

1989

# Marcelene Pierce Wehry v. Terry Ray Pierce : Brief of Appellant

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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MARCELENE PIERCE WEHRY,	)	
	)	
Plaintiff	)	Argument Priority
Respondent,	)	Classification 7
	)	
vs.	)	
	)	Appeals No. 890239-CA
TERRY RAY PIERCE,	)	
	)	Civil No. 814900255
Defendant	)	
Appellant.	)	

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BRIEF OF APPELLANT

Appeal from the Third Judicial District Court,  
Salt Lake County, State of Utah  
Judge Michael R. Murphy

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STATE OF UTAH  
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STATEMENT OF JURISDICTION

Jurisdiction for the above captioned matter is conferred upon the Utah Court of Appeals pursuant to Utah Code Annotated Section Rule 3(a) of the Rules of the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

This is an appeal from Third District Court, Judge Michael Murphy's denial of the Defendant's Petition for Modification for Change of Custody of the two minor children of the parties.

STATEMENT OF THE ISSUES

1. Did the Court err in its finding at the Petition for Modification Hearing that there is no substantial change of circumstances which would justify a consideration of a change in custody?

2. Did the Court err in failing to make sufficiently

detailed Findings of Fact with regard its analysis of whether there was a substantial change of circumstances?

3. Did the Court err in its finding that even if there was a substantial change in circumstances, it would not be in the best interest of the minor children of the parties to change custody from their mother to their father?

3. Did the Court err in failing to sustain counsel's objection to hearsay evidence being presented?

4. Did the Court err in denying the Defendant's Motion for Amendment of Findings of Fact?

#### STATEMENT OF THE CASE

This appeal is from a final order of the court denying the Defendant Appellant's Petition of Modification and from a final order of the court denying the Defendant Appellant's Motion to Amend Findings. The relevant facts are as follows:

1. The parties were divorced on September 4, 1981. Decree of Divorce.

2. Two boys were born during the marriage: Isaac Pierce born July 7, 1978, and Isaiah Pierce born September 7, 1980. Decree of Divorce.

3. Custody of the two boys was awarded in a default proceeding to the Plaintiff. Decree of Divorce.

4. The Plaintiff and children lived in Utah until January of 1985, at which time she moved to Reno, Nevada without prior notice to the Defendant, and without revealing her or the

children's whereabouts to the Defendant. The Defendant located her by driving to Reno and observing her car at her parents' residence. Defendant hired a lawyer who verified through the children's school records that the boys were residing in Reno. The Plaintiff initiated no contacts with the Defendant until the Defendant brought a Petition for Modification seeking custody of the boys in 1985. Trial Transcript 55-56, 140.

5. The Court denied the Petition for Modification, but awarded substantial summer visitation. Order on Petition for Modification.

6. In May of 1986, the Plaintiff requested the older boy, Isaac, come to live with the Defendant who had since remarried his present wife, Letha Pierce. Isaac lived with the Defendant from May 1986 until November of 1987 save a summer visit in the summer of 1987. Trial Transcript, Page 145.

7. In August of 1987, at the request of the younger boy, Isaiah Pierce, the Plaintiff signed a stipulation agreeing to change physical custody of both boys from herself to the Defendant from July 1987 until July 1988. Stipulation.

8. Both parties petitioned the court for an order changing custody based upon their stipulation, which the court refused to do, instead granting "extended visitation" to the Defendant. Minute Entry.

9. In November of 1987, without any prior notice, the Defendant and his wife became aware that the Plaintiff intended to remove the boys from the Defendant's physical custody, and

move them back to California where the Plaintiff and her husband lived at the time. Trial Transcript, Pages 165-169.

10. The Plaintiff declined to provide her phone number to the Defendant after she removed the boys from his physical custody. Trial Transcript, Page 202.

11. The boys were sent to visit the Defendant during the summer of 1988, and during this time the Defendant petitioned the court for a change of custody. Petition for Modification.

12. A hearing was held on the Petition for Modification on January 8. The Defendant's Petition was denied and this appeal resulted. Order on Petition for Modification.

