

1988

Janette Deeben v. Derick R. Deeben : Brief of Appellant

Utah Supreme Court

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 880104-CA

IN THE UTAH COURT OF APPEALS

JANETTE DEEBEN,

:

Plaintiff/Appellant

:

Case No. 880104-CA

vs.

:

DERICK R. DEEBEN,

:

Priority Classification 14b

Defendant/Respondent

:

BRIEF OF APPELLANT

Appeal from the Second Judicial District Court of Davis
County, State of Utah, the Honorable Douglas L. Cornaby, District
Judge.

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal is conferred upon this Court pursuant to Section 78-2a-3(2)(h), Utah Code Annotated, as amended, granting to the Court of Appeals appellate jurisdiction over appeals from district court involving domestic relations cases, including but not limited to divorce, child custody, support and visitation.

STATEMENT OF THE NATURE OF THE PROCEEDINGS

This appeal is taken from a Judgment and Decree of

Divorce granted on January 20, 1988 granting custody of the two minor children to each of the parties with the defendant having primary care for the minor child, Heather Lyn Deeben and plaintiff having primary care for the minor child, Kevin Roy Deeben. The trial court also made an order regarding visitation with the minor children. On January 29, 1988, an Order was entered by Judge Douglas L. Cornaby denying plaintiff's Motion for Stay of Judgment as to the custody of the minor child, Heather Lyn Deeben. The trial court amended the Findings of Fact and Conclusions of Law by inclusion of a complete transcript of the trial court's bench ruling of November 13, 1987. Plaintiff's Notice of Appeal was filed on February 16, 1988 with the District Court of Davis County, State of Utah.

On April 26, 1988, the Court of Appeals denied plaintiff's Motion for Summary Disposition on the basis of manifest error but remanded the case to the trial court to amend the findings of fact to reflect the court's determination of the "best interests of the child".

On November 2, 1988, the trial court made Additional Findings of Fact and adopted Amended Findings of Fact and Conclusions of Law submitted by defendant.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in

awarding primary physical care of the minor child, Heather Lyn Deeben, to defendant?

2. Did the trial court abuse its discretion in not following the general rule of leaving a child where she was living as long as she was happy and well-adjusted without a finding stating a substantial reason to change custody?

3. Are the Findings of Fact adopted by the Court insufficient to support the award of custody of Heather Lyn Deeben to defendant?

4. Did the trial court rule in a prejudicial manner toward plaintiff after she failed to accept the trial court's recommendation as to joint custody?

DETERMINATIVE STATUTES

Section 30-3-5(1) Utah Code Annotated, as amended,
(Disposition of property-custody and visitation)

30-3-5(1) When a decree of divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties . .

STATEMENT OF THE CASE

1. Nature of the Case. This is a divorce proceeding;

trial was held before the Honorable Douglas L. Cornaby in the Second Judicial District Court of Davis County. The Decree of Divorce was entered on January 20, 1988. Additional Findings of Fact were made and adopted by the trial court on November 2, 1988. Plaintiff appeals the custody award of the child, Heather Lyn Deeben, to defendant.

2. Course of the Proceedings. The plaintiff filed a Complaint for divorce on January 12, 1987. Defendant was served and filed an Answer on May 26, 1987. Plaintiff filed a Reply to defendant's Counterclaim on June 3, 1987. Defendant filed a Request for Pre-trial on July 14, 1987. An Order was entered July 29, 1987 granting to plaintiff temporary custody of the children, subject to defendant's visitation rights. Pre-trial was held on August 12, 1987 before Domestic Relations Commissioner, Maurice Richards.

Issues reserved for trial were custody, visitation, division of personal property, alimony and attorney fees. The Domestic Relations Commissioner recommended that defendant's parents be granted visitation from Friday evening at 6:00 p.m. to Sunday evening at 6:00 p.m. with the child, Heather Lyn Deeben, during the time defendant was in the U.S. Army stationed at Ft. Hood, Texas. Plaintiff filed an Objection to the Domestic Relations Commissioner's Recommended Order as it related to

grandparent's visitation. Plaintiff requested defendant's parents be granted one weekend per month visitation with Heather Lyn.

