

1998

Gibson v. Gibson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TERRY GIBSON,

Appellant.

vs.

DIANE GIBSON

Appellee.

7th District Ct. No. 964700223

Case No.981830

Priority R.29(b)(4)

Priority No. 15

BRIEF OF APPELLEE

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FILED

Utah Court of Appeals

NOV 10 1999

Julia D'Alessandro
Clerk of the Court

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TERRY GIBSON,

Appellant,

vs.

DIANE GIBSON

Appellee.

7th District Ct. No. 964700223

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Priority R.29(b)(4)

BRIEF OF APPELLEE

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2. 30-3-10 Utah Code Annotated
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5. Supplemental Findings of Fact and Conclusions of Law

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is based upon UCA Section 78a-3(2)(h) (Supp. 1996):
“appeals from the district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity.”

STATEMENT OF ISSUES

By considering - but not following - the custody evaluator’s recommendation to award custody of Shantel Gibson to either her paternal grandparents or her father, Appellant Terry Gibson, and by awarding custody to Appellee Diane Winters, the child’s natural mother, was the trial court within its discretion, and was the custody determination in the best interests of the child?

Did the trial court make adequate factual findings regarding the best interests of the child and the past conduct and demonstrated moral character of each of the parents; and were the trial court’s findings sufficiently detailed to ensure that the trial court’s discretionary determination was rationally based?

STANDARD OF REVIEW

This Court will not overturn a trial court’s custody determination on appeal unless the evidence clearly shows that the custody determination was not in the best interests of the child or that the trial court misapplied the law. *Smith v Smith*, 726 P2d 423, 425 (Utah

1986). Only where the trial court is “flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment.’. *State ex rel. MW*, 970 P.2d 284, 287 (Utah App. 1998).

AUTHORITIES OF CENTRAL IMPORTANCE

Winters submits that the precedents of *Childs v Childs*, 967 P.2d 942 (Utah App. 1998), UCA §30-3-10(1) and (2), and Utah Rules of Civil Procedure, Rule 52 are of central importance to this appeal. The *Childs* opinion, UCA §§30-3-10(1) and (2), and Utah Rules of Civil Procedure, Rule 52 are attached to this brief as Addendum One.

STATEMENT OF THE CASE

This proceeding was commenced in 7th District Court in Carbon County. The matter was bifurcated, and issues regarding divorce and property settlement were resolved in the Decree of Divorce entered May 20, 1997. The issue of primary physical custody of Shantel Gibson, daughter of the parties, was tried to the Court on March 30 and April 1, 1998. Judge Bruce K. Halliday, after considering testimony of witnesses and a written report from the custody evaluator, who did not testify, concluded that if Appellant father were awarded custody, his parents would continue raising the child as they had in the past, becoming surrogate parents. Judge Halliday expressed concern about this, and concluded that the trial court preferred the natural parent over surrogate parents for the responsibility of raising the child. After noting that Shantel now had a half-sibling, Judge Halliday awarded primary physical custody to Appellee mother.

STATEMENT OF FACTS

The parties were married on December 31, 1992, after a three-year relationship that began with purchasing drugs from Appellant. The marriage was a stormy one, involving drugs, domestic violence, and accusations of stalking on the part of Appellant. In April of 1996 Appellee Winters and the child went to Texas to visit Winters' biological father, which developed into a permanent move. In June, 1996 Winters left Shantel with her father so she could obtain treatment for inner ear problems under Gibson's medical plan. Gibson refused to return the child, and obtained temporary custody. Because of Gibson's work schedule, the child virtually lived with her paternal grandparents, and visited with her father when he was not working or sleeping.

In the custody evaluation performed in June, 1997, Dr. Kyle Elder recommended that because Shantel was most comfortable there, she should be placed with the elder Gibsons, and that if the Court was unwilling to award custody of the child to them, that Appellant father should be awarded custody.

Judge Halliday declined to award the child to grandparents, stating he was not comfortable with the child continuing to be raised by surrogate parents, no matter how comfortable a placement it was, and awarded primary physical custody to Appellee mother.

SUMMARY OF ARGUMENT

The Utah Supreme Court in *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996) the Court stated that trial judges are accorded broad discretion. This discretion stems from the

reality that in many cases the Court must choose one custodian from two excellent parents and the court's proximity to evidence places it in a more advantageous position than the Appellate Court. In the instant case, the court had the opportunity to view the demeanor of both parents and the grandparents and heard first hand all of the evidence.

Childs v. Childs, 967 P.2d 942, (Utah App. 1998), holds that where the trial court may exercise broad discretion, the Court of Appeals presumes the correctness of the court's decision absent manifest injustice or inequity that indicates a clear abuse of discretion.

The trial court in the instant case heard testimony about the drug use of both parties, the violence during the marriage, the work histories of both parties, and the moral standards of both parties in the past. (Record 235, Pages 326-8, 386-87) The trial court considered the recommendation of Dr. Kyle Elder, including Elder's observation that Winters tested out as the better parent (Exhibit 8, Page 28); that Winters was open and honest about her past drug use and current non-use, where Gibson was evasive and in denial (Exhibit 8 Pp. 22-23); Elder's observation that Shantel's mother was the primary caretaker until the time that the parties separated, and his comments that after the separation Terry functioned as Shantel's primary caretaker with significant assistance from his parents (Exhibit 8, Page 12).

The trial court was in a position to view each witness's demeanor and to determine what weight to place on each witness's testimony.

In *Liam v. King*, 804 P.2d 1235, (Utah App. 1991), the court stated as had other courts:

“Trial courts are given broad discretion in child custody matters. To ensure that a trial court acted within its broad discretion, it is essential that those considerations behind a custody determination be articulated in clear factual findings.”

The court further stated that it would not upset a custody determination that is consistent with the standards set by appellate courts, and are supported by adequate findings of fact and conclusions of law. The court further made reference to the fact that a trial court should consider a recommendation from an independent evaluator in making its custody determination citing the Rule 4-903(2), Utah Code of Judicial Administration (1990) which permits an evaluator to submit a written report to the court, thereby contemplating the use of such a report by a trial court in child custody determinations. However, neither case law nor statute requires a court to follow such a recommendation but only to consider the recommendation.

Judge Halliday, after considering all testimony as well as Dr. Elder’s recommendation, elected to award primary physical custody of Shantel to her mother, thereby avoiding having the child raised, for all practical purposes, by her grandparents.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT’S RULING BECAUSE THE EVIDENCE CLEARLY SHOWS THAT THE CUSTODY DETERMINATION WAS IN THE BEST INTEREST OF THE CHILD.

In *Thorpe v. Jensen*, 817 P.2d 387 (Utah App. 1991) the Court set forth a number of factors to guide the District Court in making their custody decisions. Those standards are the parents' character and status, the apparent commitment of the proposed custodian to parenting, their moral character and emotional stability, their religious compatibility with the children, the possibility and feasibility of keeping siblings together, and evidence of child abuse and neglect. The court further considered the relative abilities of the parents to provide care, supervision and a suitable environment for the children and to meet the needs of the children. The court stated that each of these factors have been recognized as appropriate by the Appellate Courts of Utah.

In the instant case, the court did consider numerous factors in determining the best interest of the child, Shantel. The Court reviewed in depth the recommendation made by the evaluator but chose to overlook ancient history (regarding both parties' use of drugs and/or alcohol, the domestic violence perpetrated by the plaintiff and the emotional outburst by the Defendant).

The court considered the recommendation that the child be placed with her grandparents and ruled in favor of placing the child with the parent who had the commitment to parenting Shantel, who would keep Shantel with her sibling (Record 235, Page 524) and who had an ability herself to provide care, supervision and a suitable environment for Shantel and to meet her needs. The court recognized that if custody of Shantel were awarded to her father, it would be tantamount to awarding custody to the

paternal grandparents who were the main caretakers of Shantel when she was with her father.

Judge Halliday stated:

“ . . . [The Court concludes that both parents could be custodial parents, but since there is a distance involved here, and since there is an absence of cooperation by the parties, I cannot conclude that joint custody is an appropriate order. So that it places upon the Court the requirement of determining what's in the best interest of the child.

“In doing that, I have concluded that the mother has been historically the primary caretaker of this child. The father's care taking has taken place since the temporary placement of the child, and has been substantially supported by the efforts of his parents, and the surrogate care that they have shown for the child.” (Record 235, Page 519).

The judge continued:

“The choice really comes down to the Court's preference that the natural parent rather than the surrogate parents have the responsibility, and my conclusion that the surrogate parents, grandparents of Mr. Gibson in this case, would ultimately end up with the responsibility of raising the child. A preference that I cannot condone.” (Record 235, Page 520)

The Utah Supreme Court in *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996) the Court stated that trial judges are accorded broad discretion. This discretion stems from the reality that in many cases the Court must choose one custodian from two excellent parents and the court's proximity to evidence places it in a more advantageous position than the Appellate Court. In the instant case, the court had the opportunity to view the demeanor of both parents and the grandparents and heard first hand all of the evidence. The court in *Tucker* further stated:

“It cannot be said that a trial court has abused its discretion in awarding custody to one parent over another where analysis reveals that the best interest of the child would be served equally well with either parent. The child cannot be divided into two parts.”

In the instant case the trial court heard evidence that if the child's custody were awarded to her father she would, in effect, be raised by her grandparents. The court obviously chose to place the child with the mother who would be primarily responsible for rearing the child and meeting her needs.

In *Liam v. King*, 804 P.2d 1235, (Utah App. 1991), the court stated as had other courts:

“Trial courts are given broad discretion in child custody matters. To ensure that a trial court acted within its broad discretion, it is essential that those considerations behind a custody determination be articulated in clear factual findings.”

The court further stated that it would not upset a custody determination that is consistent with the standards set by appellate courts, and are supported by adequate findings of fact and conclusions of law. The court further made reference to the fact that a trial court should consider a recommendation from an independent evaluator in making its custody determination citing the Rule 4-903(2), Utah Code of Judicial Administration (1990) which permits an evaluator to submit a written report to the court, thereby contemplating the use of such a report by a trial court in child custody determinations. However, neither case law nor statute requires a court to follow such a recommendation but only to consider the recommendation.

The case of *Childs v. Childs*, 967 P.2d 942, (Utah App. 1998), holds that where the trial court may exercise broad discretion, the Court of Appeals presumes the correctness of the court's decision absent manifest injustice or inequity that indicates a clear abuse of discretion

Dr. Elder performed evaluations on Diane Gibson Winters, Shantel's mother, on Terry Gibson, Shantel's father and on Kenneth Winters, Shantel's step-father. As part of his evaluation, he observed the interaction of each parent with the child and noted at length that Shantel was rude and disrespectful towards her mother and her mother's husband, Kenneth. (Exhibit 8, Pp. 11-12.) He reports that the child was hostile and combative with Ken, used rude language, told him to shut up, called her mother an "asshole", called her step-father her "asshole Dad". (Exhibit 8, Page 11.)

However, in contrast, when the child was observed with her father, Shantel's behavior was, according to Dr. Elder, much more appropriate. "Shantel demonstrated respect without hostility and interacted with her father in a playful manner which suggested she was comfortable in her presence." (Exhibit 8, Pp. 8, 11, 12.)

Despite the fact that there was evidence that Terry Gibson referred to Shantel's mother and step-father as "asshole"s and despite the fact that the child commented that her Daddy says her Mom is an "asshole", Dr. Elder did not make much of the fact that Terry was obviously not making an effort to engender a relationship between the child and her mother.

On one occasion, during the interview at her father's home she began to whisper and when Dr. Elder asked her why she was whispering, her response was "I don't want my Daddy to hear because he will be mad". (Exhibit 8, Page 13.) This clearly indicates the attitude of Terry about Shantel's mother and the pressure he was putting on the child to not want to be with her mother and step-father.

Under the section of the evaluation labeled "Parenting Skills", Diane clearly tests out as the better parent. (Exhibit 8, Page 15,) In addition, with regard to each parent's substance abuse, Dr. Elder was very open in negatively assessing both parents. However, in the final analysis, it is obvious from the evaluation report that although both parents started using alcohol and illicit substances at a fairly early age, that currently Terry minimizes his use and possible addiction where Diane is openly honest about her past use and present non-use, with Dr. Elder suggesting "Her profile suggests that her addiction is likely in remission". In contrast, he states about Terry: "His lack of willingness to share a history of past abuse of chemicals cast a shadow of doubt about his current sobriety even though his drug test came up clean". (Exhibit 8, Pp. 22-23.)

In the section of the evaluation dealing with interference with visitation, Dr. Elder indicates that despite the perceived understanding that Shantel would return to Utah to undergo necessary medical procedures for which her father's insurance would pay, and then return to her mother, the child was not allowed to return to Texas with her mother. Instead, Appellant refused to return the child and sought and obtained a temporary custody

order. (Exhibit 8, Page 26.)

Dr. Elder, in his recommendation, indicates that Shantel's mother was the primary caretaker until the time that the parties separated. (Exhibit 8, Page 12.) He comments that after the separation Terry functioned as Shantel's primary caretaker with significant assistance from his parents. (Exhibit 8, Page 14.) Dr. Elder fails to point out that Shantel's mother would have continued as the primary caretaker had her father not refused to return the child to that primary caretaker after her medical procedures had been completed

The court clearly considered the recommendation from the independent evaluator but obviously disagreed with the evaluator's conclusion that the child should be placed with the grandparents or in the alternative, the child's father. During the periods that the child was with her father the grandparents provided the primary care and nurturing of the child. (Pages 60-62) Appellant cites *Childs v. Childs*, 967 P.2d 942 (Utah App. 1998) wherein the trial court concluded that the father maintained regular employment and was better able to provide for the children and,

“with assistance from his extended family, can provide quality personal and surrogate care for his children.”

It is incontrovertible that the elder Gibsons have provided a quality environment for Shantel. However, when considering placing a child with a nonparent, there is a presumption in favor of the natural parent which cannot be rebutted merely by evidence that the nonparent would be a superior custodian. *Hutchinson v. Hutchinson* 649 P.2d 38 (Utah 1982). The Hutchinson court further stated that in a custody dispute between a

parent and a nonparent, the parental presumption can be rebutted only by evidence establishing that the particular parent, at that particular time, generally lacks all three characteristics that give rise to the parental presumption, i.e. that no strong mutual bond exist, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child and that the parent lacks sympathy for and understanding of the child that is not characteristic of parents generally.