#### SUMMARY OF THE ARGUMENT

The trial court ruled that there was not a substantial change of circumstances which justified considering a change of custody. This was against the clear weight of the evidence and was in error since the evidence presented at trial brought forth many facts which supported a finding of a change of circumstances under Utah law. The most important change of circumstances was the Plaintiff's relinquishment of physical custody of the minor children to the Defendant for an extended period of time, then her removal of the children from the Defendant without prior warning. The Plaintiff also demonstrated instability in numerous moves, and deliberate refusal to provide her phone number to the Defendant to allow him to contact the children by phone. The evidence also showed that the oldest boy was mature for his age, and that he showed a strong desire to live with his father, which

the custody evaluator found to be in the best interests of both boys.

The court also ruled that even if there was a change of circumstances, it would not be in the best interests of the children to change custody because of the younger boy's fear of his stepmother. This was error, and against the clear weight of the evidence since the only evidence of the younger child's fear was that it occurred subsequent to the Defendant's Petition for Modification and was the result of "programming" on the part of the Plaintiff. The youngest child, himself, asked to live with the Defendant and his stepmother in 1987, and he demonstrated no fear to the custody evaluator or to the Defendant's and Plaintiff's witnesses who had observed the youngest child with the stepmother on numerous occasions. In light of the custody evaluator's recommendation of a change of custody, it was against the clear weight of the evidence to find that it was not in the best interests of the children to change custody to the Defendant.

In addition, the trial court failed to make adequate findings articulating his basis for finding no substantial change of circumstances. The Court failed to discuss the prior award of custody and it did not compare those findings with the evidence presented at the hearing. Therefore the findings are inadequate as a matter of law.

The court also erred in allowing prejudicial hearsay evidence to be admitted over the objections of Defendant's

counsel. This testimony presented unfair surprise to the Defendant who was unable to cross-examine the witnesses referred to by the Plaintiff. There was no showing that the witnesses were unavailable to testify in person.

Finally, the court erred in denying the Defendant's Motion to Amend the Findings. The Defendant's Motion to Amend was based upon statements made by the judge in his ruling that neither parent had committed abuse of the children or of step children or foster children. The Plaintiff did not object to this paragraph in the Defendant's proposed Findings, and therefore the judge should have granted the Defendant's Motion to Amend the Findings to allow addition of these findings in conformance with his ruling. Also, the Plaintiff included many paragraphs in her Findings which were not supported by the weight of the evidence and which were not part of the judge's ruling. Therefore it was error to deny the Defendant's Motion to Amend the Findings.

#### DETAIL OF THE ARGUMENT

##### I.

THE COURT ERRED AS A MATTER OF LAW IN FINDING THERE WAS NO SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

At the conclusion of the presentation of evidence on the Defendant Appellant's Motion for Petition for Modification for Change of Custody of the two minor children of the parties, the court found that the Defendant had failed to show substantial change of circumstances with regard to the situation of the

parties which would allow him to consider a custody change. In recent years, the Utah Supreme Court and Utah Court of Appeals have articulated the specific types of changes which must exist for the court to consider a change of custody. This requirement is to protect the child from "ping-pong" custody awards and the "accompanying instability so damaging to a child's proper development." Kramer v. Kramer, 738 P.2d 624, 626 (Utah 1987). The threshold for finding a change of circumstances is high "to discourage frequent petitions for modification of custody decrees." Id. The case of Becker v. Becker, 694 P.2d 608 (Utah 1984) delineated the specific changes which may be considered as a change of circumstances; in the Becker case the court held that changes in the noncustodial parent's situation should not be considered a "substantial change of circumstances" for modification of custody. Id. at 610.

Concurring opinions of Justice Stewart and Howe in the Kramer case, however, cautioned the court that a strict application of the Kramer analysis would in some circumstances result in decisions which would be contrary to the best interests of the child. Kramer at 629. Justice Stewart's and Howe's concurring opinions in Kramer have been heeded in recent case law, such as Fullmer v. Fullmer, 761 P.2d 942 (Utah App. 1988).

The case of Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989), however, held that in situations where custody was not carefully examined in the first instance, a less rigid change of circumstances inquiry is allowed, and the court may accept a

greater range of evidence under Hogge's first prong, including "the events which transpired since the original award," and the "resulting effects on the child." Maughan at 160.

In light of the proliferating standards for determining whether there has been a change of circumstances, it must first be determined which standard is the appropriate standard to apply in a petition for modification case--the rigid Kramer standard which limits the asserted changes to be considered to

...those which have some material relationship to and substantial effect on the parenting ability of the functioning of the presently existing custodial relationship...