On September 8, 1987, plaintiff's Objection to Commissioner's Recommendation came on for hearing before Judge Douglas L. Cornaby. Defendant appeared in person on September 8, 1987 having obtained a hardship discharge from the U.S. Army. Defendant was granted visitation with Heather every other weekend upon stipulation and agreement of the parties inasmuch as he was then discharged from the Army and living in Salem, Utah. A home study evaluation was ordered at the request of defendant.

A home study and custody evaluation was conducted by Steven L. Watson, retained by defendant. Mr Watson recommended the best interests of the children would be served by having their custody awarded to plaintiff, Janette Deeben. The home study and custody evaluation was completed on November 11, 1987 and submitted to the Court.

The matter was tried on November 13, 1987 before the Honorable Douglas L. Cornaby. The trial court found each of the parties fit and proper persons to have custody of the children and awarded joint custody of the minor children to each of the parties. Defendant was to have primary care of the child, Heather Lyn Deeben, and plaintiff primary care of the child,

Kevin Roy Deeben.

3. Disposition at Trial Court. The Decree of Divorce was entered on January 20, 1988 awarding joint custody of both children to the parties with plaintiff to have physical custody of Kevin Roy Deeben and defendant to have physical custody of Heather Lyn Deeben. The trial court supplemented and amended its Findings of Fact and Conclusions of Law on January 19, 1988 by appending the transcript of the Bench Ruling of November 13, 1987 and incorporating the same as its findings. The trial court adopted defendant's proposed Amended Findings of Fact and Conclusions of Law on November 2, 1988 and made additional Findings of Fact on November 2, 1988.

4. Statement of Revelant Facts. The parties were married on September 6, 1984 in Sunset, Davis County, Utah (Tr., at 4). Their first child, Heather Lyn Deeben, was born on March 1, 1985 (Tr., at 4). Plaintiff had attend Utah State University and Weber State College prior to her marriage to defendant (Tr., at 5). Plaintiff was a sophomore enrolled at Weber State College majoring in elementary education at the time of trial (Tr., at 5).

Plaintiff was residing at home with her mother and father and had been since last separating from defendant in January, 1987 (Tr., at 6). Plaintiff's mother and her two sisters assisted plaintiff with child care responsibilities when

she was at school or working (Tr., at 15). Plaintiff was pregnant at the time the parties married and no one in either family wanted this marriage to occur (Home study at 5). Defendant threatened to have the marriage annulled two months after their marriage (Tr., at 15). In February, 1985, six months after marriage, plaintiff was examined for a possible miscarriage after a physical fight with defendant (Tr., at 15).

Heather Lyn Deeben was born on March 1, 1985 (Tr., at 5). In December, 1985 defendant threatened to divorce plaintiff and take Heather away from her (Tr., at 16). Plaintiff threatened to use a knife on herself during this argument if he took her child away (Tr., at 16). The police were called to their apartment during the disturbance (Tr., at 81).

The parties separated a month later in January, 1986 when defendant joined the U.S. Army (Tr., at 16, 17). Plaintiff maintained an apartment in Roy, Weber County, Utah with her daughter, Heather Lyn Deeben, while defendant was stationed in New Jersey for basic training (Tr., at 16, 17). After completion of basic training, plaintiff joined defendant in July, 1986 while stationed at Ft. Hood, Texas.

While in Texas, the parties had severe arguments, some leading to physical confrontations (Tr., at 18). In August, 1986, plaintiff's left arm was placed in a semi-cast and sling after blocking a blow to her face (Tr., at 18).