The court further stated that this presumption recognizes “the natural right and authority of the parent to the child’s custody...” *State in re Jennings*, 432 P.2d 879, (Utah 1967).

”It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child’s benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else. “ *Walton v. Hoffman*, 169 P.2d 97 (1946 at 103)

The *Hutchinson* court further stated:

“The parental presumption is not conclusive but it cannot be rebutted merely by demonstrating that the opposing party possesses superior qualifications, has established a deeper bond with the child, or is able to provide more desirable circumstances. If the presumption could be rebutted merely by evidence that a nonparent would be a superior custodian, the parent’s natural right to custody could be rendered illusory and with it the child’s natural right to be reared, where possible, by his or her natural parent.”

Although Shantel’s grandparents were not seeking actual custody of the child, the factors articulated in *Hutchinson* came into play when the evaluator recommended placing

the child with them, or alternatively, with Appellant, which was tantamount to awarding custody to the grandparents.

In the instant case the court clearly weighed those considerations before concluding that the child did, indeed, have a right to be reared by her natural parent, not surrogate parents in the form of her father's parents. (Record 235, Page 519, 520).

Appellant attempts to make much of Winters' employment history. However, Dr. Elder points out in his evaluation that the fact that Winters is not fully employed gives her that much more time to rear her children, including Shantel.

Further, Appellant, in his Brief, repeatedly refers to Winters' "past impulsive conduct, poor work history, drug use, and questionable moral standards" and does not refer to the domestic violence which Appellant perpetrated on Appellee when the child was present, nor does it refer to Appellant's lewd behavior in the presence of the child, nor does it refer to his own drug and alcohol use, nor does it refer to the evidence that shows that he introduced Winters to the very drug use that he now claims makes her unfit as a parent.

In addition, Appellant overlooks the fact that Appellee lost at least one job when she came to Utah to pick up her child after Appellant refused to return the child to her as they had agreed earlier. (Record 233, Page 21, lines 19-22)

Further, Appellant states that the people in Winters' life may not be ideally suited to look after Shantel, that in the event her father had been convicted of child molestation, he might pose a serious threat to Shantel's safety. He offers no evidence whatsoever that

Winters' father poses any danger to the child.

Further speculating, Appellant believes that "Kenny might also have a problem with alcohol" because he stated he drank a beer or two each evening and had a single conviction of driving under the influence and, like Appellant, had previously used a controlled substance. Further along in his brief, Appellant has inflated Kenny Winters' one or two beers of an evening into "excessive alcohol use" and in the next sentence damns Appellee as an unstable woman and her husband as a heavy drinker.

Again, the trial Court heard and observed all testimony regarding these matters at trial and was in a position to determine the weight such testimony should be given.

Further, Appellant's brief makes frequent references to Dr. Elder's custody evaluation, quoting often, when in reality the quotes are Appellant's trial lawyer, Mr. Schindler, paraphrasing Dr. Elder's report. For example, Appellant's brief on page 5 states "In the instant case, Dr. Kyle Elder performed a custody evaluation and made the following recommendations: 'If it were up to me the kid would go to Grandma and Grandpa (Gibson's parents), because she's most comfortable there.' " In actuality, these are Mr. Schindler's words. (Record 235, Page 498.)

The court heard the evidence regarding Winters' emotional outburst, Kenny Winters' drinking and DUI conviction as well as the evidence of all three parties' drug use in the past as well as the evidence concerning Appellant's domestic violence and his introduction of Winters to various drug usage. The Court heard testimony regarding Appellant's coarse

language and behavior in the child's presence, such as asking the mother to "suck my d-i-c-k" (Record 235, Pp. 244-245), mooning Appellee in the presence of the child (Record 235, Page 336), occasions of physical violence in the presence of the minor child (Record 235, Pp. 326-7, 386-7), instances of Appellant refusing to allow Appellee visitation with the child (Record 235, Pp 347, 350) and his failure to keep Appellee advised about the child's medical condition and treatment and her activities (Record 235, Pp. 357-8).

The Court additionally heard evidence from witnesses concerning both parties' ability and commitment to parenting the child, as well as their respective commitments - and lack thereof - to fostering a relationship between the child and the other parent.

Although Appellant's brief refers numerous times to an incident in which Appellee lifted her dress to show the investigating officer a bruise on her back and is characterized as "revealing more of herself than Officer Watkins [an admitted friend of Appellant's father- (Record 235, Page 435)] more than he wanted to see . . ." in an apparent effort to demean Appellee's moral standards and behavior, the Court heard testimony that at the time Appellee was wearing a pair of shorts under her muu-muu-type dress the first time, and a pair of sweats the second time, thus ensuring she was modestly attired despite the lifting of the skirt. (Record 235, Pp. 363-4, 425-6).

This Court should affirm the trial court's award of primary physical custody to Appellee Winters, the child's mother, for the reason that there has been no "manifest injustice or inequity that indicates a clear abuse of discretion" as required by *Childs v*

Childs, *Id.*

POINT II

THE TRIAL COURT'S FINDINGS DID ADEQUATELY EXPLAIN THE BASIS FOR
AWARDING CUSTODY TO WINTERS.

In the case of *Barnes v Barnes*, 857 P.2d 257, (Utah App. 1993), the court, in setting forth the standard of review, cited various cases:

"Trial courts are given broad discretion in making child custody awards." *Skin v. Skin*, 842 P.2d 922, 923 (Utah App. 1992) (citing *Maughan v. Maughan*, 770 P.2d 156, 159 (Utah App. 1989)). "The trial court's decision regarding custody will not be upset 'absent a showing of an abuse of discretion or manifest injustice.'" *Id.*(quoting *Maughan*, 770 P.2d at 159). "We give great deference to the trial court's findings of fact and do not overturn them unless they are clearly erroneous." *Riche v. Riche*, 784 P.2d 465, 467 (Utah App. 1989).

At the conclusion of the trial, Judge Halliday awarded primary physical custody of the child to Winters, stating: ". . . I have concluded that the mother has been historically the primary caretaker of this child. The father's care taking has taken place since the temporary placement of the child, and has been substantially supported by the efforts of his parents and the surrogate care that they have shown for the child." (Record 235, page 519).

The judge further stated "The choice really comes down to the Court's preference that the natural parent rather than the surrogate parents have the responsibility, and my conclusion that the surrogate parents, parents of Mr. Gibson in this case, would ultimately end up with the responsibility of raising the child. A preference that I cannot condone."

(Record 235, Page 520).

In addition, Judge Halliday indicated that he placed a considerable amount of weight on the fact that the child had a half-sister, stating “. . . I believe that I need to consider that aspect in that decision, and that was one of the matters that weighed heavily.”

In *Tucker v Tucker*, 910 P.2d 1209 (Utah 1996), the court considered the issue of whether a parent should be deprived of parental rights for lack of parental ability or fitness, and stated:

“What was at issue was which of two basically good parents should have custody of the child. As stated above, the determination of custody governed by the best interests of the child “may frequently and of necessity require a choice between good and better.” *Hogg v Hogg*, 649 P.2d 451 (Utah 1982)] Often when there are two equally suitable parents, the trial judge may be compelled to base a custody award upon observations of the parents in court, the reactions of the child to each parent, or other factors. A trial court need not find one parent inadequate before awarding custody to the other.”

The court further stated that where applicable, certain factors should be considered, including factors relating to a child’s feelings or needs keeping siblings together; the relative strength of the child’s bond with one or both of the prospective custodians reasons for having relinquished custody in the past.

The trial court in the instant case clearly indicated that its decision was based on keeping siblings together and having the child raised by a natural parent rather than surrogate parents in the form of Appellant’s parents.

The trial court clearly explained the basis for awarding custody to Winters, and its

decision should be upheld by this Court.

In addition, The Court in *State ex rel MW*, 970 P.2d 284 (Utah App. 1998), quoting *JM* 940 P. 2d at 531 (Ut Ct. App.1997), held that an appellant challenging factual findings " 'must (1) marshal all of the evidence that supports the finding, and (2) demonstrate that, despite the evidence, the finding is so lacking in support as to be "against the clear weight of the evidence" and thus, clearly erroneous.' "

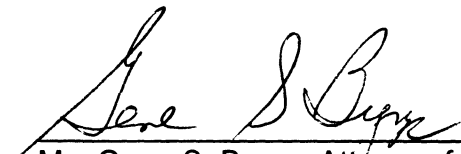
Appellant has not demonstrated that Judge Halliday's findings are so lacking in support as to be against the clear weight of the evidence, and thus clearly erroneous.

The trial court's decision should be affirmed by this Court.

CONCLUSION

Based on the foregoing, Appellee requests the Court to affirm the trial court's decision to award primary physical custody of the minor child, Shantel Gibson, to Appellee Diane Winters.

November 8, 1999



Ms. Gene S. Byrge, Attorney for
Appellee Diane Winters

IN THE UTAH COURT OF APPEALS

TERRY GIBSON,

Appellant,

vs.

DIANE GIBSON

Appellee.

7th District Ct. No. 964700223
Case No.981830

Priority R.29(b)(4)

CERTIFICATE OF SERVICE

I certify that I caused to be delivered, on November 9, 1999, two true and correct
copies of the foregoing BRIEF OF APPELLEE to the following address:

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November 9, 1999



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ADDENDUM 1

*942 967 P.2d 942

353 Utah Adv. Rep. 8

Brad Russell CHILDS, Plaintiff and Appellee,

v.

Heather T. CHILDS, Defendant and Appellant.

No. 971258-CA.

Court of Appeals of Utah.

Oct. 1, 1998.

Rehearing Denied Dec. 1, 1998.

Husband sought dissolution of marriage. The Third District Court, Salt Lake Division, Tyrone E. Medley, J., dissolved the marriage and awarded husband sole legal custody of children, and mother appealed. The Court of Appeals, Wilkins, Associate P.J., held that: (1) best interests of children were served in awarding father sole custody; (2) mother was not entitled to provide day care for her children; (3) temporary alimony to mother of \$350 was proper; and (4) award of \$1000 to mother for attorney fees was not unreasonable.

Affirmed.

1. DIVORCE ☞ 184(5)

134 ----

134IV Proceedings

134IV(O) Appeal

134k184 Review

134k184(5) Discretion of court.

Utah App. 1998.

Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence.

2. DIVORCE ☞ 223

134 ----

134V Alimony, Allowances, and Disposition of Property

134k220 Allowance for Counsel Fees and Expenses

134k223 Discretion of court.

[See headnote text below]

2. DIVORCE ☞ 235

134 ----

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k235 Discretion of court.

[See headnote text below]

2. DIVORCE ☞ 296

134 ----

134VI Custody and Support of Children

134k296 Discretion of court.

Utah App. 1998.

Trial courts have broad discretion in making custody determinations, awarding alimony, and in awarding attorney fees

3. APPEAL AND ERROR ☞ 900

30 ----

30XVI Review

30XVI(G) Presumptions

30k900 Nature and extent in general.

Utah App. 1998.

Where the trial court may exercise broad discretion, the Court of Appeals presumes the correctness of the court's decision absent manifest injustice or inequity that indicates a clear abuse of discretion.

4. INFANTS ☞ 19.3(4)

211 ----

211III Custody and Protection

211k19 Proceedings Affecting Custody

211k19.3 Determination of Right to Custody

211k19.3(4) Award or order; visitation.

Utah App. 1998.

In making its custody determination, the trial court must make specific findings regarding the factors relied upon.

5. DIVORCE ☞ 298(1)

134 ----

134VI Custody and Support of Children

134k298 Grounds for Award of Custody

134k298(1) In general.

Utah App. 1998.

In custody dispute following divorce, children's best interests were served in awarding father sole custody; father provided a stable environment for children, was involved in the children's lives, was supportive of children's educational and extracurricular activities, maintained regular employment and was better able to provide for the children than the mother.

6. PARENT AND CHILD ☞ 2(17)

285 ----

285k2 Custody and Control of Child

285k2(4) Proceedings to Determine Right

285k2(17) Temporary custody, visitation and removal from jurisdiction.

Utah App. 1998.

In determining visitation, the trial court gives highest priority to the welfare of the children over the desires of either parent. U.C.A.1953, 30-3-33(13).

7. INFANTS ☞19.3(7)

211 ----

211III Custody and Protection

211k19 Proceedings Affecting Custody

211k19.3 Determination of Right to Custody

211k19.3(7) Review of discretion and fact questions.

Utah App. 1998.

The Court of Appeals will not disturb the trial court's visitation determination absent a showing that the trial court abused its discretion. U.C.A.1953, 30-3-33(13).

8. PARENT AND CHILD ☞2(17)

285 ----

285k2 Custody and Control of Child

285k2(4) Proceedings to Determine Right

285k2(17) Temporary custody, visitation and removal from jurisdiction.

Utah App. 1998.

Statute governing visitation does not entitle a willing noncustodial parent to provide day care, but merely suggests that the trial court encourage such an arrangement based on the presumption that parental care is better. U.C.A.1953, 30-3-33(13).

9. DIVORCE ☞299

134 ----

134VI Custody and Support of Children

134k299 Access to child by parent deprived of custody.

Utah App. 1998.

In custody dispute following divorce, mother was not entitled to provide day care for her children; mother was vindictive, uncooperative and emotionally unstable, was unlikely to allow father to maintain a healthy relationship with the children, and had work schedule incompatible with day care requirements. U.C.A.1953, 30-3-33(13).

10.DIVORCE ☞235

134 ----

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k235 Discretion of court.

Utah App. 1998.

Trial courts have broad discretion in making alimony awards. U.C.A.1953, 30-3-5(7)(a).

11.DIVORCE ☞286(3.1)

134 ----

134V Alimony, Allowances, and Disposition of Property

134k278 Appeal

134k286 Review

134k286(3) Discretion of Lower Court

134k286(3.1) In general.

Utah App. 1998.

The Court of Appeals will not disturb a trial court's alimony award so long as the trial court exercised its discretion within the appropriate legal standards and supported its decision with adequate findings and conclusions. U.C.A.1953, 30-3-5(7)(a).

12.DIVORCE ☞240(2)

134 ----

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k240 Amount

134k240(2) Facts affecting or controlling amount.

Utah App. 1998.