Kramer at 626 quoting Hogge v. Hogge, 649 P.2d 51 (Utah 1982), or the less restrictive standard set forth in the Maughan case. It is submitted that in the case at bar, the Maughan standard is more appropriate for the reason that the minor children involved have been subjected to "ping-pong" custody arrangements by the Plaintiff herself when she voluntarily sent the oldest son, Isaac to live with the Defendant for the 86-87 school year, agreed in writing that both boys would remain with their father for an additional year, and then contrary to her agreement, removed both children from the custody of the Defendant without warning in the middle of the school year. It was precisely this ping-pong physical custody arrangement, along with the strong desires of the oldest child, which motivated the Defendant to seek a change in custody. To change custody from the Plaintiff to the Defendant is quite a different situation where the children have

previously spent extended periods of time with the Defendant, and where the Plaintiff had voluntarily agreed to such arrangements.

Another grounds for finding that the Maughan standard rather than the Kramer standard is applicable to the case at bar is that the prior petition for modification brought by the Defendant did not result in findings indicating that the court thoroughly examined various factors pertaining to the children's welfare. The fact that no findings were made with regard to the children's best interests allows a wider range of evidence under Hogge's first prong regarding "the initial custody arrangement, the events that have since transpired, and the resulting effects on the child." Maughan at 160.

A third ground for applying a more relaxed standard to the substantial change of circumstances requirement is submitted by the Defendant for the reason that it would serve the best interests of the children of divorce to expand the Kramer standard to cases involving changes in circumstances which affect the children's access to and relationship with their non-custodial parent. Too often a vindictive custodial parent, secure in the knowledge that district courts rarely find a custodial parent in contempt for failure to allow visitation, systematically refuse visitation, campaign to alienate the children from their noncustodial parent, and make their living arrangements such that geographical distance and will prevent frequent visitation.

A custodial parent's behavior in attempting to

restrict visitation, whether by refusal to allow visitation or by simply moving away from the noncustodial parent, is a change of circumstances which drastically affects the child's well-being. Research has clearly demonstrated the importance of the child's access to both parents after divorce. Children of divorce are at a higher risk for suicide, juvenile delinquency, teenage pregnancy, failure in school, and health problems. U.S. News & World Report, November 28, 1983 pgs. 57-62. The single most important factor which has been found to alleviate the pain and stress children experience in a divorce situation has been found to be regular and frequent contact with both parents. See Jacobson, The Impact of Marital Separation/Divorce on Children, 1 J. Divorce 341 (1978), which documents a study finding "the higher the loss of time with the father, the higher the maladjustment of the child." Id. at 339. See also B. Garfinkel and H. Golombek, The Adolescent and Mood Disturbance, 204, 205. (1983), E.M. Heatherington, Effects of Father Absence on Personality Development in Adolescent Daughters, Developmental Psychology Vol. 7, pgs. 313-326 (1972), H. Biller, Father and Sex Role (1971), and J. Cortes, Delinquency and Crime, A Biopsychosocial Approach, (1972).

One of the longest range studies ever done on the effects of divorce upon children, was a ten year study in California which found that the only children who were relatively happy following their parent's divorce, were those who could visit their noncustodial parent daily with the approval and

permission of their custodial parent. L. Francke, Growing up Divorced, (1983). Another five year study of children of divorce found that "regular, frequent visitation" with the noncustodial parent was the "key factor" contributing to the success of children of divorce. J. Wallerstein and J. Kelly, Surviving the Breakup, page 328, (1980). This same study determined that approximately one fifth of the custodial parents participating in the study saw no value in visitation and actively tried to sabotage the child's visits with the noncustodial parent. Id. In light of the well-documented importance of contact between the child and the noncustodial parent, the custodial parent's actions in attempting to thwart frequent and regular contact with the noncustodial parent must be considered in any determination of a change of circumstances in order to fully protect the children of divorce in Utah. Therefore, this court should modify the standards set forth in Maughan to include the custodial parent's actions in facilitating or thwarting visitation as evidence to be considered a substantial change of circumstances.

Here, the evidence at trial revealed many facts which under Utah case law constitute a change of circumstances even under the more restrictive Kramer standards.