The parties separated after an argument in October, 1986 and plaintiff returned to Utah (Tr., at 19). Heather Lyn remained in the care of plaintiff during this separation (Tr., at 19). There was discussion of divorce at this time (Tr., at 19). Plaintiff, however returned and joined defendant in Texas around November 11, 1986 (Tr., at 19). The parties did not speak to each other for a week (Tr., at 20).

On November 24, 1986, defendant slapped plaintiff in the face after an argument (Tr., at 20). Plaintiff sought medical treatment at the emergency room of the Ft. Hood military hospital (Plaintiff's Exhibit 1). The medical report indicates mild, facial contusion with chief complaints being to her eye and ear (Plaintiff's Exhibit 1). Plaintiff told the treating physician she would contact the "Family in Crisis" organization (Plaintiff's Exhibit 1).

The parties had another severe argument on or about January 7, 1987 resulting in the police being called to the home (Tr., at 21). Plaintiff stayed with a neighbor that night and returned to Utah the next day, on January 8, 1987 with Heather Lyn. Plaintiff filed for divorce on January 12, 1987.

Defendant remained in Texas until March, 1987 when he came home on leave (Tr., at 22). Defendant had visitation with his daughter for about one week while on leave (Tr., at 23). Defendant's parents had visitation with Heather Lyn about one

weekend per month after plaintiff returned to Utah in January, 1987 (Tr., at 23).

Plaintiff gave birth to her second child, Kevin Roy Deeben, on July 1, 1987 (Tr., at 23). Defendant claimed Kevin was not his child and that plaintiff must have been raped (Tr., at 43). Defendant returned to Utah in the latter part of July, 1987 after the birth of Kevin, and was allowed visitation with Heather and to see Kevin (Tr., at 24).

Defendant obtained a hardship discharge from the Army around the first of September, 1987 (Tr., at 92, 93). At trial defendant claims the reason for the hardship discharge was his unit was being assigned to Germany and he would be unable to see after the care of his children and finalize his divorce (Tr., at 93). So defendant choose to take a hardship discharge rather than go to Europe (Tr., at 93).

However, defendant's counsel and defendant made other representations at a hearing before Judge Cornaby on September 8, 1987. (Hearing, September 8, 1987).

Plaintiff had objected to the Pre-trial Recommendation of visitation every other weekend for defendant's parents. (Objection to Commissioner's Recommendation). Hearing on the objection came before Judge Douglas L. Cornaby on September 8, 1987. The issue of grandparent's visitation became moot as defendant was discharged from the military and had returned to

Utah by September 8, 1987. However, as to the issue of child support, defendant's counsel argued that defendant should pay very little if any child support as defendant now had no income as a result of recently being discharged from the Army. (Hearing, September 8, 1987, at 8, 9). Defendant and his counsel represented he was injured in Army field exercises and needed surgery (Hearing Sept. 8, 1987, at 8, 9). Defendant had been released to the Veteran's Administration and his first appointment was within approximately two weeks (Hearing Sept. 8, 1987, at 9). The reason he left the military was due to a 50/50 probability of permanent knee impairment after surgery (Hearing Sept. 8, 1987, at 9). Defendant was ordered to pay \$80.00 per month per child by the court. (Hearing Sept. 8, 1987, at 10).

After the hearing of September 8, 1987 plaintiff filed a Request for Production of Documents to obtain a copy of Defendant's Hardship Discharge papers and related correspondence. None were produced. Plaintiff filed a Motion to Compel Discovery on October 30, 1987. Still Defendant did not produce a copy of the discharge or correspondence. At the time of trial plaintiff's counsel alleged surprise when defendant testified he obtained a hardship discharge to resolve the divorce and custody issue because of the representations made by defendant and his counsel at the Hearing of September 8, 1987. (Tr., at. 99, 100).

