 it doesn't prevent him from umpiring, little league
4 umpiring, and those kind of things which is somewhat
5 strenuous. I've been involved as an umpire doing softball
6 games and others and there is a certain amount of strain
7 and it extends the Court's credibility a little bit to
8 indicate that he can do substantial umpiring for a number
9 of time and yet his disability is such that he can't do any
10 type of work or light work or other work in terms of
11 providing long term for the child. It raises some concern
12 for the Court. It doesn't seem to be consistent in terms
13 of testimony and ability to work but I think both parties
14 have not exhibited strong characteristics as far as work
15 and employment and those kinds of, in this situation
16 neither party has.

17 Also, as to a suitable environment, that there is
18 some indication that testimony was that defendant smokes in
19 the car and home and I think that's detrimental for small
20 children if you smoke in the home and car where the child
21 is. That provides a level of detriment to the child.

22 The Court does find in terms of suitable
23 environment that the character and emotional stability is
24 another factor that must be considered and the Court does
25 consider and believe that the fact that defendant has five

1 alcohol related offenses that would have some indication
2 where charges have been made and there was one theft charge
3 in 1992, the criminal trespass was dismissed, but I think
4 it is indicative of the disputes they're having over
5 visitation.

6 MR. MADDOX: Your Honor, if I could just to
7 correct the Court. The plaintiff had that record not the
8 defendant.

9 THE COURT: That's correct. The plaintiff had the
10 record and I think he's to be commended that it has changed
11 but I still think that life style character, it's part of
12 his character and life style. I think there has been an
13 explanation as to the calendar and the concern of the
14 calendar had to do with the sensitivity, his sensitivity to
15 those factors in relation to long term, if I'm going to
16 award custody in bringing up a young lady, sensitivity to
17 those issues of having and presently those. And I think it
18 exhibited a lack of sensitivity which would affect, some
19 effect on the character of the plaintiff.

20 The commitment to providing custodial parent and
21 providing needs of the child both were excellent. Very
22 strong, I think they are both very concerned in providing
23 for the needs of the child.

24 The relative strength in the parental bonds, they
25 are both extremely strong. I think both parents testimony,

1 their attachment to their young girl is very strong and
2 that is to be commended with both parents.

3 Maintaining primary custodial bond, I think that
4 that factor in and of itself favors the defendant in this
5 case. That over the last two-and-a-half years, based on
6 the testimony, that the defendant has provided more of the
7 primary care taking of custodial care. I think it was
8 clearly demonstrated in this case, however, that the
9 plaintiff has done more primary care taking in a
10 significant factor than most fathers would in this case and
11 has the ability and skill to provide primary care and has
12 in the past.

13 As to the issues of visitation. There are
14 examples in this case and this is a very difficult case for
15 the Court to deal with in terms of a relationship where
16 it's a paternity action and as a result while there was, as
17 least for a short period, there was some physical ties,
18 there doesn't seem to appear to be any significant
19 emotional ties between these parties in terms of a family
20 and parental relation and as a result that is going to
21 cause, I think, emotional feelings and circumstances that
22 make it much more difficult to deal with the child than in
23 a marital relation. The fact that it may have the same
24 consequence to the child, I think, is true. However, the
25 impact on both the parties in dealing with each other is a

1 much more difficult situation, I think in a paternity
2 situation, in their own minds where there are not any type
3 of feelings and relations. So, I think there is going to
4 be in and of itself, much greater conflict.

5 And I think in listening to the testimony of both
6 of the parties that the defendant's testimony was, you know
7 allowing visitation of my child and the view of the child
8 being hers. Where also the plaintiff's testimony was that
9 the actions were in reference to what she, Twila, was doing
10 to me. In terms of what was happening with visitation was
11 what was happening to the plaintiff, not what was happening
12 to the child and so the actions that were taken that he was
13 and the motive and the background was what it was doing to
14 him not what it was doing to the child. So that both
15 parties were looking at this in a situation of involving
16 their own personal interest and investment in the situation
17 with neither party, based on the testimony that I have
18 heard, taking or viewing the primary consideration of the
19 child in this case. I don't think either party's testimony
20 or background exhibited that their primary interest or the
21 primary concern in viewing the visitation problems was the
22 child but it was how it affected them personally in the
23 situation and I don't think that that's in the best
24 interests of the child.

25 Given these factors and findings, I think that

1 the stability is really, of homes, is equal. The
2 maintaining of primary custodial relationship that has
3 historically gone on would favor with the mother. The
4 relative strength of parental bonds is relatively equal.
5 The relative ability of the parent to provide to a suitable
6 environment is likewise equal. The character and emotional
7 stability, I think would favor the mother in this case.
8 The commitment to provide parenting skills would favor
9 neither. The ability and willingness to provide visitation
10 would clearly favor the plaintiff in this case. So, the
11 issue is, I think, --

12 MR. OLDS: What was that last? I'm sorry, your
13 Honor.

14 THE COURT: Ability and willingness to provide
15 visitation.

16 MR. OLDS: Okay, I'm sorry.

17 THE COURT: -- would clearly favor the defendant
18 or the plaintiff in this case. And so, you have a
19 situation, I think, where two of the factors favor the
20 mother probably more than that father. One factor favors
21 the father probably at a significant level and all other
22 factors being equal.

23 Now on that basis, then the Court is being asked
24 to make a decision of custody. And it is almost a Solomon
25 decision, okay, we are going to cut the baby in half kind

1 of situation because the factors come out to be in some
2 relatively equal. Given those, the Court would find, and
3 by the slimmest of margins in this, that the mother is more
4 suitable on the factors and would award custody to the
5 mother in this case with liberal visitation.

6 I think we need to deal with visitation in a very
7 structured fashion and the Court, where she's in Idaho, and
8 the transportation of neither party working, I mean there
9 isn't significant income, I mean transportation is always
10 going to be a significant problem. I think until the child
11 starts school that would allow the plaintiff to have his
12 weeks visitation plus any holidays that would fall during
13 that month that he has a weeks visitation. So, that if
14 there is one holiday, you would add the holiday on to his
15 visitation. If there are two holidays, you would add the
16 two days on. And then I would allow in addition to that
17 very liberal extended summer visitation so that he would
18 have a period of six weeks during the summer of visitation
19 of the child and during that six weeks that the plaintiff
20 would then have one weekend --

21 MR. OLDS: Do you mean defendant?

22 THE COURT: Yes, defendant would have during that
23 period of time one weekend that could be arranged somewhere
24 in the middle, the third, fourth, or fifth week that she
25 could have the child for one weekend. The rest of the time

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February 1999 I served a true and correct copy of the foregoing **ADDENDUM TO APPELLANT'S BRIEF** to the person(s) at the address listed below by depositing a copy in the United States Mail, postage prepaid.

TWILA GOUGH
Defendant Pro Se
670 North Fleming #2
Idaho Falls, ID 83406