First of all, the undisputed evidence presented at the hearing on the Petition for Modification was that the two minor boys involved in this case had been subject to numerous moves and school transfers since the entry of the Decree of Divorce. Mrs. Wehry testified that since the date of the Decree of

Divorce, the oldest child, Isaac, had attended 7 schools--2 in Salt Lake City, 3 in Reno, 1 in Eureka, and 1 in Chico. Since the Petition for Modification, he attended 5 schools--3 in Reno, 1 in Eureka, and 1 in Chico. Testimony of Marcelene Wehry, page 194, lines 5-8. Ms. Wehry was unable to provide stability in the children's environment, necessarily forcing them to abandon friendships and familiar circumstances. She was unable to provide continuity in their education environment subjecting them to different curriculums, and on at least one occasion, as set forth below, forcing them to change schools in the middle of the school year.

In addition to the numerous moves on the part of the Plaintiff, the parties agreed to a physical change in custody for Isaac for the 86-87 school year, and then a physical change in custody for Isaiah so that both boys would reside with their father in 87-88. Just three months after the boys were enrolled in school in Utah and pursuant to the stipulation giving Defendant custody of both boys for the year of 87-88, the Plaintiff removed the boys from their father in an abrupt, unplanned, and unnecessary custody change, totally without notice or warning to the Defendant and to the children. The court-ordered custody evaluator, Dr. Lewis Morse testified that such a move would have a destabilizing effect upon the children as seen from the following quote:

Q. Do you have an opinion as to whether it had a positive or a negative effect on the boys for the Wherys [sic] to send the boys to

live in Utah, and then remove them a few months later with no warning?

- A. In my opinion, I would think that that would have an unstabilizing and confusing effect on the boys.

Testimony of Dr. Lewis Morse, Pages 22-23.

The case of Hirsch v. Hirsch, 725 P.2d 1320, 1321 (Utah 1986) dealt with a situation where the noncustodial parent had assumed physical custody of the child for a majority of the time since the divorce. The custodial parent had moved seven times since the decree was entered and did not exhibit the same stability the noncustodial parent demonstrated. The Utah Supreme Court found that failure to assume the role of custodial parent was a material change of circumstances which warrants the reopening of the question of custody, particularly when the noncustodial parent provided the child with a permanent residence and stable home life. Id.

The case at bar is very similar to the Hirsch case. In this case, as set forth above, the Plaintiff voluntarily relinquished custody to the noncustodial parent, splitting up the children for one year, and then agreeing to relinquish custody of both children for another year. She then removed the children from the Defendant's care, without warning, subjecting the children to much instability in conjunction with her many relocations of the childrens' residence. The Defendant, on the other hand, offered the children stability and a chance to enhance the close bond that existed between the children and their father and his family. Under the Hirsch case the court

below clearly erred in finding no substantial change of circumstances.

The Plaintiff also testified that after removing the boys unexpectedly from their father in November of 1987, she changed her phone number. It was her intention to deprive the Pierces of her phone number from November of 1987 until June of 1988. This prevented the Pierces from having contact with the minor children of the parties. Testimony of Marcelene Pierce, page 193, lines 3-9. This action on the part of the Plaintiff prevented the Defendant from initiating calls to his sons, and unnecessarily restricted the boys' telephone contact with their father. The court itself, after reviewing the telephone records, questioned the Plaintiff as to why no calls were made to the children's father in the month of May, 1988 in the following exchange:

Q. Why were there no phone calls made to Mr. Pierce in May of 88. There were no phone calls made to--

A. Probably because I didn't encourage the children to call. I don't know.

Q. Why didn't you encourage them to call?

A. I don't know. They were leaving on June 20th and we had arranged for visitation to begin that day. I don't know why there were no calls in May, I was kind of surprised when I looked at the bill myself.

Testimony of Marcelene Wehry, pages 202, 203.

The Plaintiff's behavior in this instance demonstrated

irresponsibility and disregard for the best interests of the children. In light of the large body of research documenting the importance of contact between children and their non-custodial parent, this court should find, as a matter of law, that a custodial parent's attempts to restrict contact should be considered to reflect her parenting ability and the functioning of the custodial relationship.