Following divorce, temporary alimony to wife of \$350 was adequate considering the duration of the marriage, the wife's excellent health, youth, and ability to improve her capacity to meet her own needs ,and her fault in engaging in an extra-marital affair. U.C.A.1953, 30-3-5(7)(a).

13.DIVORCE ☞247

134 ----

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k247 Commencement and termination.

Utah App. 1998.

Statute governing alimony does not require that trial court award alimony for a period equivalent to the length of the marriage. U.C.A.1953, 30-3-5.

14.DIVORCE ☞237

134 ----

134V Alimony, Allowances, and Disposition of Property

134k230 Permanent Alimony

134k237 Grounds.

[See headnote text below]

14.DIVORCE ☞240(2)

134 ----

- 134V Alimony, Allowances, and Disposition of Property
- 134k230 Permanent Alimony
- 134k240 Amount
- 134k240(2) Facts affecting or controlling amount.

Utah App. 1998.

The decision to award attorney fees and the amount must be based on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees. U.C.A.1953, 30-3-5.

15.DIVORCE ☞ 221

- 134 ----
- 134V Alimony, Allowances, and Disposition of Property
- 134k220 Allowance for Counsel Fees and Expenses
- 134k221 In general.

[See headnote text below]

15.INFANTS ☞ 19.3(4)

- 211 ----
- 211II Custody and Protection
- 211k19 Proceedings Affecting Custody
- 211k19.3 Determination of Right to Custody
- 211k19.3(4) Award or order; visitation.

Utah App. 1998.

A trial court may award attorney fees in divorce and custody proceedings. U.C.A.1953, 30-3-5.

16.DIVORCE ☞ 227(1)

- 134 ----
- 134V ***942** Alimony, Allowances, and Disposition of Property
- 134k220 Allowance for Counsel Fees and Expenses
- 134k227 Amount
- 134k227(1) In general.

Utah App. 1998.

Award of \$1000 to wife for attorney fees was not unreasonable in divorce and custody proceeding, where trial court found that both parties had incurred necessary and reasonable attorney fees, that wife was in need of financial assistance, and that husband had the ability to pay. U.C.A.1953, 30-3-5.

17.COSTS ☞ 230

- 102 ----
- 102X On Appeal or Error
- 102k230 Prevailing or successful party.

Utah App. 1998.

In divorce proceedings, when the trial court has awarded attorney fees below to the party who then prevails on the main issues on appeal, the Court of Appeals generally awards fees on appeal. U.C.A.1953, 30-3-5.

***943** Randy S. Ludlow, Salt Lake City, for Defendant and Appellant.

Harry Caston, Salt Lake City, for Plaintiff and Appellee.

Before WILKINS, Associate P.J., and JACKSON and ORME, JJ.

OPINION

WILKINS, Associate Presiding Judge:

Defendant Heather T. Childs appeals the divorce decree granting plaintiff Brad Russell Childs sole legal custody of their three children, denying her request to provide day care to the children, and awarding her "insufficient" alimony and attorney fees. We affirm.

BACKGROUND

Brad and Heather married on December 14, 1990 and are parents to three children. Alex was born before the marriage in January 1988; however, Brad is not Alex's biological father. During the marriage, Brad and Heather had two children: Patches, born June 1991; and Brooke, born September 1993. Heather never sought child support from Alex's biological father and the biological father never provided support, sought visitation, nor contacted Alex. Brad, however, is the only father Alex has ever known, and both Heather and Brad have represented Brad as Alex's father. Brad treats Alex as his own, and both he and Alex have developed a nurturing father-son relationship. In addition, Brad provided the sole financial support for all three children.

At some time during their marriage, Brad and Heather decided that Brad should legally adopt Alex. After seeking legal advice, they determined that they could not afford the adoption fees because of their limited financial resources. However, they were advised, mistakenly, that Brad could formally adopt Alex by merely putting his name on the birth certificate. Soon after, they amended Alex's birth certificate to show Brad as Alex's father, believing that they had effected a legal, yet inexpensive,

adoption.

On March 31, 1995, Brad filed for divorce and requested temporary custody of all three children. Heather filed a Motion for Temporary Custody, requesting custody of and child support for all three children, without asserting that Brad is not Alex's biological father. In September 1995, a custody evaluation recommended joint legal custody, but suggested Brad be awarded primary physical *944 custody of all three children. In October 1995, Heather filed an Answer and Counterclaim challenging Brad's adoption of Alex and asserting the parental presumption. After a three-day trial in October and November 1996, the trial court entered the divorce decree and awarded Brad sole legal custody of all three children. The trial court concluded that Heather was estopped from asserting the parental presumption. The trial court, however, went on to conclude that, if the presumption applied, Brad had effectively rebutted it. The trial court then awarded Heather temporary alimony of \$350 per month, awarded her \$1000 in attorney fees, and ordered her to pay child support, one-half of the day care obligation, and one-half of all the medical and educational expenses for the children. Heather appeals.

STANDARD OF REVIEW

[1] [2] [3] "Trial courts may exercise broad discretion in divorce matters so long as the decision is within the confines of legal precedence." *Whitehead v. Whitehead*, 836 P.2d 814, 816 (Utah Ct.App.1992). Trial courts have broad discretion in making custody determinations, *see Sukin v. Sukin*, 842 P.2d 922, 923 (Utah Ct.App.1992), awarding alimony, *see Haumont v. Haumont*, 793 P.2d 421, 423 (Utah Ct.App.1990), and in awarding attorney fees, *see Rudman v. Rudman*, 812 P.2d 73, 77 (Utah Ct.App.1991). Where the trial court may exercise broad discretion, we presume the correctness of the court's decision absent "manifest injustice or inequity that indicates a clear abuse of ... discretion." *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct.App.1987).

ANALYSIS

Heather challenges the divorce decree on three grounds. First, Heather challenges the trial court's custody determination. She argues that the trial court erred in concluding she was estopped from asserting the parental presumption, that there is insufficient evidence to support the trial court's decision to award

Brad custody of all three children, and that the trial court abused its discretion in denying her request to provide work-related day care for the children. Second, Heather argues the trial court abused its discretion in awarding her only \$350 per month in temporary alimony. Third, she argues the trial court abused its discretion in awarding her only \$1000 in attorney fees. In addition, she requests attorney fees on appeal.

I. CUSTODY

A. Parental Presumption

Heather challenges the trial court's determination that she was estopped from raising the parental presumption regarding Alex. Brad argues that the trial court correctly determined that she was estopped from raising the presumption and also argues that she waived her right to assert the presumption. However, we need not address the issues of estoppel or waiver because, even assuming that the parental presumption applied, the trial court concluded the presumption was rebutted and Heather fails to challenge that conclusion. Therefore, because the parental presumption was effectively rebutted, Brad and Heather stand on "equal footing" for purposes of the custody determination. Next, we address whether there was sufficient evidence to show that it is in the children's best interest that Brad have sole legal custody.

B. The Children's Best Interest

[4] [5] Heather contends the evidence is insufficient to support the trial court's conclusion that awarding Brad custody of all three children is in their best interest. In *Hutchison v. Hutchison*, 649 P.2d 38, 41 (Utah 1982), the Utah Supreme Court listed several factors which may be considered in determining what is in the child's best interest. (FN1) In making its custody determination, *945 the trial court must make specific findings regarding the factors relied upon. *See id.* at 42. However, determining the applicability of and weight accorded to these various factors lies solely within the trial court's sound discretion. *See id.* at 41. Therefore, only where the trial court is " 'flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment.' " *Id.* (citations omitted). Although Heather supports her argument by pointing out that Brad works several hours of overtime a week and that she, up until January 1995, had been the primary care provider--we cannot say that these

factors show the court's decision to grant Brad custody to be so flagrantly unjust as to amount to an abuse of discretion.

Here, the trial court made specific findings regarding several factors considered in determining the children's best interest. The trial court found that the three children have strong bonds with one another and that it would not be in their best interest to be separated. Furthermore, the children love both parents equally. Both before and after the parties' separation, Brad has provided a stable environment for the children in which they are thriving; Brad is involved with the children's lives, is an appropriate disciplinarian, and is supportive of the children's educational needs and extracurricular activities; he has kept the children well dressed, groomed, and is watchful when they are in his care. In addition, Brad is of sound moral character and is emotionally stable; Brad's desire for custody has been continual and deep in that he adjusted his work schedule so he could be available for the children. Moreover, Brad has maintained regular employment and is better able to provide for the children and, with assistance from his extended family, can provide quality personal and surrogate care for his children.

In comparison, the trial court found Heather to be emotionally abusive to the children. The court heard evidence that Heather regularly degrades and swears at the children, and that she regularly disparages Brad in front of the children. The court found Heather mean, vindictive, uncooperative, emotionally unstable, and likely to prevent Brad from maintaining a healthy relationship with the children if she obtained custody. For instance, she threatened to take the children to Mexico to prevent Brad and his family from seeing the children if Brad was awarded custody. Moreover, the court found Heather's moral character questionable based on her untruthful testimony regarding her extra-marital affair. Finally, the court noted that Heather's work schedule and lifestyle would prohibit her from providing quality personal care to her children.

Based on the record facts, there is sufficient evidence to support the trial court's findings and its determination that the children's interests are best served in Brad's custody.

C. Day Care

[6] [7] Heather asserts that, pursuant to Utah Code Ann. § 30-3-33(13) (1995), she is entitled to provide

all the work-related day care for her children. Therefore, she argues that the trial court abused its discretion by denying her request to provide the necessary day care.

[8] Section 30-3-33 lists "advisory" guidelines "suggested to govern all visitation arrangements between parents." Utah Code Ann. § 30-3-33 (1995). Section 30-3-33(13) advises that "parental care shall be presumed to be better care for the child than surrogate care and the court shall *encourage* the parties to cooperate in allowing the noncustodial parent, if willing and able, to provide child care." *Id.* § 30-3-33(13) (emphasis added). The statute's plain language does not entitle the willing and able noncustodial parent to provide day care. It merely ***946** suggests that the trial court encourage such an arrangement based on the presumption that parental care is better. Clearly, section 30-3-33 gives the trial court the discretion based on the facts of each case to determine whether parental day care by the noncustodial parent is appropriate. (FN2) Therefore, under the facts of this case, we analyze whether the trial court abused its discretion in denying Heather's request to allow her to provide day care for her children.

[9] In this case, the trial court denied Heather's request to provide day care for several reasons. The trial court found Heather to be mean, vindictive, uncooperative, emotionally unstable, and unlikely to allow Brad to maintain a healthy relationship with the children. The court found that Heather emotionally and verbally abused the children by regularly degrading the children and making derogatory remarks about Brad in front of the children. In addition, the record shows that in the past, Heather has been uncooperative and unreliable in providing day care for the children. She would often show up late to pick up the children, requiring Brad to make other arrangements, and was often late returning them home. Moreover, the court found Heather's work schedule incompatible with the day care requirements in that she often works afternoons during the time day care would be required. Based on these unchallenged facts, the trial court did not abuse its discretion in denying Heather's request to provide day care.

II. Alimony

[10] [11] Heather argues the trial court awarded her insufficient alimony. Trial courts have broad discretion in making alimony awards. *See Haumont v. Haumont*, 793 P.2d 421, 423 (Utah Ct.App.1990).

Therefore, we will not disturb a trial court's alimony award so long as the trial court exercised its discretion within the appropriate legal standards, *see id.*, and " 'supported its decision with adequate findings and conclusions ...' " *Naranjo v. Naranjo*, 751 P.2d 1144, 1147 (Utah Ct.App.1988) (citations omitted).

Section 30-3-5(7)(a) of the Utah Code codifies four factors trial courts must consider in determining alimony. (FN3) Trial courts must consider:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support; and
- (iv) the length of the marriage.

Utah Code Ann. § 30-3-5(7)(a)(i)-(iv) (Supp.1998). Although not required, the court may consider fault in determining alimony. *See id.* § 30-3-5(7)(b) (Supp.1998). If these factors have been considered, " 'we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion.' " *Watson v. Watson*, 837 P.2d 1, 3 (Utah Ct.App.1992) (citations omitted).

[12] Here, the trial court awarded Heather temporary alimony of \$350 per month based, in part, on its findings regarding both parties' financial conditions. The trial court specifically found that Heather earns approximately *947. \$840 gross per month and that she has reasonable monthly expenses of \$1,250. The trial court also found that Brad earns approximately \$3,300 gross per month and has reasonable monthly expenses of \$2,500. The court found that \$350 per month was appropriate considering "the duration of the marriage, [Heather's] excellent health, youth, and ability to improve her capacity to meet her own needs, and her fault in engaging in an extra-marital affair." The trial court's findings clearly show that the trial court considered all four of the required factors and expressly noted factors it considered in limiting the alimony award. Heather, however, does not challenge the trial court's findings or any basis relied upon by the trial court to limit the alimony award. She only argues that \$350 is insufficient to meet her needs, but that \$500 would be

sufficient--without any argument or support for this figure. Because Heather has failed to prove serious inequity in the alimony amount, we cannot say the trial court abused its discretion in awarding her \$350 per month.

[13] Heather also argues that she should have been awarded alimony for a period equivalent to the length of the marriage under Utah Code Ann. § 30-3-5 (Supp.1998). We have reviewed section 30-3-5 and find nothing to support the argument that the trial court is required to award alimony for a period equivalent to the length of the marriage. Therefore, we affirm the trial court's alimony award.

III. Attorney Fees

[14] [15] [16] Heather argues the trial court abused its discretion in awarding her only \$1,000 for attorney fees. Pursuant to Utah Code Ann. § 30-3-3 (1995), a trial court may award attorney fees in divorce and custody proceedings. The decision to award attorney fees and the amount thereof rests primarily in the sound discretion of the trial court. *See Kerr v. Kerr*, 610 P.2d 1380, 1384 (Utah 1980). However, the trial court must base the award on evidence of the receiving spouse's financial need, the payor spouse's ability to pay, and the reasonableness of the requested fees. *See Bell v. Bell*, 810 P.2d 489, 493 (Utah Ct.App.1991). In this case, the trial court specifically made all three findings in awarding Heather attorney fees. The trial court found that both parties had incurred "reasonable and necessary attorney fees," that Heather was in need of financial assistance, and that Brad had the ability to pay. The trial court made the required findings, and Heather does not challenge them. Instead, she argues that she should have been awarded more. Under the facts of this case, we cannot say that the amount is unreasonable. Therefore, the trial court did not abuse its discretion in awarding Heather \$1000 in attorney fees.