A psychologist, Steven L. Watson, chosen and retained

by defendant conducted a home study and custody evaluation (Home Study and Custody Evaluation). Mr. Watson recommended the best interests of the children would be served by having their care and custody awarded to the plaintiff (Home study, at 7). Mr. Watson predicted that plaintiff would do more actual parenting than would defendant due to his work and school schedules (Home study, at 6). Defendant was employed at Best Products, Provo, Utah working 20 to 30 hours per week at \$3.40 per hour. Defendant planned to attend Utah Community College next term and work part time in addition (Tr., at 90 and Home Study, at 3). Defendant was placed in the Reserves as part of his hardship discharge which carries with it attendant weekend drills (Tr., at 99).

Mr. Watson also predicted the defendant's situation would require considerable use of babysitter's during day times because defendant's parent's work and his other brother's and sister's would be in school (Home study, at 6). While plaintiff's situation is similar, use of babysitters is not necessary as often (Home study, at 6). Only one of three references of defendant could say they had seen defendant with Heather on more than one or two occasions (Home Study, at 5). Heather Lyn appeared to be a bright and active child to Mr. Watson (Home study, at 4). She was judged to be quite well developed both mentally and physically (Home study, at 4). Her

vocabulary was a bit ahead of most children her age (Home study, at 4). There was no indication the child was not healthy, happy, and well adjusted at the time of trial.

The trial judge meet with counsel for the parties for approximately one hour and fifteen minutes prior to trial in an effort to settle the case (Tr., at 2). The trial judge suggested joint custody with plaintiff, Janette Deeben, being awarded actual physical custody of both children but defendant to have Heather Lyn one week (seven days) per month continuous visitation until she started school. Defendant to have visitation four hours per week with Kevin until he became somewhat older. The case went to trial as plaintiff resisted joint custody preferring custody of the children to herself with defendant to have visitation every other weekend.

At the start of the trial, the trial judge stated,

Now, as we start, one of the original issues in the matter was custody and because of what I said in chambers and recommended to the parties in chambers, I want the parties to understand that I have no preconceived notions as I start this hearing that the plaintiff is going to get custody of the children. I want them to understand that so that if, at the end of the hearing, I think it's appropriate that the defendant be awarded the custody, you don't misinterpret when I try to get something solved in my chambers, so you both understand that (Tr., at 2).

At the conclusion of the trial the Court found that each of the parties are fit and proper persons to have the care, custody and control of the minor children and the Court finds that each of the parties should be awarded joint custody of the two minor children, with the defendant having primary care for the minor child, Heather and the plaintiff having primary care for the minor child, Kevin (Amended Findings of Fact #7).

The Court made a finding that defendant chose the hardship discharge so that he could fight for custody of his children (Trial Court's Additional Findings of Fact #1, at 2). The Court failed to make a finding that defendant wanted to get out of the service because of an alleged physical injury.

The trial court made a finding that plaintiff has been the primary caretaker the majority of the time until the Court's ruling on January 19, 1988 (Additional Findings of Fact #2, at 2). The Court found this was out of necessity because of the defendant's military assignment during 1987 (Additional Findings of Fact #2, at 2). The Court found the defendant spent as much time as caretaker of Heather as the plaintiff when he was in the home and not filling military duties (Additional Findings of Fact #2, at 3).

The Court found plaintiff gave Heather paregoric when it was not medically necessary and neared the point of being habit forming (Additional Findings of Fact #3, at 3).

The Court found plaintiff had been a better custodial parent since returning to Utah where she had assistance of her family (Additional Findings of Fact #4, at 3).

The Court found there is no special need created by any bond between Heather and Kevin, there being no particular attachment by the sister to the new born brother at this time (Amended Findings of Fact #7 E). The trial court stated the bonding is not the same as with children when they are older, when they became better acquainted, when they have been long associated with each other, and he was not even so sure the bonding became so strong that either party should be denied a right to have custody just so that one parent can be satisfied with total custody or no custody (Tr., at 148, 149).

However, defendant stated he considered it extremely important in a child's growth and development that the two children be together (Tr., at 112, 113). Plaintiff testified the two children interacted alot with Heather playing the role of mother to Kevin (Tr., at 57).