While moving numerous times alone may not be sufficient to justify a change of circumstances, a change of custody for over a year, which separated the minor children of the parties, a plan to reunite the children in the physical custody of their father and then disruption of that plan with no warning, is certainly a change of circumstances justifying review of custody. The fact that the boys have moved often and that there was a substantial period of time when the boys were denied calls initiated by their father because of the Plaintiff decision to deprive Defendant from having her telephone number, compounds the difficulties for the boys and clearly establishes a change of circumstances.

A second change of circumstances which should have been recognized by the court as a substantial change of circumstances was the fact that Isaac wanted to live with his father for several years, and at the time of the Petition for Modification he had experienced the opportunity to live with his father for a year, and had attained a sufficient degree of maturity, both emotional and chronological, to appreciate the consequences of a

permanent change of custody. In this case, the court-ordered custody evaluator testified that Isaac had firmly stated his desire to live with his father. Testimony of Dr. Louis Morse, page 15, lines 20-22. He also testified that Isaac was mature for his age, was intelligent and creative.

Id., page 16, lines 5-7.

The custody evaluator expanded upon his perception of Isaac's desire to live with his father when he testified as follows:

Now Isaac has been adamant about living with his father for two reasons: one is the person of the father and the personal relationship between him and his father and the lifestyle of his father. The lifestyle of the father is rural, and he prefers to have a rural lifestyle himself.

Q. Do you have an opinion as to which element is stronger in Isaac's preference to live with his father?

A. Well, he made many statements regarding his relationship--many positive statements regarding his relationship with his father. The most positive one is the one I put into the report, where he said, "I love my father more than anybody else on earth."

Testimony of Dr. Louis Morse, page 20, lines 11-23.

The evidence also indicated that forcing Isaac to return to his mother against his will affected him in such a negative way as to cause him physical pain. Isaac's stepmother testified of the following event which occurred at the time Isaac was to return from his extended summer visitation with his

father:

...I says to Isaac, I says, "come on, let's go." And he started doubling with pain and started crying and he said his stomach hurt and he didn't want to go. And I had to sit with him on the front steps for about 15 minutes with my arm around him. And I was rubbing his back and telling him that this would be okay, and that he was strong and that he would get through this. And we got into the car and we picked up my sister and my nephew and we went to California.

Testimony of Letha Pierce, page 120, lines 22-25, and page 121, lines 1-6.

The Utah Supreme Court case of Finnegan v. Finnegan, 535 P.2d 1159 (Utah 1975) found that a mature child's desire to change physical custody justified a change in custody to allow the child to live with the parent of his choice.

Under Utah case law, and in light of the testimony at the hearing, the court erred in finding that there was no substantial change of circumstances.

## II.

THE COURT ERRED IN FINDING THAT IT WAS IN THE BEST INTEREST OF THE CHILDREN TO REMAIN WITH THEIR MOTHER BECAUSE OF ISAIAH'S FEAR OF HIS STEPMOTHER.

Having found there was no substantial change of circumstances, the Court ruled that even if there were found to be a substantial change of circumstances, it would not be in the best interests of the children to change custody stating the following reasons:

. . .it's my belief based on the evidence that I heard and the interviews with the children that it still would not be in the best interest of the children to change custody if for no other reason that this: Isaiah's feelings about his step-mother may not be justified, but he has those feelings, nevertheless, and that's fairly clear from the interview with him. It seems to me that based on the evidence and based on the interviews, that Isaac would be better able to adapt to the proposition that he cannot be with his father as the custodial parent better than Isaiah could adapt to being away from his mother as the custodial parent.

Both sets of parents and step-parents need to work with Isaiah on this.

And I'm not seeing anything negatively, Mr. Pierce, but not only the clear impression I got, but expressly from Isaac, not from Isaiah but from Isaac, that he has the feeling that maybe Isaiah is not picked on exactly, but there is more discipline from Letha with respect to Isaiah than there is with respect to him. And that's because it's his belief that he is so associated with you that the discipline in your house with respect to Isaac is your discipline, not Letha's.

And he thinks that is not the case with respect to Isaiah, and the way it comes out is this, he says, that, "If Letha did anything with me, my dad would step in. But it's not the same with respect to Isaiah."

You know, I'm sure that your effort is that when the children are with you to have even-handed justice, and I assume that's what occurs. But their perception of it is not that way, and I'm not so concerned with Isaac because he sees what he sees and he is willing to say it. But Isaiah did not say that, but it may be what he is thinking and never expressing it. It's just a problem that ought to be addressed.