[17] Heather seeks attorney fees on appeal. In divorce proceedings, when the trial court has awarded attorney fees below to the party who then prevails on the main issues on appeal, we generally award fees on appeal. *See Hall v. Hall*, 858 P.2d 1018, 1027 (Utah Ct.App.1993); *Allred v. Allred*, 835 P.2d 974, 979 (Utah Ct.App.1992). Because Heather does not prevail on any of the issues, we decline her request for attorney fees on appeal.

Affirmed.

JACKSON and ORME, JJ., concur.

FN1. The *Hutchison* court stated:

Some factors ... relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition.

Hutchison, 649 P.2d at 41.

FN2. Determining whether the noncustodial parent is entitled under the circumstances to provide day care

is part of the trial court's visitation determination. In determining visitation, the trial court gives "highest priority to the welfare of the children over the desires of either parent." *Kallas v. Kallas*, 614 P.2d 641, 645 (Utah 1980). Such determinations are within the trial court's sound discretion. See *Slade v. Dennis*, 594 P.2d 898, 901 (Utah 1979). Accordingly, we will not disturb the trial court's visitation determination absent a showing that the trial court abused its discretion. See *Watson v. Watson*, 837 P.2d 1, 4 (Utah Ct.App.1992).

FN3. The May 1, 1995 amendment to Utah Code Ann. § 30-3-5 statutorily codified under subsection (7) the well-established standard for setting alimony. The statute, however, now requires courts to consider four factors--the fourth being the length of the marriage--rather than the three traditionally repeated throughout the long line of alimony cases. See, e.g., *Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Barnes v. Barnes*, 857 P.2d 257, 262 (Utah Ct.App.1993); *Schindler v. Schindler*, 776 P.2d 84, 90 (Utah Ct.App.1989). Therefore, because the court determined the alimony appropriate to this case in October 1996, we apply the four factor test under section 30-3-5(7).

ADDENDUM 2

30-3-10. Custody of children in case of separation or divorce - Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(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.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) A court may not discriminate against a parent due to a disability, as defined in Section 57-21-2, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising therefrom by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(ii) the parent with a disability has sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the child at issue.

(c) Nothing in this section may be construed to apply to:

(i) abuse, neglect, or dependency proceedings under Title 62A, Chapter 4a, Family Services, or Title 78, Chapter 3a, Juvenile Courts; or

(ii) adoption proceedings under Title 78, Chapter 30, Adoption.

History: L. 1903, ch. 82, § 1; C.L. 1907, § 1212x; C.L. 1917, § 3004; R.S. 1933 & C. 1943, 40-3-10; L. 1969, ch. 72, § 7; 1977, ch. 122, § 5; 1988, ch. 106, § 1; 1993, ch. 131, § 1; 1997, ch. 43, § 1.

Amendment Notes. - The 1997 amendment, effective May 5, 1997, added Subsection (4).

Cross-References. - Disposition of property and children, § 30-3-5.

Removal of children from homestead, § 30-2-10.

ADDENDUM 3

110 Utah Rules of Civil Procedure, Rule 52*WEST'S UTAH COURT RULES
UTAH RULES OF CIVIL
PROCEDURE
PART VI. TRIALS**

*Current with amendments received through
11-1-98*

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need

not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of Findings of Fact and Conclusions of Law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

***111** (1) by default or by failing to appear at the trial;

(2) by consent in writing, filed in the cause;

(3) by oral consent in open court, entered in the minutes.

ADDENDUM 4

COPY

Custody Evaluation

Date of Report: October 28, 1997

Evaluator: A. Kyle Elder, Ph.D.
Ut./ 93-117649-2501

Participants:

Father: Terry B. Gibson Age: 31 DOB: 08-24-97

Mother: Diane L. Gibson Age: 26 DOB: 12-31-70

Prospective
Step-Father: Kenneth A. Winters Age: 39 DOB: 3-10-58

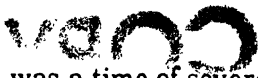
Paternal
Grandfather: Stanley B. Gibson Age: 51 DOB: 8-7-46

Paternal
Grandmother: Maureen Gibson Age: 48 DOB: 12-7-48

Child in Question: Shantel P. Gibson Age: 5 DOB: 6-24-92

Reason for the Evaluation:

This custody evaluation was ordered by the Honorable Judge Bryce K. Bryner of the Seventh Judicial District Court in and for Carbon County, State of Utah. This evaluation will focus on representing a custody recommendation based on the needs and best interest of Shantel P. Gibson. Shantel is the 5 year old daughter of Terry and Diane Gibson. The couple separated in April of 1996 following bouts of domestic violence, distrust and conflict. Diane took the child to Texas to "be away from him." She alleged that Terry was violent and in Texas "Terry couldn't hurt us". Terry kept contact by phone which only fueled the conflict according to Diane. In June of 1996 Diane sent Shantel to Terry in Utah because she needed tubes in her ears and Terry had insurance to have the surgery done. Diane was under the understanding that Terry would send her back to Texas after her medical needs were met. Terry kept Shantel with him. Diane returned to Utah to in August of 1996. This



was a time of severe accusations toward each other. On the 12 of August 1996 Diane went to the home of Stan and Maureen Gibson where Shantel was with her father Terry Gibson. A dispute broke out and the Helper Police were called. According to the police report Terry and Diane were fighting over the child. Terry had Shantel under the arms and Diane had the child around the waist trying to pull her out of Terry's arms. DCFS was called and investigated the situation awarding temporary custody to Terry Gibson. Diane was asked by officer Blackburn to leave the area. Legal action was taken which resulted in this request for a custody evaluation.

Sources of Information/Tests Administered:

- 4 hours interview, Terry Gibson, Wellington, Utah
- 4 hours interview, Diane Gibson, Price, Utah and Cleveland, Texas
- 3 hours interview, Kenneth Winters, Price, Utah and Cleveland, Texas
- 3 hours interview, Stan and Maureen Gibson, Helper, Utah
- 2 hours interview, Shantel Gibson, Wellington and Helper, Utah and Cleveland, Texas
- 1 hour Observation in Stan Gibson's home, Helper, Utah (Terry, Shantel, Stan, and Maureen Gibson)
- 1 hour Observation in Terry's home, Wellington, Utah (Shantel and Terry Gibson)
- 2 hours Observation in Kenneth Winters' home, Cleveland, Texas (Shantel and Diane Gibson and Kenneth Winters)
- Home Study, Terry Gibson's home, Wellington, Utah
- Home Study, Kenneth Winter's home, Cleveland Texas
- Home Study, Stan Gibson's home, Helper, Utah
- Parent Questionnaire, Terry Gibson, Diane Gibson, Kenneth Winters, Stan Gibson, and Maureen Gibson
- Child Questionnaire, Terry Gibson and Diane Gibson
- Weschler Adult Intelligence Scale—Revised, Terry Gibson, Diane Gibson, and Kenneth Winters.
- Minnesota Multiphasic Personality Inventory—2 (MMPI-2), Terry Gibson, Diane Gibson, Kenneth Winters, Stan Gibson, and Maureen Gibson
- Thematic Apperception Test (TAT), Terry Gibson, Diane Gibson, Kenneth Winters
- Substance Abuse Subtle Screening Inventory—2 (SASSI-2), Terry Gibson, Diane Gibson, Kenneth Winters, Stan Gibson, and Maureen Gibson
- Parent Awareness Skills Survey, Terry Gibson and Diane Gibson
- Drug and Alcohol Screening, Terry Gibson
- Drug and Alcohol Screening, Diane Gibson
- Drug and Alcohol Screening, Kenneth Winters
- Child Abuse/Neglect Report Dated 8-06-96
- Child Abuse/Neglect Report Dated 8-13-96
- Doctor's Records

- Helper City Police Report dated: 8-12-96
- Wellington City Police Report dated: 8-26-95
- Preschool Progress Report, Shantel Gibson, by Mrs. Jensen
- Letters from Diane Gibson
- References

Background Information:

Terry B. Gibson

Terry Gibson is the son of Stanley and Maureen Gibson of Helper, Utah. He lived with his parents in American Fork, Utah until he was in the forth grade when he moved with his family to Helper, Utah. He has a younger brother Shawn Gibson who is married and resides in Helper, Utah.

Terry recalled his relationship with his father as supportive and reciprocal. He related that his father was a hard worker but when he come home he was willing to spend time with him hunting, fishing and working on cars and motorcycles. He stated that his relationship has remained loyal, respectful and helpful. He stated that his father, brother and himself built his brother's home. He reported that his father was the disciplinarian in the home and maintained strict standards. Terry stated that there was no abuse in the home and his father's form of punishment was usually grounding.

Terry described his relationship with his mother as "good, she was basically mom." He stated that as a child his mother played games with him and took care of him and his brother. They took trips together, watched TV and movies. He stated that he could talk with his mother about anything. His mother was the nurturing parent and pretty much allowed his father to take charge of discipline.

Terry stated that ~~his parents had an excellent relationship~~. He remembers arguments from time to time but they were able to talk them out. His parents did not use physical punishment with the children and there was no domestic violence in the home.

Terry graduated from Carbon High School in 1984 where he received average to above average grades. He attended College courses at the College of Eastern Utah in "machine shop." He did not receive a degree because he didn't take any general education

courses. Terry currently works for Joy Manufacturing as a machinist. He has been working at his current job for over four years.

Diane Gibson

Diane Gibson is the daughter of James A. Morehouse and Sherry Brand who separated when she was only 3 years old. Her mother raised her in East Carbon in her maternal grandparent's home until she was 11 years old. ~~Her mother remarried Duane~~ Brand when Diane was approximately 12 years old. Sherry and Duane Brand moved to Price where she was raised until she left home as a young teenager. Diane has one half-brother Shawn Brand (30) who lives in Price, Utah.

Diane affectionately stated that Duane Brand was my daddy since I was 12 years old. She stated that he was one of her best friends and that Duane "has always been there for me." She said that their relationship was mixed with feelings of love and hate. She explained that they were both stubborn "we were both bulls" which caused friction between them. She stated that she misses them since they recently moved to Arizona. Diane reported that Duane and Sherry "raised Shantel as much as Terry did."

Diane stated that she and her mother did not see eye to eye but she was always there for her. As a child she interacted well with her mother but in her teens they ran into conflict. She described her mother as "a fanatic." She said that her mother was "very clean" and that they were opposites in personality. She stated that her mother was angry with her when her mother found out that her brother was being physically and sexually abusive toward her. She stated that her mother "trusted us to the full extent" and that she did not remember being disciplined. She said that "mom would cry so we would not do it again and "I just tried to mind." She said that even though she and her mother disagree on many things they have always been there for one another.

Diane reported that her relationship with her brother started out very well. As young children they were "best buddies" until Shawn got hit by a car on his bicycle. She stated that he was not treated at the time. Subsequently her brother had a seizure and

almost died. His personality changed and he began to be physically and sexually abusive toward her. For one reason or another she did not feel that she could tell her mother about the abuse. She stated that the abuse from her brother was a major factor in the decision to leave her parent's home. She said that she gets along better with her brother now yet she is more like "his big sister." Her brother was hospitalized on an inpatient psychiatric unit for violent behavior. She stated that he was diagnosed manic-depressive.

Diane attended Carbon High School for two years until she met Terry Gibson and moved in with him. She stated that a girl friend took her to Terry Gibson's home to buy drugs. She spent a few days with him doing drugs and became acquainted with him. She stated that within a few days they became sexually involved and Terry asked her to move in with him. She made the decision to move in because she wanted freedom from her parents and wanted to get away from her abusive brother.

She stated that she was an excellent student receiving straight A's through the 9th grade. By the 10th grade she got a job as a disk jockey and was "burning the candle at both ends." Her grades quickly deteriorated and she got involved with peers who were involved in drugs and alcohol. She stated that she dropped out of school in the 11th grade when she moved in with Terry. She stated that she took and passed the GED during her senior year. Since that time she has worked as a cake decorator, cashier for KFC, and for McDonald's. Her most recent employment was with McDonald's until May of 1997. She stated that she took a leave of absence because she was pregnant and started spotting.

Kenneth Winters

Kenneth is the son of Earl J. Winters and Ruth Francis who are both deceased. Ken was born in El Paso, Texas and raised in Salt Lake City, Utah. Ken has three siblings: Jim Winters (49) of Florida, Larry Winters (46) of Wyoming, and Shirley Morehouse (41) of Cleveland, Texas (Shirley is married to Diane's biological father, James A Morehouse). Ken's mother passed away when he was 15 years old leaving him and his brother's to care for their own needs around the house. Ken reported that his father was hard on him and

expected a lot from him. He described his father a "pretty strict" disciplinarian who occasionally used spanking. Ken stated that he was not abusive but did hit his sister on one occasion. When he was 17 his father married Bernice Winters who Ken described as "eccentric." He moved out of the home at the age of 18 because he wanted to get away from his step-mother.

Ken reported that his mother was a "good caretaker". She was "not afraid to discipline" and used a spatchula as a whipping tool. He stated that he received the "spatchula to my butt once in awhile but "I don't remember many whippings." He stated that his mother was ill with cancer which she kept from her family. She died on the operating table at LDS Hospital while Doctors were attempting to remove a blood clot. An autopsy revealed that cancer had spread throughout her entire body. Her death was a surprise and Ken and his brothers took it hard.

Ken graduated from Skyline High School in Salt Lake City, Utah. He stated that he was a good student when he was not bored. He enjoyed science and math and "hung out with jocks and preppies." He worked as a Technical consultant from 1978 until 1993 in Utah. In 1995 he obtained work as a machinist in Texas. He currently works for Shiloh setting up and operating machinery.

Ken stated that he met Diane through his sister who is Diane's biological father's wife. He had room in his home and Diane needed a place to stay so he allowed her to move in. Ken stated that the relationship was just friendship at first and did not become intimate until after Shantel returned to Utah for medical attention. Ken stated that Diane was "wearing a wedding ring" but they had to wait for Diane's divorce to be finalized before they could get married. He reported that Diane was pregnant with his child and due in October of 1997.