The trial court ruled that it would refuse to follow the general rule of leaving the children where they have been unless there's some major reason for changing them (Tr., at 154). The court stated,

If we followed that in this kind of a case, we would never consider the person who is in the military

service for custody because they are always subject to a change in duty and that like the defendant, husband there was no way that the family could be together. So, there is a special consideration that must be given to these military circumstance that would not be there if both parties were in the State of Utah (Tr., at 154).

SUMMARY OF THE ARGUMENT

1. That the trial court abused it's discretion in awarding primary physical care of the minor child, Heather Lyn Deeben, to defendant. That plaintiff was unquestionably the primary caretaker of the child during the course of the marriage. The child was healthy, happy and well adjusted in her present environment. Plaintiff has the greater flexibility to provide personal care for the child. Heather has spent all of her life with plaintiff and was closer to her than the defendant. The award of custody of Heather to defendant created a split custody award as Kevin Roy Deeben should unquestionably remain with plaintiff. That as to other factors relative to the parties character or capacity to function as parents each party ranks equally. The Home Study and Custody Evaluation found the best interests of the children were served by the award of their custody and care to plaintiff.

2. The trial court abused its discretion in not

following the general rule of leaving a child when she has been living as long as she was happy and well adjusted as it did not find or express a substantial reason for changing custody. The trial court admitted there was no major reason for changing custody but refused to follow the law in this case due to defendant's military circumstances. The trial court can not change the facts of this case to suit itself. Allegations of diaper rash and unwarranted administration of paragoric to Heather Lyn Deeben are disputed and insignificant factors.

3. The Findings of Fact adopted by the Court are insufficient to support the award of custody of Heather Lyn Deeben to defendant. The findings of the trial court do not support a significant or major reason for taking Heather Lyn Deeben out of her mother's home. If plaintiff is a good enough parent to be awarded the custody of her son, Kevin Roy Deeben, she is also a good enough parent to be awarded custody of Heather. The Court does not state any substantial reason for splitting the children.

4. The trial court ruled in a prejudicial manner toward plaintiff after she failed to accept the trial court's recommendation of joint custody. The trial court was apparently angered by plaintiff's refusal to accept his recommendation of joint custody and ruled for joint custody anyway at the conclusion of the trial.

ARGUMENT

POINT I: THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING PLAINTIFF THE CARE, CUSTODY, AND CONTROL OF BOTH CHILDREN, AND THE AWARD OF PHYSICAL CUSTODY OF HEATHER LYN DEEBEN TO DEFENDANT IS NOT IN THE BEST INTERESTS OF THE CHILD

In divorce proceedings, including initial custody awards, trial courts are given broad discretion. Moody v. Moody, 715 P.2d 507, 510 (Utah 1985). A trial court's custody determination on appeal should stand unless the evidence clearly shows that the custody determination was not in the best interests of the child or that the trial court misapplied principles of law. Smith v. Smith, 726 P.2d 423, 425 (Utah 1986); Cox v. Cox, 532 P.2d 994, 996 (Utah 1975); Shiuji v. Shiuji, 712 P.2d 197 (Utah 1985); and Wiese v. Wiese, 699 P.2d 700 (Utah 1985).

However, if the review of custody determining is to be anything more than a superficial exercise of judicial power, the record on review must contain written findings of fact and conclusions of law by the trial judge which specifically set forth the reasons, based on those numerous factors which must be weighed in determining the best interests of the child and which support the custody decision. Hutchison v. Hutchison, 649 P.2d 38, 42 (Utah 1982).