Ruling of the Court, pages 3-4.

From this speech, the Court's reasoning with regard to

the best interests of the children is not easily discerned, but the salient points seem to be that the younger child, Isaiah Pierce, was afraid of his stepmother, and because of this Isaac would be better able to adjust to not living with his father than Isaiah would be able to adjust to not living with his mother. Although the court mention "disparate treatment" of the two boys, he also said "I'm sure that your effort is that when the children are with you to have even-handed justice, and I assume that's what occurs." Id. (Emphasis added.) This statement indicates that he did not believe disparate treatment actually occurred, apparently leaving the issues of Isaiah's fear as the only reason why he did not feel it was in the childrens' best interests to have custody transferred to their father. The court's finding that the best interests of the Pierce children required that custody remain with their mother because of Isaiah's fear was against the clear weight of the evidence, as can be seen by examination of the testimony of the various witnesses, including the Plaintiff's witness, and the Plaintiff's own testimony.

The court-ordered evaluator interviewed the children the day he testified in trial, and testified that Isaiah's fear of Letha was the result of "programming" by the Plaintiff and her husband rather than upon fact:

My interpretation of this entire situation is that while Isaiah says, "I am scared to be in Utah to be with Letha," that that fright is not based on fact, and I believe both families in this case

have tried to influence the children to their point of view. And I think that at least part, in my opinion, of his impression of being afraid of Letha is due to the influence that he receives from his parents in Chico [the Plaintiff and her husband].

Testimony of Dr. Lewis Morse, page 17, lines 14-21.

The custody evaluator, Dr. Morse, expanded upon his basis for believing that Isaiah's fear was not based on fact in the following exchange.

Q. What is the basis for that opinion,

A. Say it again please?

Q. What is the basis for your opinion, that part of his fright is based upon the influence of the Chico family?

A. By all accounts the boy is immature. His mother in Chico stated expressly that he is moldable and he changes his story according to the circumstances. And he has--you know, he has lied to me.

Q. Can you think of a specific example of what he has lied to you about?

A. Yes. In Chico I asked him, "Does your mother ever refuse to let you call your father on the phone?" And he said, "yes." I asked him the same question this morning, and he said, "No." So in one of those cases he was not telling me the truth.

Id. at pages 17-18.

Dr. Morse took into consideration Isaiah's fear of his stepmother in recommending what custody arrangement would best serve the interests of the Pierce boys. He testified that because Isaiah's fear was not substantiated and was not in proportion to

reality, he was still of the opinion that it would serve the best interests of the boys to be placed in the custody of their father. Testimony of Dr. Morse, page 41, lines 1-5.

Other facts and statements by witnesses leave no other conclusion but that Isaiah's fear was based upon "programming" by the Plaintiff rather than being based upon reality.

Probably the strongest indication of the fact that Isaiah's fear was not based on reality is his statement to the custody evaluator during summer visitation, that he wanted to live with his father. It was not until he returned to live with his mother that his fear was first expressed, and he then changed his mind and stated he wanted to live with his mother.

Isaiah, the younger boy, when I interviewed him in Eureka, he opted for living with his father. When I interviewed him in Chico, he opted to live with his mother. Today when I saw him briefly, he said he wished to live with his mother.

Testimony of Dr. Louis Morse, page 15, lines 20-25, page 16, lines 1-2.

Obviously, Isaiah's fears of his stepmother were not based on reality because at the time he was living in her care and physical custody for extended visitation of 60 days, he did not show any discomfort or fear whatsoever. When questioned at that time by the evaluator about his relationship with Letha, he stated he got along with Letha "pretty good." Testimony of Dr. Louis Morse, page 17, lines 10-13.

The testimony of the Plaintiff herself establishes that

Isaiah had no fear of his father. It was the Plaintiff's testimony that Isaiah came to her and asked her to go live with his father. Obviously he had no fear at that time of living with his father and stepmother.

...Isaiah came to me and he said, "I want to go spend a year with dad." And I said, you know, I told them, well, I gave Isaac a year so I felt like I had to give Isaiah a year too.

Testimony of Marcelene Wehry, page 145, lines 7-11.