Stanley B Gibson

Stan was born in Price, Utah the son of Wallace and Katherine Gibson. He has four siblings: Barbara Beason (58) of Helper, Maba Farrell (56) of Helper, Lennard Gibson

(deceased), and Clifford Gibson (49) of Helper, Utah. He described his relationship with his father as "fantastic" stating that they worked on cars together and shared similar interests. He reported that his father was "not real strict" and preferred "scolding" to "whipping". He stated that his parents raised him LDS but that his father was "not quite as religious" as his mother.

Stan related that his relationship with his mother was also "fantastic." She was always there when he needed her. Her discipline style was also scolding yet he did remember one occasion in which he received a whipping from her. Their relationship has improved since his father died and he is regularly involved in making sure her needs are met.

Stan attended Moab and Carbon High School graduating in 1965. Stan has a history of steady employment working 15 years as a mechanic in the coal mines. He currently works as a mechanic for Carbon County and has been employed by them since 1991. He is contented to remain in his job until retirement.

Maureen Gibson

Maureen was born in American Fork, Utah the daughter of Le Mar Rushton (deceased) and Lorraine Brown. She has two siblings: Bonnie Wolverton (46) of Nevada and Randy Rushton (42) of Lehi, Utah. She described her father as "close and loving". She reported that her father took her horseback riding, camping and fishing. Her father died in a mine explosion in 1963. She stated that her parents were sealed in the LDS temple in 1962.

Maureen described her relationship with her mother as "close". Her mother was more of a disciplinarian than her father but was not abusive. Her mother's discipline consisted of being sent to her room. Maureen stated that she maintains close contact with her mother exchanging phone call almost every day. Maureen reported that Shantel calls Maureen's mother "Grandma Bear". Her mother moved to Lehi, Utah after her father's death and married Gil Brown whom she described as a "nice guy."

Maureen attended Lehi High School yet never finished. She stated that she had a lot of friends and was "liked by everyone." She met Stan when she was young and married him when she was 16 years old. She stated that the decision to marry was a big reason she did not finish high school. Stan and Maureen have been married since 1965 (32 years) and have a healthy relationship. Maureen currently works full time at Swift Market in Helper, Utah. She works because she enjoys meeting people and stated that her job, "has been good to me."

Marital History

As previously mentioned Diane reported that she was introduced to Terry by a friend who took her to his house to buy marijuana. According to both they dated a few times and Terry asked her to move in with him. Diane stated that she said yes because she wanted a "life on my own—so no one could tell me what to do." Terry stated that they made the decision because they "loved one another." Their relationship became sexual after a "couple of days" according to Diane. They lived together for approximately 3 years before making the decision to marry. Diane was pregnant with Shantel at the time and Terry said that Diane put pressure on to get married. He said he thought she "had the whole thing planned ("have a child then split")." Diane stated that they had planned getting married for years but Terry "would always back out." She stated that Terry was always too busy.

Terry said that having Shantel was not planned. He said, "I'm glad, I wanted it. I just hadn't planned that quick." Diane reported that she had always wanted children. She stated that she had several miscarriages and that Terry was not very sympathetic toward her. She said that she planned to have Shantel on her own and that Terry was "not very happy when he found out."

Diane identified drugs as "the biggest problem" in their marriage. She stated that Terry "started getting deep into crystal Methamphetamines." According to Diane Terry was smoking "an 8 ball every two days." Terry stated that they had always had marital

problems. According to Terry "she created problems out of little things." Diane had a pattern of wanting to be on the go which Terry did not like. He suggested that Diane started hanging out with a friend and they "both used drugs." Terry suggested that Diane provoked fights through excessive verbal violence. Diane started fights often hitting Terry in the head. Terry reported that she gave him a bloody nose. This was confirmed by Diane who stated that she had "bloodied his nose a few times." Diane reported that Terry was extremely abusive and that she had "blocked out a lot of the abuse." She admitted that she usually started the fights "verbally but not physically." Diane stated that Terry had held her down on the ground and "covered my mouth until I went unconscious."

Fighting increased to the point that on August 26, 1995 Police were called to the Gibson residence in Wellington. According to the police report the officer asked Diane to tell him what had happened. He reports that she was very agitated and upset. She "pulled her dress up to her shoulder" and showed him a welt she said was received when Terry hit her with a stick. Diane was so up set that she turned on the officer shouting obscenities directed at him calling him a "fucking Mormon." The officer stated that she accused him of "taking sides" because he was a man. The officer approached Terry who was sitting on a chair couch in the living room. The officer reported that Terry was calm and cooperative. He reported that he had taken the keys out of Diane's car and Diane had got a stick and hit him in the leg. He took the stick from her and "poked her in the butt" She then retrieved a bar and Terry broke the stick on the door "which hit her in the back." Diane claimed that Terry hit her in the back with the stick. The officer stated that the couple then exchanged blows. Both Terry and Diane were charged with domestic assault and ordered to complete domestic violence classes through the Division of Child and Family Services. A couple of hours after the incident Terry's father and brother, accompanied by a police officer, went to the home to get some of his things. Diane was still angry and asked if Stan Gibson wanted to see his granddaughter. The report states, "Diane, standing next to the child said in a loud voice 'Say goodbye to grandpa because you are not going to see him for years.'" Stan

said nothing and left as Diane "continued to yell obscenities and saying the Gibsons were wife beaters."

Apparently incidences of severe arguments and fighting continued until Diane took Shantel with her to Texas to see her biological father who had resurfaced in her life. Terry reports that he had no idea she was leaving. He found out from Diane's brother where she was staying in Texas and began to call her on the phone. Terry reported that she kept saying that she was going to come home and then after about one month decided that she wanted a divorce.

Diane stated that she got tired of being mistreated. She said, "I couldn't go anywhere without accusations of sex or drugs. She reported that Terry was "stalking on her" and he would come at night with a flash light to see if she was home. She was tired of being accused of affairs and being controlled and manipulated. In Texas she met Kenneth Winters and with in a few weeks moved into his home with her daughter Shantel. Shortly thereafter, Diane returned to Utah to get some of her things and left Shantel with Kenneth Winters. She stated that they were just friends at first and that their relationship was not "intimate" until August of 1996. They conceived a child in February of 1997 and are planning on marriage.

Findings

Duration and depth of desire for custody

When the child is with each parent in their respective homes there is a display of genuine interest in the child. Both Diane and Terry express a desire to have custody of their daughter Shantel. However, both parties have used Shantel as a tool to fight one another. Their actions have demonstrated that they are unwilling to cooperate with one another to insure that Shantel's needs are met. Diane has had difficulty managing her anger toward Terry which has resulted in damaging and inappropriate statements in front of the child. For example, in the Wellington Police Report Officer Watkins recorded insensitive statements toward Stan and Shawn Gibson which were delivered in the presence

of the child. She reportedly said in a loud voice to Shantel, "Say goodbye to grandpa because you are not going to see him for years." She continued to use obscenities and make accusations which were inappropriate in front of the child. On another occasion Helper Police reported that Diane and Terry were actually fighting over Shantel. The report states that "Terry had a hold of Shantel just under her arms, and Diane had Shantel around the waist area. The two adults were pulling on the child and yelling at one another." This reflects a lack of consideration for the child on the part of both parents. Both parents are guilty of ignoring the child's emotional welfare in continuing the conflict between them.

In interview with Shantel in Texas she reflected and parroted the negative comments and feelings that each parent has expressed toward one another. Shantel stated that "her (Mom) hates him (Dad)". She stated that her mother would not let her dad call her. She commented that her "Daddy says my mom's an asshole." Such negative tones are being created by each parent's statements and actions toward the other in front of the child.

Child's Preference

In observations of Shantel with Diane and Kenneth Winters in Texas there were few spontaneous attempts on Shantel's part to show affection toward her mother or Kenneth. In fact, Shantel was rude toward her mother calling her an "asshole." She was hostile and combative with Ken attempting to hit him at one point. She used rude language with Ken telling him several times to "shut up." She refused to follow directions and whined and argued with both adults. When asked if she wanted to live with her mother she responded "no." Shantel was negative toward her mother and Ken stating, "I don't like anybody. They're not my friends." She stated further, "Kenny doesn't love me. He hits me. He scares me. My Dad in Utah is the only one who loves me." She then proceeded to tell the examiner that she loves her "Daddy and Mommy" and misses her dogs and her friend Amy.

In observation with her father in Helper and Wellington, Utah Shantel's behavior was much more appropriate. In three separate observations with her father her language was appropriate and she demonstrated respect without hostility. She interacted with her

father in a playful manner which suggested that she was comfortable in his presence. Her father demonstrated affection toward Shantel which was reciprocated. Shantel was very patient with her father and responded well when her father set limits.

In interview in Terry's home Shantel stated that she desired to live in Texas because, "I have a new baby sister." In Texas she stated that she wanted to live with her father in Utah. It was apparent over time that Shantel does not have a consistent preference to live with either parent. Considering her interaction with each parent, Shantel behaved in such a way to suggest that she is more comfortable with her father. It should be noted that there was a drastic difference in Shantel's behavior between observations with her mother and Ken in Texas and with her father in Utah. She was much better behaved in Utah and there was no display of hostility which was pronounced while she was with her mother in Texas.

Relationship with Half-Sibling

In September or October of 1997 Diane gave birth to a daughter, Kenna Dawn Winters. In October of 1997 Shantel was allowed to visit the child for one week in Texas. At this point Shantel is excited to have a sister and desires to spend more time with her. However, there has not been enough time to establish a bond with the child.

Primary Caretaker

Each parent has had significant time with Shantel in which they have acted as the primary care taker. During the time that Terry and Diane were married and living together Diane served as the primary caretaker. Diane shopped for the child, fed her and clothed her and cared for her daily needs while her father worked. When Diane left for Texas and took the child with her she continued to be the primary caretaker. Terry became the primary caretaker when Diane returned Shantel for medical attention in the summer of 1996 and has carried on the role since that time. It should be noted that during the time that Shantel has lived with her father Terry's parents Maureen and Stan Gibson have served significant roles in Shantel's life. Shantel sleeps at Stan and Maureen Gibsons

approximately 5 out of 7 nights per week. Her father takes Shantel to his parents each weeknight and prepares her for bed. Her grandparents are there in the mornings when she wakes up and her grandmother gets her ready for school. Shantel attends Sally Marrow Elementary which is in Helper, Utah. Stan and Maureen indicated that Terry spends any time he has away from work caring for his daughter. On the weekends Shantel sleeps at her father's house.

Strength of Bonding with each prospective Parent

This factor was covered in detail under the section **Child's Preference**. Shantel appeared to be much more comfortable in the presence of her father. She was well behaved and respectful of her father and offered spontaneous affection toward her father. In observation of Shantel with Diane her behavior was disrespectful and she was angry and irritable. She used foul language toward her mother and Kenny and refused to follow directions to the point of throwing temper tantrums. Shantel appeared to be angry with both parents and made derogatory statements toward each. She had a tendency to speak more affectionately about her possessions, friends, and pets over her parents. It is the examiner's opinion that Shantel has loving feelings and is attached to both parents yet she is angry with them because of being placed in the middle of their fighting. On one occasion in interview in her father's home she began to whisper. The examiner inquired why are we whispering and Shantel's response was, "I don't want my Daddy to hear because he will be mad." Shantel has been in the middle of many of her parent's violent arguments which has resulted in anxiety and fear. Angry and resentful comments toward both parents appears to be heavily influenced by the verbal and physical tirades of her parents.

Time available to spend with child

Diane has more time available to spend with Shantel because she no longer works outside the home. Diane is available to be with Shantel each day and during the night as well. Terry works graveyard shifts and is not available to be home with Shantel through

the night. He has his daughter sleep at his parents house during the week and they see her off to school. Terry sleeps in the mornings and picks Shantel up in the early afternoon and remains with her until bed time. Terry stated that he choose to work graveyard shifts so that he would have time to spend with Shantel during the day.

Time with parent pending trial

Shantel has spent the majority of time pending trial with her father. Shantel accompanied her mother to Texas upon separation of her parents. Diane left Shantel in Texas with Kenny for approximately 4 days shortly after she arrived in Texas. She left Texas and returned to Utah to obtain some of her possessions. She remained with her mother for a few months when her mother sent Shantel to Terry to have medical attention. From that point Terry kept Shantel and did not return her to her mother. In August of 1996 temporary custody was awarded to Terry. From that point Shantel remained with Terry without extended visits with her mother. Shantel was able to spend about one month with her mother in Texas during the summer and for one week after the birth of her sister.

Personal vs. surrogate care

Diane has an advantage in this area as she does not work and is available to provide daily care for Shantel without the need for surrogate care. Because Terry works full time he has had to make arrangements with his parents to care for Shantel while he is working. The surrogate care is provided by family members to whom Shantel is affectionately bonded.

Parenting Skills

Terry and Diane were both administered the first two sections of the Parent Awareness Skills Survey. The survey asks parents to respond to 18 hypothetical situations involving children of different ages. Each parent's response is rated according to six critical factors: **Critical Issues, Adequate Solutions, Understandable Terms, Acknowledging Feelings, Relevant History, and Feedback Data.** The instrument

provides a comparative analysis of each parent's awareness on the above factors. The actual ratings are listed below to allow for a comparative view on each factor (36 possible on each factor):

	Terry	Diane
Critical Issues:	09/36	21/36
Adequate Solutions:	15/36	26/36
Understandable Terms	1/36	5/36
Acknowledging Feelings	5/36	13/36
Relevant History	1/36	2/36
Feedback Data	3/36	13/36

The results of the survey suggest that Diane demonstrated a significantly greater awareness of each of the six factors on this survey. Diane's strength was in her ability to identify adequate solutions. Her identification of critical issues was fair to moderate. Diane's part to consider the child's feelings but not to an adequate degree. Terry's responses to these scenarios reflected lack of understanding of adequate parenting. Terry's responses were very concrete and lacked insight. Terry's responses did not reflect an understanding of the importance of listening to the child's viewpoint, or a consideration of the child's feelings, or the need to present feedback in understandable terms according to the child's age. Comparatively, Diane demonstrated a stronger awareness of children's needs throughout the scenarios on all of the factors.