In any determination of the best interests of the child, it is appropriate for court to consider the quality of the child's present custody arrangement, the length of time the child spent in that arrangement, and the insecurity and emotional upheaval the child may suffer as a result of any modification in custody. Hogge v. Hogge, 649 P.2d 51, 55 (Utah 1982). Heather Lyn Deeben had spent all two and one-half years of her life in the care of her mother, plaintiff herein, at the time of trial. Of the child's 30 months of age, the defendant was physically absent from the child eighteen (18) months. Defendant was in basic training for six months (Tr., at 16, 17); the parties separated between October and November, 1986 (Tr., at 19); and the parties separated in January, 1987 until trial in November, 1987 (Tr., at 22). In the last year of Heather's life prior to the trial, Heather lived in defendant's home for two months with plaintiff, saw defendant in March for four days (Tr., at 105), for ten days in July, 1988, and every other weekend for two months before trial (Tr., at 105, 106). Thus, Heather had been in the sole care of plaintiff for a long period of time before the trial.

All of the evidence indicates Heather was bright and alert, had an above average vocabulary, and appeared well adjusted (Home study). The quality of her care while in the custody of plaintiff is self-evident. There was

no substantial reason given by the court to take Heather out of that environment. The Utah Supreme Court, recognizing the importance of a stable environment has repeatedly announced the principal that:

Notwithstanding the desires and contentions of the parties, the welfare of the children is the paramount consideration of the courts, and where custody has been determined, and the children appear to be comparatively well adjusted and happy, they should not be compelled to change their home unless there appears some substantial reason for doing so.

See Hogge v. Hogge, 649 P.2d 51, 55; Trego v. Trego, 565 P.2d, at 75; Nielsen v. Nielsen, 620 P.2d at 512; Robinson v. Robinson, 391 P.2d at 435. There was a Stipulation and Order granting plaintiff temporary custody of the children prior to trial, and Heather had been solely in the plaintiff's care for ten months prior to trial.

There was no compelling or substantial reason warranting the trial court in taking Heather from her mother's home. The trial court made a finding that plaintiff has been a better custodian of the child since returning to Utah and being in the home of her parents (Additional Findings of Fact #4, at 3). Also, the trial court admitted there was no major reason for changing custody but refused to follow the announced law

in this state because the defendant had been in the military service (Tr., at 153, 154).

The Court stated,

There is another consideration just with the military that we can't -- normally our appellate courts have said we will talk about custody matters. We will pretty much leave the children where they have been unless there's some major reason for changing them. If we followed that in this kind of a case, we would never consider the person who is in the military service for custody because they are always subject to that kind of a change of duty and that like defendant, husband, was on his six months of basic training, there was no way that the family could be together (Tr., at 153, 154). (emphasis added).

The trial court cannot change the facts in this case. The defendant has been physically absent from these childrens' most of their lives. The fact that he was absent because he was in the military is of no consequence.

The trial court's position appears to be but for his military obligations the defendant would have been an equal caretaker. The court adopted as a finding that past custody patterns and the role of primary caretaker must be put in the context of defendant's military service; had he not been in the military, both parents would have ranked as jointly being

caretakers (Amended Findings of Fact #7 (N)). Also, the trial court found the defendant spent as much time as a caretaker of the child as the plaintiff when he was in the home and not filling military duties (Additional Findings of Fact #2, at 3). The problem is that defendant was away from home filling military obligations. The trial court cannot change the facts of this case.

In Pusey v. Pusey, 728 P.2d 117, 120, (Utah 1986) the Utah Supreme Court held that the choice in competing child support claims should be based upon function-related factors. The court went on to hold,

Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child and the identity of the parent with whom the child has spent most of his time or her time pending custody determination if that period has been lengthy.

The trial court did find the plaintiff to be the primary caretaker the majority of the time. (Additional Findings of Fact #2, at 2). But according to the court this was out of necessity, because of the defendant's military assignments during the year 1987. (Additional Findings of Fact #2, at 2). The trial court seems to be unwilling to recognize that for whatever

reason the plaintiff has been the primary and predominant caretaker of Heather. It is not disputed that Heather has spent most of her time with the plaintiff pending custody determination.