Many witnesses observed the interactions between Isaiah and his stepmother, Letha Pierce, including the Plaintiff's own witnesses who observed an easy-going, friendly, loving relationship between the boys and their stepmother without any indication of fear whatsoever. The Plaintiff's witness, Peggy N. Rogers, testified that she had known Isaac and Isaiah for 9 years. She testified that she had seen the boys interact with their stepmother and father and that,

...They seem real happy with them, especially Isaac. Isaiah is just very fond of his mother and I think he is just a little bit uneasy with Letha just because he wants to be with his mother. But he is not, you know he is not--I don't feel like he feels like he is being threatened to the point of fear anything like that.

Testimony of Peggy Rogers, Page 133.

The Defendant testified that Isaiah's relationship was close to his stepmother:

From what I see it's a very, very close and loving relationship.

He's always running up to give her hugs and likes to cuddle up next to her, sit on her lap. Very close relationship.

Testimony of Terry Pierce page 74, line 25, and page 75, lines 1-3.

Dr. Harold J. Shaw, Jr., a witness for the Defendant, who has a master's degree in Educational Administration and a doctor's degree in Educational Administration, and was principal of Tintic High School for 6 years, testified that he had been acquainted with Terry and Letha Pierce for 8 years. He testified that he had observed them in his capacity as community member, church member, and as principal of the school their daughter Amy attended. He testified that he observed them in school and at home at parties. "Just about every life situation you could have in the community." Testimony of Dr. Shaw, page 97, lines 2-24.

Dr. Shaw testified that he observed Letha and Terry Pierce, Isaac and Isaiah, and that he observed,

They played a lot. They had a good time. They had a warm and loving relationship. I think they like to cuddle up to Letha a lot in church.

Testimony of Dr. Shaw, page 102, lines 1-7.

The question was asked, did you ever see any evidence of Isaiah being afraid of Letha? Answer, "never, no." How many opportunities did you have to observe Letha and Isaiah together? Answer, "Oh, at least 20 or more." Testimony of Dr. Shaw, page 102, lines 8-13.

The Plaintiff did not produce one witness who could

testify, from personal experience, of fear existing on the part of Isaiah prior to the Petition for Modification of Custody Hearing, nor could she produce any witness who could testify, from personal experience, of any incident which would cause Isaiah to fear his stepmother.

In conclusion, it can be seen that the Court's finding the best interest of the minor children mandated that they remain with their mother is against the clear weight of the evidence. Most importantly, it was contrary to the finding of the court-ordered custody evaluator who recommended that the best interest of the children would be served by giving permanent custody of them to their father. In addition, the court failed to examine the Findings of Fact rendered by the judge at the prior Petition for Modification. The case of Jensen v. Jensen, 775 P.2d 436 (Ct. App. Utah 1989) requires that the court must discuss the evidence offered in support of a Petition for Modification of custody, and must compare the evidence with the factors underlying the original award. The court's comments from the bench in the modification hearing must explain the reasoning behind the denial of the petition. Id., at 438. The court in that case failed to establish sufficient factual grounds to conclude whether a change of circumstances had been demonstrated. The case was remanded for articulation of the considerations behind the prior award of custody and the order denying modification. Id. at 439.

The case at bar is identical to the Jensen case in its

lack of adequate findings. The court did not articulate the considerations behind the initial award of custody nor the order denying modification. Here, like the Jensen case, there are insufficient factual grounds expressed to conclude whether a change of circumstances has been demonstrated.

### III.

#### THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE WHICH WAS PREJUDICIAL TO THE DEFENDANT

At the hearing on the Petition for Modification, the Plaintiff attempted to justify her removal of the two children from the Defendant's physical custody in contravention of the stipulation she entered granting the Defendant physical custody of the boys for a year. The Plaintiff testified of numerous conversations with various individuals, in which she claimed to have been told information which caused her to believe her children would be placed in foster care, therefore, necessitating her picking up the children. The Plaintiff testified to conversations with Dixie Trinkle. Testimony of Marcelene Wehry, pages 162-164, Bruce Schofield, Id. at pages 164-165, Mr. Grimsted, Id. at pages 153-156 and Mrs. Jessop Id. at pages 156-160.