Move Out of State/Non-marital Sexual Relationship

Diane originally left Utah to "have some time to myself with Shantel" and she had found her biological father whom she had never known. Her father offered her plane tickets to fly to Texas to spend time with him. Diane stated that she did not intend to stay in Texas. She met Kenneth Winters through her father and moved in to his home within a few weeks because, "He had room in his home." Terry found out where Diane was living

through Diane's brother and began calling her on the phone. Terry reported that Diane maintained that she would be returning to Utah. He stated that after she met Kenny and moved in with him she requested a divorce. Soon after moving in with Kenny, Diane returned to Utah to pick up some of her possessions leaving Shantel with Kenny. Terry stated that she did pick up some of her own things but did not take any of Shantel's. ✓

Although Diane admits she was living with Kenny she maintained that their relationship was only friendship and did not become sexually intimate until August of 1996, after Shantel had returned to her father in Utah. Kenneth and Diane conceived a daughter in February of 1997 and the child was born in the fall of 1997.

Factors Concerning Abuse (emotional, physical, sexual, etc.)

Diane's move to Texas without notification fueled resentment in Terry toward Diane. Terry's refusal to return Shantel to Texas following medical procedures during the summer angered Diane. Events leading up to the separation and these factors created a war between the parents with the child as the battle ground. On August 6, 1996 Terry filed a report to DCFS that Shantel was alleging that Kenneth Winters had hit her in the head. On August 12, 1996 Helper Police were called to a domestic dispute where Terry and Diane were yelling at each other and trying to pull Shantel out of each other's arms. The next day Diane filed a report that Terry was neglecting Shantel's emotional and medical needs. In reviewing the reports from DCFS it was evident that both reports were unfounded and reflected the parents animosity toward one another.

In summary, allegations that Terry has neglected Shantel's medical needs are unfounded. Also, there was no evidence to suggest that Kenneth Winters had physically abuse Shantel. However, there is overwhelming evidence that both parents are willing to carry on their fight against each other in their child's presence. This form of emotional abuse could account for the child's animosity toward each parent. Their violent arguments

have directly involved the child causing emotional abuse. Each parent is equally responsible for the trauma and emotional abuse to the child.

Domestic Violence

This is a factor of considerable note which was covered extensively under the previous heading **Marital History**. Please refer to this section for more information.

Moral Character and Emotional Stability

Terry Gibson

Terry was administered the Weschler Adult Intelligence Scale-Revised. On this test he received a Full Scale IQ of 83 placing his overall intellectual functioning in the Borderline/low average range. There was a significant difference between his Verbal IQ (78) and his Performance IQ (96). Terry's verbal abilities were in the borderline range of functioning and it was evident that he lacked confidence in expressing himself through this modality. Terry was very anxious about this test questioning what the results had to do with being a parent. He made several statements that you don't have to know these things to work at his job. After the test Terry disclosed that he was worried about failing because he was in special classes for learning disabilities. Terry's strengths were definitely in the visual-perceptual domain where his abilities fall within the average range. He was much more confident on tasks which required use of his hands rather than verbal expression. His subtest scores (Mean = 10, standard deviation = 3) were as follows:

Information	5	Picture Completion	10
Digit Span	6	Picture Arrangement	8
Vocabulary	5	Block Design	10
Arithmetic	6	Object Assembly	(10 prorated)
Comprehension	7	Digit Symbol	10
Similarities	8		

Terry was also given the MMPI-2 which identifies personality characteristics and traits. On this test he responded in such a way as to present himself in a positive light. The extreme scores indicate that he was unwilling to admit to any shortcomings or faults which most people would be willing to acknowledge. People who score similar on this test lack flexibility and do not tolerate stress or handle pressure well. Terry's response represents an excessive use of repression and denial which questions the validity of the test. Such people are not prone to introspection. These people tend to respond to provocation in an appropriate manner on most occasions yet at times respond with aggressiveness without provocation.

On the Thematic Apperception Test Terry was avoidant of emotional expression. His stories were accurate in perceptual detail but Terry was not into the task and offered little content for analysis. He reacted to the test as if he were put off about having to take the test. Without prompts Terry offered no information about the thoughts and emotions of the characters in his stories. His response style is indicative of someone who is not prone toward introspection and avoids having to evaluate and respond to provocative situations.

Diane Gibson

Diane was administered the Weschler Adult Intelligence Scale-Revised. On this test she received a Full Scale IQ of 96 placing her overall intellectual functioning in the average range. There was a significant difference between her Verbal IQ (91) and his Performance IQ (105). She shows a slight preference toward a visual-perceptual modality over verbal skills however, both modalities were in the average range. She demonstrated a strength in her ability to compare objects and concepts and determine how they are alike. There were no pronounced weaknesses on this test. Her subtest scores (Mean = 10, standard deviation = 3) were as follows:

Information	9	Picture Completion	12
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Digit Span	7	Picture Arrangement	12
Vocabulary	8	Block Design	10
Arithmetic	7	Object Assembly	(11 prorated)
Comprehension	9	Digit Symbol	10
Similarities	14		

Diane was administered the MMPI-2 and her response style suggests that she was honest in her responses and offered a valid test. The response style indicates a naive defensiveness in attempt to present herself as virtuous and of strong moral character. People who respond similarly lack insight into how their behaviors and actions impact others. Her pattern of responding suggests that she is suspicious, distrustful and prone toward resentments and brooding. These people have a tendency to project blame on others and utilize the defense mechanism of projection to an excess. They are often seen as oversensitive, rigid and have poor social relationships. Individuals who obtain similar profiles are seen as angry, hostile and unable to resolve anger. These people have a tendency to feel isolated with a sense that others do not understand them. They also feel persecuted and mistreated expecting hidden motives behind the acts of others. She also responded to the questions in a way to suggest proneness to alcohol and drug abuse addiction of alcohol and/or drugs.

Diane was also administered the Thematic Apperception Test. On this test Diane projected in to her responded resistance toward authority and discomfort in being controlled. She views her world from an emotional perspective. There are indications that she has difficulty modulating affective expressions. Her stories indicate a tendency to lash out impulsively and then regret the consequences. She tends to view her world naively expecting that everything will happen according to her desires. She often projected herself into the stories and had difficulty distancing herself from the stimulus demands of the pictures.

Kenneth Winters

Kenneth was administered the Weschler Adult Intelligence Scale-Revised. On this test he received a Full Scale IQ of 118 placing his overall intellectual functioning in the Bright or high average range. There was a significant difference between his Verbal IQ (109) and his Performance IQ (124). His verbal abilities were in the average range with strengths in mental processing. Visual-perceptual skills were in the superior range with no clear weaknesses. His subtest scores (Mean = 10, standard deviation = 3) were as follows:

Information	13	Picture Completion	14
Digit Span	10	Picture Arrangement	12
Vocabulary	10	Block Design	13
Arithmetic	15	Object Assembly	(13 prorated)
Comprehension	11	Digit Symbol	11
Similarities	9		

Kenneth was administered the MMPI-2 and his response style suggests that he has a negative self-image. The results of the test suggest that Ken identifies himself as having chronic physical complaints and poor health. This fact was confirmed in interview when Kenneth reported that he suffers from diabetes. People with similar profiles have a tendency to fatigue easily and become irritable. They prefer isolated activities and avoid crowds or being in a group. They tend to lack energy and avoid emotional situations involving others.

Kenneth was also administered the Thematic Apperception Test. On this test Kenneth demonstrated optimistic aspirations. His stories were indicative of good problem-solving skills. However, when problems involved emotional situations he was at a loss as to how to resolve the conflict. Several stories ended with statements leaving the outcome to be resolved by time. For example, in one story sadness was resolved by stating, "She'll cry and eventually life will go on."

Stan Gibson

Stan Gibson was administered the MMPI-2 and responded with a valid profile. There were no significant areas of concern on this test suggesting healthy character development. Stan responded in such a way to suggest that he is socially introverted. He may have a tendency to worry and be somewhat moody. Overall, his response pattern indicated good personality development.

Maureen Gibson

Maureen Gibson completed the MMPI-2 and responded with a valid profile. Her response style suggests that she is somewhat hard on herself with a low self-image. However, the overwhelming result is that her personality and character development is healthy and stable.

Alcohol and Drug Problems

Terry Gibson

Terry stated that the first time that he drank alcohol was at the age of 14. He said that he has not had a drink in the past month and only drinks occasionally. Terry reported that the last time he got drunk was on his wedding night. Terry stated that he had tried marijuana when he was approximately 14 years old. He stated that the last time he smoked marijuana was approximately 6 years ago. He insisted that he could not use marijuana because he would lose his job. Terry assured that his work randomly tests employees and that he had been tested a couple times in the past 3 years and was clean each time. He stated that at the peak of his use he may have smoked pot a couple of times a week. Terry reported that he had tried crank (Methamphetamines) only one time as a teenager and that he had not used any other drugs.

This report is totally inconsistent with Diane's report. Diane reported that a friend took her to Terry's home because Terry had Marijuana. She further stated that drug use was "the biggest problem" for both parties throughout the marriage. She stated that Terry started "getting deep into Crystal Meth." She stated that Terry was smoking "an eightball

in two days." She stated that in the early stage of their relationship Terry would "offer her a line for sex."

The results of the Substance Abuse Subtle Screening Inventory—2 do not indicate chemical addiction yet the results strongly suggest that he was minimizing and in denial of chemical use. The Supplemental Addiction Measure Scale of the SASSI-2 was above the 98th percentile indicating that use is more problematic than he is willing to admit. Terry was asked to produce a drug screening through Castleview Hospital in Price, Utah within 24 hours. In response to the request he was extremely upset and resistant. Efforts to calm him were not successful. His reaction to the request appeared to be unusual and extreme. The test results did not indicate the presence of any illicit drugs.

This is an area in which Terry appeared to avoid telling the truth. There was multiple sources to suggest that Terry's involvement with drugs was extensive and his report in this evaluation appears to reflect denial and minimization. His lack of willingness to share a history of past abuse of chemicals casts a shadow of doubt upon his current sobriety even though his drug test came up clean

Diane Gibson

Diane indicated that she first used alcohol when she was approximately 15 years old. She stated that alcohol made her sick and she rarely drinks. She reported that she may have drank alcohol 6 times between age 15 and now. The last time she drank was a year ago "at dinner." She first tried marijuana at age 15 and used the drug on almost a daily basis until she was 22 years old. She reported that she maintained sobriety during Shantel's pregnancy. Diane stated that she had "one tokes" of pot about three years ago and that was her last use. Diane stated that Terry introduced her to crank (Methamphetamines) and that she used the drug regularly between the ages of 23 and 25. She stated that at the peak she was using four or five times per day. She stated that the last time she used was in March of 1996 and that she has not used since she moved to Texas.

Diane was willing to offer an open account of her substance abuse history. On the SASSI-2 Diane's profile indicated chemical dependence. However, her profile suggests that her addiction is likely in remission. The test indicates that she did not use excessive denial or minimization. Diane also was given 24 hours to produce a drug screening which she was willing to do. The results of the screening indicated that she did not have a significant level of any illicit drugs in her system. There is reason to believe that Diane's account of drug abuse in their marriage is an accurate account.

Kenneth Winters

Ken reported that he first drank alcohol when he was 12 years old. He stated that he drinks a "couple of beers" about 20 out of the past 30 days. He added that his drinking was "never to intoxication" and that "it's just a beverage." Ken stated that he had a significant drinking problem (drinking every night) approximately 10 years ago. At that time he received a DUI and was court ordered into treatment which he claimed that he completed. Ken stated that he first smoked marijuana when he was 16 years old. He reported that he has not used pot since December of 1996. Ken reported that he first tried crank at age 20. From the age of 24 to 28 years old Ken stated that he used crank about 8 days out of 30. He stated that he had not used crank since he left Utah 4 years ago.

An analysis of the results of Ken's SASSI-2 indicate an admission to past problems with both drugs and alcohol. The results do not indicate chemical dependency and are consistent with someone who is in recovery. He was also given a drug screening which did not identify a significant level of illicit drugs in his system. There is a concern about his current drinking and his attitudes toward alcohol (i.e. drinking beer 20 out of 30 days, and "it's just a beverage).

Stan Gibson

Stan stated that he first used alcohol when he was 16 years old. He reported that has never used alcohol on a regular basis and has not had a drink in over 9 months. Stan reported that he has never used any other drugs. The results of the SASSI support that

Stan is not chemically dependent. There was some indication that he may have minimized his level of involvement.

Maureen Gibson

Maureen reported that she has never used drugs and only drinks "once every 2 or 3 years." Results of the SASSI-2 do not suggest chemical addiction and tend to confirm her report that she does not abuse substances.

Relationship with Step-Parents

Shantel has not established a healthy relationship with Kenneth Winters. Observations of Shantel with Kenneth Winters suggest that Shantel does not like him or show respect for him. During observations Shantel repeatedly told Kenneth to "shut up." In interview she referred to Kenneth as her "asshole Daddy." She stated in interview that Kenneth Winters was "mean" and that "he hits me and locks me in my room." Although these allegations appear to be mostly fabricated they do reflect that she views him in a negative light.

Relationship with Extended Family-

Shantel has had extensive contact with both sets of grandparents. Shantel spent a lot of time with her maternal grandparents, Duane and Sherry Brand before they moved to Arizona. Mr. and Mrs. Brand had visitation rights with the child from the time that Terry Gibson was given custody. According to Terry they were allowed to visit the child. According to Diane, Terry interfered with the visitation. According to Diane, her parents moved to Arizona in part to escape the animosity and fighting over the child.

Shantel has an extensive relationship with her paternal grandparents, Stan and Maureen Gibson, especially since the time Diane moved to Texas. Stan and Maureen share caretaking responsibilities with Terry. Shantel spends a majority of time during the week with her grandparents. On the weekends she spend the majority of her time with her father but spends much of that time with her father and her grandparents in her

grandparent's home. She has a room of her own in Stan and Maureen's home which contains a majority of her toys and clothes.

Maureen Gibson is highly involved in meeting Shantel's daily needs. She gets her ready for school in the mornings and makes sure that she gets there. In observations of Shantel with Maureen and Stan, Shantel demonstrated love and affection. She was very comfortable in their home and free of anxiety. In fact, Shantel appeared to be more relaxed, secure, and comfortable in Stan and Maureen's home than either Terry's home in Wellington or Diane's home in Texas.

Religious Compatibility with Child

Both Terry and Diane claim affiliation with the church of Jesus Christ of Latter-Day Saints. However, during their cohabitation and marriage church attendance was not stressed. Diane reported that she did not follow the mormon religion and there are recorded reports that Diane may have very negative feelings toward the mormon religion. (i.e. Officer Watkins of the Wellington Police Dept., stated that she called him a "Fucking Mormon") Terry has been taking Shantel to the LDS church in Wellington for the past few months. Neither Terry nor Diane have demonstrated a long-standing interest in religion. Therefore, religious compatibility does not appear to be an important factor.