Not only did the trial court change the custody from the plaintiff, being the primary caretaker of Heather, it made a split custody award of the children. In Hutchison and Jorgensen vs. Jorgensen, 599 P.2d 510 (Utah 1979), the Supreme Court stated a factor to consider in awarding custody was the preference of keeping siblings together. Specifically, in Jorgensen, at 512, the Court held,:

While it is true that a child custody award which keeps all the children of the marriage united is generally preferred to one which divides them between the parents, that preference is not binding in the face of consideration dictating a contrary course of action.

In Pusey, supra, the Supreme Court affirmed a split custody award. However, the court stressed the twelve year old son manifested a strong preference for his father, which caused friction and ill feelings between him and his mother. That is not the case in this custody dispute. Heather is two and one-half years old. Furthermore, in Findings of Fact #7B the court found the children's feelings are not susceptible to making an expression of choice between the parents. Plaintiff testified as

to the closeness of Heather to Kevin as she pretended to be his mother when playing with him (Tr., at 57). Defendant testified he thought it was extremely important the two children should be together (Tr., at 113).

In a child custody dispute, the extent to which each contesting parent could care for the child personally is an appropriate consideration for the court. Lembach v. Cox, 639 P.2d 197, 200 (Utah 1981). The trial court failed to consider or make a specific finding which parent could spend more time personally with the children. However, Mr. Watson in his home study and custody evaluation predicted that plaintiff "will do more actual parenting than will defendant due to his work and class schedules" (Home study at 6).

In Hutchison our Supreme Court has listed certain other factors in determining the child's best interests. Those factors as they relate primarily to the child's feeling or special needs are:

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.
Hutchinson at 41.

In this case, Heather is too young to state a preference and the court has so found. As to keeping siblings

together, there is no question plaintiff should be awarded custody of the youngest child, Kevin, as she was nursing him at the time of trial.

Heather, therefore, should rightfully remain with plaintiff in order to keep the children together. Mr. Watson observed Kevin to be a healthy, happy child and a very mellow baby (Home study, at 4). He found Kevin, being nursed and at this state in his life, closely bonded to the mother and should not, in any case, be absent from the mother for any great length of time (Home study, at 5, 6).

As to the relative strength of Heather's bond with one or both of the prospective custodians, the Court made no finding. However, Heather has spent almost totally all of her life with plaintiff. Finally, in maintaining the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted the trial court gave no substantial or compelling reason for changing custody.

The court found both parties to be fit and proper parents to be awarded joint custody of the children. The court found plaintiff to be a better custodian since returning to Utah. The court found plaintiff was not an ideal caretaker in Texas and the child was not always properly fed, diapered, or put to bed at a reasonable hour by plaintiff (Additional Findings of Fact #2, at 2). These facts were vigorously disputed by

plaintiff (Tr., at 39). Defendant claimed to be the primary caretaker of Heather while in Texas (Tr., at 106). But he blamed Heather's diaper rash on plaintiff (Tr., at 106). When asked if he had occasion to change diapers and participate in the care of Heather, the defendant said "Oh, Yes. Several times." (Tr., at 83). Defendant admitted at one time Heather was being treated for a yeast infection which could account for diaper rash (Tr., at 106). If defendant, as he claims to be, was the primary caretaker in Texas, why does he not assume primary responsibility for the diaper rash. The worst evidence of lack of care defendant asserts is a diaper rash. It certainly is not uncommon for babies to develop diaper rash. Defendant admits the children have not been hospitalized for injuries, abuse, or lack of care (Tr., at 110).

Defendant's mother testified she visited defendant, the plaintiff, and Heather while they were living in Texas (Tr., at 115). She testified that Heather was very outgoing, talked a lot, had a lot of fun, was just excited about everything (Tr., at 116). From that observation, it does not appear Heather fared too poorly while living in Texas.

Defendant testified on several occasions, when picking up Heather for the weekend she wouldn't go to sleep upon trying to put her to bed (Tr., at 89). He described her as completely lethargic but not willing to sleep, or was hyperactive and would

stay up late at night (Tr., at 89). Defendant attributed this to Heather being given drugs because "I have seen people on drug withdrawals" (Tr., at 89).