The court allowed the hearsay conversations to be related over the objections of Defendant's counsel in each instance. See pages 162, 164, 153, and 156 of the hearing transcript. This was error under Utah law as can be seen from the Utah case of Butler v. Butler, 461 P.2d 727 (Utah 1969). In that case the trial court sustained an objection to hearsay

evidence where the witnesses were available. Like the Butler case, the Plaintiff, in the case at bar, made no showing as to why the actual witnesses could not testify. Her self-serving statements seeking to justify her actions after the fact are highly suspicious and do not afford the court the opportunity to evaluate the witness' credibility or reliability. The Plaintiff's testimony was extremely prejudicial to the Defendant, as he had no prior notice of her intention to quote witnesses not in the courtroom, and therefore, he did not have the opportunity to subpoena them and subject them to cross-examination. The testimony with regard to conversations with witnesses was also prejudicial in that it seemed to justify, at least in part, the Plaintiff's hasty actions in contravening her stipulation to leave custody with the Defendant for a year, when in reality, she may have had no justification. In spite of the fact that the Plaintiff subjected the children to "ping-pong" custody arrangements without notice or warning, the trial court found that no change of circumstances had occurred. His finding in this regard seems to have ignored the "ping-pong" custody issue in large part because of the Plaintiff's testimony of conversations seemingly justifying her actions. Based upon the Butler case, Defendant's counsel's objections to hearsay should not have been overruled. This case should be remanded for further hearing in conformance with the Butler case.

IV.

THE COURT ERRED IN FAILING TO AMEND THE FINDINGS  
AS PER THE DEFENDANT'S MOTION TO AMEND FINDINGS

The Defendant made a timely motion to amend the Findings to include statements made by the trial judge in his ruling from the bench after presentation of the evidence, and to eliminate other statements not made in his ruling.

The Court's ruling included the following statements:

I specifically find there has been no abuse of these two boys by either natural parent or by either step-parent.

I also specifically find, for the purposes of this Court, without intending to undercut a finding and determination by another agency or another Court concerning Amy, but with respect to this Court I find that there was no abuse of Amy.

Furthermore I find that there was no abuse of the foster child, Steven Slater.

Ruling of the Court, page 2, lines 3-12.

In light of this language, Defendant submitted its own proposed Findings of Fact and Conclusions of Law and included that language in it. The Plaintiff objected to the Defendant's proposed findings but did not object to that specific language. Therefore, it was error for the judge to deny the Defendant's Motion to Amend the Findings to include that language. The Defendant's Motion to Amend Findings also objected to Plaintiff's paragraph 1, 2, 3, 4 and 5. As can be seen from the Court's ruling, these matters were simply not discussed. The Court

should have granted the Defendant's Motion to Amend in light of that fact.

With regard to paragraph 8, the Court did not find that Isaiah's fears were concrete, real and pervasive and provided instead as follows:

Isaiah's feelings about his stepmother may not be justified, but he has those feelings, nevertheless, and that's fairly clear from the interview with him.

Ruling of the Court, page 3, lines 6-8.

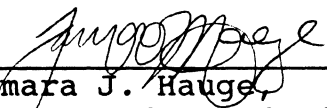
To find that Isaiah's feelings were "concrete, real and pervasive" is not supported by the evidence, and, therefore, the Court should have granted the Motion to Amend Findings. In light of the discrepancy between the Court's ruling and the Plaintiff's proposed Findings of Fact, and in light of the Defendant's objections, the Court should have granted the Defendant's Motion to Amend.

#### CONCLUSION

Based upon the arguments and case law set forth above, the Defendant respectfully requests that this court reverse the Findings of the lower court and enter a finding that there is a substantial change of circumstances, and that it is in the best interests of the children to change custody from the Plaintiff to the Defendant. In the alternative the Defendant requests that the case be remanded for proper findings to be entered in conformance with Utah law, and that the findings be amended as prayed for by the Defendant in his Motion to Amend.

RESPECTFULLY SUBMITTED this 16th day of January,  
1990.

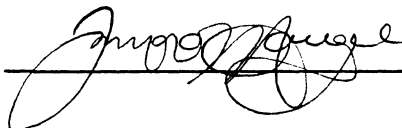
SYKES & VILOS

  
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Tamara J. Hauge,  
Attorney for Defendant Appellant

MAILING CERTIFICATE

I hereby certify this 16th day of January, 1990, I  
mailed four copies of the foregoing Brief of Appellant, by  
placing the same in the United States Mail, postage pre-paid,  
addressed as follows:

Carolyn Driscoll  
Attorney for Plaintiff/Respondent  
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