Stability of Environment

Home Study

Three homes were evaluated: Terry Gibson's home in Wellington, Utah; Stanley and Maureen Gibson's home in Helper, Utah; and Kenneth Winters and Diane Gibson's home in Cleveland, Texas. Extensive time was spent by the examiner in each of these homes. Each of the home's in the evaluation offer physical facilities which are more than adequate for Shantel's needs. Shantel has her own room in each of these homes equally filled with

clothes, toys and other necessities. There were no concerns in any of the homes and all meet healthy safety standards.

Terry has maintained consistent employment with Joy Manufacturing and receives adequate income to support himself and Shantel. Diane does not work and relies on Kenneth for financial support. Kenneth receives a modest income from a job which he has maintained since November of 1995. It appears that each parent has the financial resources to support Shantel.

Interference with Visitation

This is a factor which has been a major concern and source of fighting and contention between the two parties. Diane left Terry for Texas without notifying Terry of where she was taking the child. He found out where she was by calling her biological father in Texas. Diane maintains that she intended to insure that Shantel had frequent visits with her father in Utah. She returned Shantel to Utah, with what she thought was an understanding, that the child would be returned after necessary medical procedures were performed in Utah. She presented DCFS a copy of Shantel's plane ticket for a return trip to Texas on the 11th of August 1996. The couple fought physically over the child and temporary custody was awarded to Terry. Diane claims that Shantel was to visit with her over Easter 1997 but the visit did not happen. Terry sent Shantel to Texas for a visit with her mother in June of 1997 and there was disagreement over the length of stay. Arguments continued until this last visit in October of 1997 in which arrangements appear to have been more conflict free.

Both parents have demonstrated a lack of consideration toward Shantel in their battle over visitation. The distance between the two homes has also added to the conflict and problems. There have been arguments over who is responsible to pay for flights and other associated costs. Terry and Diane have failed to demonstrate an ability to work in a cooperative manner to work out visitation.

Conclusion and Recommendations

Terry and Diane experienced extensive conflict throughout their relationship. At times their conflict escalated to the point of domestic violence on both parts. Each parent's actions since the separation reflect selfish interest and a lack of insight as to what their child needs. Insensitivity and ignorance toward their child's best interest is reflected in Shantel's anger and obscene language toward each of them. Shantel appears to be more comfortable in her father's presence and in the home of Stan and Maureen Gibson. Shantel was extremely disrespectful of Diane in her home and did not make many attempts to seek out or give affection. She was consistently negative toward Kenneth Winters stating on more than one occasion that he hits her and is mean. Such statements were not substantiated but do reflect that there is little bond established between Shantel and Kenneth. It is true that Shantel has a half-sibling, Kenna Dawn Winters but the two have not spent enough time together to establish attachment and bonding. Both parents have acted as primary caretakers of Shantel. Shantel's mother appears to have been the primary caretaker until the time of separation. After the separation Terry has functioned as Shantel's primary caretaker but he has shared significant assistance from his parents especially Maureen Gibson. Shantel appeared to be bonded to her environment more than any one person. She appears to be most attached to the environment in her grandparent's home which includes her animals and her friend Amy. Attachment to animals and things is probably due in part to the trauma caused by the fighting between her parents.

Diane has the advantage of having the most time available to spend with Shantel because she does not work outside the home. However, Terry has demonstrated consistency in spending his available time with his daughter. When Terry is not available to care for Shantel she remains in the supervision of Stan and Maureen Gibson. The facts show that Shantel spends the majority of her time in her grandparent's home and is attending school in Helper, Utah. This would support Diane's contention that Shantel is

living with her grandparents. This form of surrogate care is far more healthy than placing the child with non-relatives.

Diane clearly demonstrates a greater awareness of the critical issues of child development and has knowledge of appropriate problem-solving. Terry's awareness of child development and parenting skills was deficit. Terry had difficulty identifying critical issues, adequate solutions, and other factors when verbally presented parenting situations. However, in observation he demonstrated sensitivity, and responded naturally to situations which resulted in adequate solutions.

Each parent demonstrated instability in character which has potential to hinder Shantel's development. Diane appears to be resentful and angry without the ability to modulate the expression of those feelings. Because she is unable to resolve anger she instigates fights. She admits that she has a tendency to be "hot headed." Diane has had a tendency to react impulsively without considering the consequences of her actions. As a result she has made statements in front of Shantel which have caused resentment and confusion. She showed instability and poor judgment in moving to Texas and moving into a man's home that she had only known for less than one month. Leaving her daughter with a man whom she did not know well while she returned to Utah to pick up some of her belongings was very poor judgment. This is further evidenced by the fact that Shantel makes statements that she does not like Kenneth Winters and that she says that he is mean. This poor judgment appears to be a long-standing character trait as she also made similar impulsive decisions when she moved in with Terry as a young teenager.

Terry has limited reasoning ability which shows up in his lack of awareness of parenting skills. Although he demonstrates genuine love and interest in his daughter he was not able to identify critical issues or adequate solutions to children's needs in different situations at different ages. It is likely that he would have difficulties raising Shantel especially through the adolescent years.

1. It is in the best interest of Shantel that she be placed in Stan and Maureen Gibson's home in their custody. This appears to be the home in which Shantel feels most comfortable and in which Shantel's needs will be most fully cared for.
2. If the court is unwilling to consider Stan and Maureen Gibson as custodians for Shantel then custody should be awarded to Terry Gibson.
3. Both parties should refrain from fighting or arguing in the presence of the child. Resentments and anger need to be resolved so that the focus of each parent can remain on satisfying Shantel's needs.
4. Each parent should refrain from making any derogatory statements or gestures toward the other in the child's presence. Efforts should be made by Terry and Diane to support Shantel to maintain a healthy relationship with the other parent.
5. Both parents should eliminate using the child to fight battles between them. Shantel needs a clear message that the divorce was not her fault and that her parents share equal responsibility.
6. Visitation arrangements should be set up in a concrete way so as to eliminate room for argument. Because of the distance between Utah and Texas, financial responsibility for travel related to visitation should be clearly established and followed.
7. Diane should be awarded the majority of the summer for visitation. Due to the expense of travel her time should be continuous rather than broken up.
8. Counseling should be considered for Shantel as she harbors considerable resentment toward both parents. She has also witnessed domestic violence and experienced emotional abuse through her parents fighting.



A. Kyle Elder, Ph.D.

Licensed Psychologist

Terry, Diane, and Kenneth each have a significant history of drug and alcohol abuse. Diane was much more willing to take a look at her substance abuse problems. Terry was very defensive about his drug use which leads on to question his honesty about current involvement with illegal substances. Kenneth continues to drink beer on a regular basis yet states that beer is only a beverage. There is a serious potential for problems with drugs and alcohol on the part of each parent.

Accusations of abuse on both parts appear to be unfounded. It appears that each party has attempted to use these accusations as weapons in their custody battle. Even though Shantel made accusations against Kenneth DCFS found the reports to be inconsistent and unfounded. Diane's accusations of medical neglect are also unfounded as reflected in both medical notes and DCFS reports. However, both parties are guilty of multiple instances of emotional abuse. A few examples of this abuse include instances of domestic violence in front of the child. To physically fight over a child, trying to pull the child out of the others arms has the potential to seriously traumatize the child. Such antics serve only to promote selfish interests at the expense of the child's emotional well being.

Shantel appears to be most comfortable in her grandparent's home, Stan and Maureen Gibson. She demonstrated respect for her grandparents who serve as caretakers for a majority of her week. They have refrained from speaking negatively toward Diane and recognize the importance of Terry and Diane's involvement in Shantel's life. Stan and Maureen have a home environment which provides emotional and physical security to Shantel. Both Terry and Diane provide homes which are adequate to meet Shantel's physical needs but Shantel's grandparents have a more stable environment to offer.

Diane and Terry have demonstrated that they cannot or will not cooperate with one another concerning visitation. They have a long history of fighting and arguing that will likely prevent any attempt to leave visitation to discussion.

As a result of the findings in this evaluation the following recommendations are suggested:

ADDENDUM 5

STEVEN D. BURGE [6504]
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COPY

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH

<p>TERRY GIBSON, Petitioner, vs. DIANE GIBSON, Respondent.</p>	<p>SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW</p> <p>Case No.:964700223</p> <p>Judge: Bruce K. Halliday</p>
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THE ABOVE-CAPTIONED MATTER having come before the Court for trial on March 30, 1998. Petitioner, Terry Gibson appeared in person and was represented by John E. Schindler. Diane Gibson (Winters) appeared in person and was represented by Steven D. Burge. The Court, after hearing testimony of the parties and various witnesses and received evidence and having reviewed the records and files herein, being fully advised in the premises, does now make, adopt, and find the following:

FINDINGS OF FACT

1. **DIVORCE:** The parties were previously granted a Decree of Divorce pursuant to bifurcated proceedings. A Decree was entered on May 20, 1997.
2. **CUSTODY:** The Court finds that it is in the best interest of the minor child, Shantel P. Gibson, that sole custody be awarded to the mother, Diane Gibson (Winters). The mother has

been the historical care taker of the child. The father's care taking has taken place since the temporary orders were issued and has been substantially supported by his parents though the surrogate care they have given. The Court finds that the natural parent, rather than the surrogate parents have the responsibility for the child. It is in the Court's belief that ultimately the care of the child would fall on Respondent's parents. The Court finds that it cannot condone such a preference. The Court placed great weight on the child's half sibling. The Court finds that joint custody is not appropriate because of distance between the parties and lack of cooperation.

3. **VISITATION:** Petitioner should have liberal rights of visitation with the child of the parties. At a minimum, said visitation shall be as follows:

A. Christmas: The Christmas holiday visitation shall coincide with the Christmas school break. On odd numbered years the Petitioner shall have visitation from 6:00 p.m. the day school is out until December 26th at 1:00 p.m. In even numbered years the Petitioner shall visit from 1:00 p.m. December 26th until 7:00 p.m. on January 2nd.

B. Thanksgiving: Petitioner shall have Shantel in even numbered years from Wednesday at 6:00 p.m. until the following Sunday at 6:00 p.m.

C. Summer: 4 uninterrupted weeks at Petitioner's option either:

1. Beginning with the first Friday after school is out for four weeks, or;
2. July 15 to August 15.
3. The Petitioner shall provide at least a thirty (30) day advance notice to the Respondent indicating which option he has selected.

D. Spring Break: Every year beginning on the first day of spring break or U.E.A. from 6:00 p.m. the day school lets out until the night before the child returns to school.

E. Minimum Schedule: This schedule is intended as a minimum schedule only and may be altered from time-to-time as the parties may agree.

F. Any other visits as may be agreed to by the parties. Respondent will encourage and support visits as frequently as possible between Petitioner and Shantel.

G. Telephone/Mail: Each party should be required to permit and encourage liberal telephone contact during reasonable hours and uncensored mail privileges with the child.

H. Miscellaneous: Petitioner and Respondent shall exchange information concerning the health of the child, including immunization records, medical records and reports and check ups. Petitioner shall have access to information concerning the child's education and Respondent shall make available to the Petitioner a copy of the child's report cards as and when they are received. The parties shall have the joint right to attend and participate in the child's parent-teacher conferences. Each party shall have the right to obtain medical care for the child. Each party shall provide the other with their current address and telephone number within 24 hours of any change. Respondent shall notify the Petitioner within 24 hours of receiving notice of all significant school, social, sport, and community functions in which the child is participating or being honored, and the Petitioner shall be entitled to attend and participate fully in those events. The child should be available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child or in the life of the parents.

4. **TRANSPORTATION**: The Court finds that the cost for transportation for visitation should be borne by both of the parties. Each parties should pay one-half of Shantel's cost for pickup and delivery (airfare, bus fare, etc.) for said visitations.

5. **CHILD SUPPORT:** The Court finds that Petitioner is employed and earns \$2,767 per month. The Court further finds that Respondent is capable of earning the equivalent of full-time minimum wage and, therefore, imputes to her an income of \$886. Petitioner should provide child support in accordance with the Utah Uniform Child Support Guidelines in the amount of \$337 which amount is consistent with the guidelines. Child support should continue until the child reaches the age of 18 years, or graduates from high school, whichever occurs later. Said child support shall be paid one-half on or before the 5th and one-half on or before the 20th of each month. Said child support will be in the form of check, cash or money order.

6. **WITHHOLDING:** The Respondent should be granted an income withholding order to be implemented only if Petitioner is more than thirty (30) days delinquent in this child support payments. Petitioner should be required to pay any statutory fee associated therewith.

7. **MEDICAL COVERAGE:** The Court finds that each of the parties should be ordered to provide health and accident insurance for and on behalf of the minor child, including optical and dental insurance, when it is available to them at a reasonable cost or no cost. All reasonable and necessary uninsured medical expenses, including deductibles and co-payments, should be paid and discharged equally by the parties. Each party should be required to provide the other with the name, telephone number and addresses of their medical insurer, claim forms, authorization forms allowing direct payment to the medical provider, script cards, statement of benefit forms, list of authorized providers, summaries of coverage and any other document necessary and required to process claims, obtain payment to providers or reimbursement of payment to providers.

Should either party incur medical, dental, optical or pharmaceutical expense for the

minor child they should be required to provide written verification of the cost and payment of medical expenses to the other parent within thirty (30) days of payment. One-half of said payment should be reimbursed to the other party within 15 days of verification.

At least every year each party should provide the other with an accounting of medical expenses allegedly paid or unpaid. This accounting is intended to occur every year such that all alleged unpaid medical costs can be resolved at that time and should not accumulate beyond one year. Any unpaid medical costs not settled beyond a one year period shall be lost.

8. SCHOOL RECORDS: The Court find that both parties are entitled to access all school records of the child directly from the school as well as from the other parent. Respondent should request that the school forward all records to the Petitioner each school year.

9. DAYCARE: Petitioner shall reimburse Respondent one-half of daycare expenses incurred as a result of her employment after verifying the amount of the expenses and her work schedule. Respondent shall provide such verification within 15 days of payment. Petitioner's reimbursement should be due within 15 days of verification as contemplated and required by this paragraph.

10. PROPERTY: The Court finds that the personal property of the parties should be awarded to the listed party free and clear of any claim from the other party as follows:

To Petitioner: 1986 Dodge Ram 4x4; Dodge Ram Charger, 1961 Buick LSB; 1974 Columbia travel trailer; tent trailer; livingroom furniture; diningroom table with 4 chairs; entertainment center; gas stove; dishwasher; microwave; refrigerator; aluminum cookware set; misc kitchen items; gas barbeque; kerosene heater; Bicentennial wood burning stove; brass buck and doe; deer oil painting; 27" color TV; VCR; black and green bedroom set; super single

waterbed; king size waterbed; linens; meg welder; acetylene torches; air compressor with pneumatic accessories; tool chest; misc hand tools; child's swing set; trampoline; 30.06 rifle; 22 rifle; compound bow and arrows; scrap vehicles; 5 gal shop vac; gun cabinet; ironing board; diamond wedding set; 35mm camera; small refrigerator; coleman camp stove and lantern; 20 gal aquarium with hood; pocket knife collection; hat collection; eight piece stoneware set; two chest of drawers; and all his personal possessions and clothing.

To Respondent: 1987 Oldsmobile; Dirt devil hand vacuum with attachments; generation 4 Kirby vacuum; dust buster; food processor; hope chest; ½ Christmas decorations; ½ of Shantel's pictures; Polaroid 600 camera with case; Carbon High 1989 class ring; 2 small curio cabinets; coffee table; 2 standing lamps; Garfield collection; Curtis Mathis 13" TV; Magnavox VCR; cake pans; sewing machine; 20 gal. aquarium; linens; misc. tools; 9mm pistol; shot gun; deep freezer; quilting material; craft supplies; and the following heirloom items: small white dresser; large and small dressers; child's white rocking chair; porcelain cat teapot; child's tea set; large dresser with night stand; doll house furniture and clothes; and turquoise sewing chair with storage desk; and all her personal possessions and clothing.

The Court finds that the above division of property is equivalent in value without placing any specific value on the property.

The Court finds that the parties owned no real property. The property upon which the mobile home is located belongs to Petitioner's parents, as does the 14X70 mobile home. Respondent has no interest of any kind in those properties.

11. DÉBTS: The Court finds the following division of debts is fair and equitable:

To Petitioner: All balances owed to Visa Associates, Discover, Texaco, Bravo, Dr. Dorr

Hansen, First Security (Evaluator), Carbon Credit Union (Evaluator), GM Mastercard, and MBNA. One-half of \$5,600 on Prudential credit card, and any debt incurred by him or for his benefit after the date of separation on April 24, 1996.

To Respondent: All balances owed to Marine Midland Bank, American Express, First USA, one-half of \$5,600 on Prudential credit card, and any debt incurred by her for her benefit after the date of separation on April 24, 1996. In addition, Respondent is liable for one-half of the cost of the custody evaluator (one-half of \$5,000 or \$2,500). Respondent should reimburse Petitioner the amount of \$2,000 (she has already paid \$500 of the total of \$5,000).

12. TAX EXEMPTIONS: The Court finds that the parties should be allowed to claim the child as a dependent for income taxes on an alternating basis. Petitioner shall claim the child as a dependent for odd years beginning with 1997 and the Respondent shall claim the child on even years.

13. ALIMONY: The Court finds that neither party should be awarded ongoing alimony.

14. ARREARAGES, BACK ALIMONY AND OTHER PAYMENTS:

A. The Court finds that Petitioner owes Respondent \$461 as reimbursement for airfare for Shantel. That amount may be offset against amounts owed below.

B. The Court reviewed Petitioner's request for back child support, but finds that due to Respondent's pregnancy and the birth of a child Respondent was unable to pay child support during the time Shantel resided with Petitioner. Respondent owes no back child support to Petitioner.

C. Respondent is ordered to repay to Petitioner all amounts she received for alimony between October 1996 and the date of trial. That amount is \$2,509.

D. The parties' claim for medical expenses offset each other, because they are essentially equal the party incurring the cost is required to make the payment.

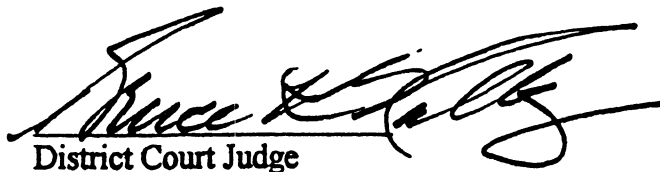
15. **FEES AND COSTS:** The Court finds that each of the parties shall pay their own attorney fees and costs associated with the action.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to the action and over the subject matter of this action.

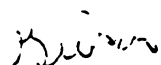
2. The Supplemental Decree should be in conformance with the foregoing Findings of Fact.

DATED this 25TH day of November, 1998.


District Court Judge

APPROVED AS TO FORM
this ___ day of _____, 1998:

John E. Schindler
Attorney for Petitioner



ADDENDUM “D”

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IN THE SEVENTH JUDICIAL **DISTRICT** COURT IN AND FOR
CARBON COUNTY, STATE OF UTAH

TERRY GIBSON, Petitioner, vs. DIANE GIBSON, Respondent.	SUPPLEMENTAL DECREE Case No.:964700223 Judge: Bruce K. Halliday
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THE ABOVE-CAPTIONED MATTER having come before the Court on March 30, 1998 for trial. Petitioner, Terry Gibson appeared in person and was represented by John E. Schindler. Diane Gibson appeared in person and was represented by Steven Burge. The Court heard the testimony of the parties and various witnesses and received evidence and having reviewed the records and files herein and being fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law; based thereon and for good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **DIVORCE:** The parties were previously granted a Decree of Divorce pursuant to bifurcated proceedings. The decree was entered on May 20, 1997.

2. **CUSTODY:** Sole custody of the minor child, Shantel P. Gibson, is awarded to the

mother, Diane Gibson (Winters).

3. **VISITATION:** Petitioner is awarded liberal rights of visitation with the child of the parties. At a minimum, said visitation shall be as follows:

A. Christmas: The Christmas holiday visitation shall coincide with the Christmas school break. On odd numbered years the Petitioner shall have visitation from 6:00 p.m. the day school is out until December 26th at 1:00 p.m. In even numbered years the Petitioner shall visit from 1:00 p.m. December 26th until 7:00 p.m. on January 2nd.

B. Thanksgiving: Petitioner shall have Shantel in even numbered years from Wednesday at 6:00 p.m. until the following Sunday at 6:00 p.m.

C. Summer: 4 uninterrupted weeks at Petitioner's option either:

1. Beginning with the first Friday after school is out for four weeks, or;
2. July 15 to August 15.
3. The Petitioner shall provide at least a thirty (30) day advance notice to the Respondent indicating which option he has selected.

D. Spring Break: Every year beginning on the first day of spring break or U.E.A. from 6:00 p.m. the day school lets out until the night before the child returns to school.

E. Minimum Schedule: This schedule is intended as a minimum schedule only and may be altered from time-to-time as the parties may agree.

F. Any other visits as may be agreed to by the parties. Respondent will encourage and support visits as frequently as possible between Petitioner and Shantel.

G. Telephone/Mail: Each party should be required to permit and encourage liberal telephone contact during reasonable hours and uncensored mail privileges with the child.

H. Miscellaneous: Petitioner and Respondent shall exchange information concerning the health of the child, including immunization records, medical records and reports and check ups. Petitioner shall have access to information concerning the child's education and Respondent shall make available to the Petitioner a copy of the child's report cards as and when they are received. The parties shall have the joint right to attend and participate in the child's parent-teacher conferences. Each party shall have the right to obtain medical care for the child. Each party shall provide the other with their current address and telephone number within 24 hours of any change. Respondent shall notify the Petitioner within 24 hours of receiving notice of all significant school, social, sport, and community functions in which the child is participating or being honored, and the Petitioner shall be entitled to attend and participate fully in those events. The child should be available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child or in the life of the parents.

4. **TRANSPORTATION**: Transportation for visitation is to be borne by both of the parties. Each parties is to pay one-half of Shantel's cost for pickup and delivery (airfare, bus fare, etc.) for said visitations.

5. **CHILD SUPPORT**: Petitioner is ordered to provide child support in accordance with the Utah Uniform Child Support Guidelines in the amount of \$337 which amount is consistent with the guidelines. Child support should continue until the child reaches the age of 18 years, or graduates from high school, whichever occurs later. Said child support shall be paid one-half on or before the 5th and one-half on or before the 20th of each month. Said child support will be in the form of check, cash or money order.

6. **WITHHOLDING:** The Respondent is granted an income withholding order to be implemented only if Petitioner is more than thirty (30) days delinquent in this child support payments. Petitioner should be required to pay any statutory fee associated therewith.

7. **MEDICAL COVERAGE:** Each of the parties is ordered to provide health and accident insurance for and on behalf of the minor child, including optical and dental insurance, when it is available to them at a reasonable cost or no cost. All reasonable and necessary uninsured medical expenses, including deductibles and co-payments, should be paid and discharged equally by the parties. Each party should be required to provide the other with the name, telephone number and addresses of their medical insurer, claim forms, authorization forms allowing direct payment to the medical provider, script cards, statement of benefit forms, list of authorized providers, summaries of coverage and any other document necessary and required to process claims, obtain payment to providers or reimbursement of payment to providers.

Should either party incur medical, dental, optical or pharmaceutical expense for the minor child they are required to provide written verification of the cost and payment of medical expenses to the other parent within thirty (30) days of payment. One-half of said payment should be reimbursed to the other party within 15 days of verification.

At least every year each party is to provide the other with an accounting of medical expenses allegedly paid or unpaid. This accounting is intended to occur every year such that all alleged unpaid medical costs can be resolved at that time and should not accumulate beyond one year. Any unpaid medical costs not settled beyond a one year period shall be lost.

8. **SCHOOL RECORDS:** The parties are entitled to access all school records of the

child directly from the school as well as from the other parent. Respondent is ordered to request that the school forward all records to the Petitioner each school year.

9. **DAYCARE:** Petitioner shall reimburse Respondent one-half of daycare expenses incurred as a result of her employment after verifying the amount of the expenses and her work schedule. Respondent shall provide such verification within 15 days of payment. Petitioner's reimbursement is due within 15 days of verification as contemplated and required by this paragraph.

10. **PROPERTY:** The personal property of the parties is awarded to the listed party free and clear of any claim from the other party as follows:

To Petitioner: 1986 Dodge Ram 4x4; Dodge Ram Charger; 1961 Buick LSB; 1974 Columbia travel trailer; tent trailer; livingroom furniture; diningroom table with 4 chairs; entertainment center; gas stove; dishwasher; microwave; refrigerator; aluminum cookware set; misc kitchen items; gas barbeque; kerosene heater; Bicentennial wood burning stove; brass buck and doe; deer oil painting; 27" color TV; VCR; black and green bedroom set; super single waterbed; king size waterbed; linens; meg welder; acetylene torches; air compressor with pneumatic accessories; tool chest; misc hand tools; child's swing set; trampoline; 30.06 rifle; 22 rifle; compound bow and arrows; scrap vehicles; 5 gal shop vac; gun cabinet; ironing board; diamond wedding set; 35mm camera; small refrigerator; coleman camp stove and lantern; 20 gal aquarium with hood; pocket knife collection; hat collection; eight piece stoneware set; two chest of drawers; and all his personal possessions and clothing.

To Respondent: 1987 Oldsmobile; Dirt devil hand vacuum with attachments; generation 4 Kirby vacuum; dust buster; food processor; hope chest; ½ Christmas decorations; ½ of

Shantel's pictures; Polaroid 600 camera with case; Carbon High 1989 class ring; 2 small curio cabinets; coffee table; 2 standing lamps; Garfield collection; Curtis Mathis 13" TV; Magnavox VCR; cake pans; sewing machine; 20 gal. aquarium; linens; misc. tools; 9mm pistol; shot gun; deep freezer; quilting material; craft supplies; and the following heirloom items: small white dresser; large and small dressers; child's white rocking chair; porcelain cat teapot; child's tea set; large dresser with night stand; doll house furniture and clothes; and turquoise sewing chair with storage desk; and all her personal possessions and clothing.

The Court finds that the above division of property is equivalent in value without placing any specific value on the property.

The Court finds that the parties owned no real property. The property upon which the mobile home is located belongs to Petitioner's parents, as does the 14X70 mobile home.

Respondent has no interest of any kind in those properties.

11. DEBTS: The following division of debts is fair and equitable:

To Petitioner: All balances owed to Visa Associates, Discover, Texaco, Bravo, Dr. Dorr Hansen, First Security (Evaluator), Carbon Credit Union (Evaluator), GM Mastercard, and MBNA. One-half of \$5,600 on Prudential credit card, and any debt incurred by him or for his benefit after the date of separation on April 24, 1996.

To Respondent: All balances owed to Marine Midland Bank, American Express, First USA, one-half of \$5,600 on Prudential credit card, and any debt incurred by her for her benefit after the date of separation on April 24, 1996. In addition, Respondent is liable for one-half of the cost of the custody evaluator (one-half of \$5,000 or \$2,500). Respondent should reimburse Petitioner the amount of \$2,000 (she has already paid \$500 of the total of \$5,000).

12. **TAX EXEMPTIONS:** The parties are allowed to claim the child as a dependent for income taxes on an alternating basis. Petitioner shall claim the child as a dependent for odd years beginning with 1997 and the Respondent shall claim the child on even years.

13. **ALIMONY:** Neither party is awarded ongoing alimony.

14. **ARREARAGES, BACK ALIMONY AND OTHER PAYMENTS:**

A. The Petitioner owes Respondent \$461 as reimbursement for airfare for Shantel. That amount may be offset against amounts owed below.

B. The Respondent owes no back child support.

C. Respondent is ordered to repay to Petitioner all amounts she received for alimony between October 1996 and the date of trial. That amount is \$2,509.

D. The parties' claim for medical expenses offset each other; because they are essentially equal the party incurring the cost is required to make the payment.

15. **FEES AND COSTS:** Each of the parties shall pay their own attorney fees and costs associated with the action.

DATED this 25th day of November, 1998.


District Court Judge

APPROVED AS TO FORM
this ____ day of _____, 1998:

John E. Schindler
Attorney for Petitioner