As to Kevin, defendant described him as being lethargic, and we would have a rough time waking him up for anything (Tr., at 89). When he was awake, he would lay there. He wouldn't play. We would have toys there for him. He wouldn't even watch them (Tr., at 89). However, defendant noticed a substantial difference in Kevin after he reported plaintiff to Social Services for child abuse for allegedly giving the child paregoric. After the report was made, the next time defendant picked him up he was active and like a child his own age (Tr., at 89).

Apparently, defendant does not recognize that babies two to three months old don't play with toys and they appear lethargic because they sleep most of the time. Even if the defendant did not recognize that fact the trial court should have.

In Hutchison, the Supreme Court stated other factors meriting consideration in custody disputes relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents:

Moral character and emotional stability; 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 having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, step parent status; and financial conditions.Hutchinson at 41.

The court found the moral character of each party to be the same (Amended Findings of Fact #7H). The court found both parties to be emotionally immature to some degree with plaintiff having expressed suicidal tendencies on at least two occasions. One of these occasions occurred during an argument when defendant threatened to take Heather away from her and the other was apparently before their marriage in September, 1984.

The court found the depth of desire to be a responsible parent has been exhibited by the defendant by taking a hardship discharge and giving up a good job. (Amended Findings of Fact #7J). The court failed to find or overlooked the fact that defendant stated he took a hardship discharge because he needed surgery and there was a 50/50 chance of permanent injury after surgery (Hearing Sept. 8, 1987, at 9).

As to the ability to provide personal rather than surrogate care, the court found both parents are limited by work and school but that plaintiff is limited by the needs of Kevin (Amended Findings of Fact #7L). The trial court overlooked the

recommendation and prediction of Mr. Watson's home study that plaintiff will do more actual parenting than will defendant do to his work and class schedules (Home study, at 6). The trial court found that Kevin will limit plaintiff's ability to parent Heather. This finding flies in the face of the consideration that siblings should be kept together as stated by our Supreme Court. It appears that the trial court is of the opinion that bonding between siblings never becomes so strong that one parent should be denied a right to have custody of one of the children to satisfy the other parent's wishes.

The court found no impairment of either party due to drug use, excessive drinking or other concern. Also, religion factors and kinship factors rank equally with either party.

As to financial conditions, the parties are equal except as to possibly housing. Mr. Watson's assessment was that plaintiff's housing conditions were somewhat constricted but tolerable and would probably resolve itself when plaintiff's sister returned to college (Home study, at 2).

The trial court stated he believed plaintiff improperly used paregoric on the children (Tr., at 160). Plaintiff testified she gave Heather paregoric because she had the flu, had been throwing up for two days and had diarrhea (Tr., at 58). Pepto-Bismol was not curing it so she and her mother gave Heather

paregoric (Tr., at 58). Paregoric was only given to Heather when the doctor prescribed it (Tr., at 63) and never given to Kevin (Tr., at 64). For the trial court to find paregoric was given improperly to the children and without a doctor's prescription is not supported by the record.

It should be noted, that defendant obtained his hardship discharge around the first of September, 1987 (Hearing, September 8, 1987 at 8, 9) about two months prior to trial the on November 13, 1987. During those two months, defendant twice reported plaintiff to the Department of Social Studies for alleged child abuse (Tr., at 57). Once for a bruise on Heather's thigh and the other for giving Heather paragoric for stomach flu (Tr., at 58). Plaintiff had never been accused of neglect or allegedly abusing her children until just two months before the trial. The timing of these reports to the Department of Social Services is not accidental on the part of the defendant.

Plaintiff has expressed far more maturity about the situation having not reported defendant to Social Services when Heather returned home from a weekend visit with a cut lip and gums. Defendant admitted Heather fell against a coffee table and cut her lips and gums while in his care. (Tr., at 110). Defendant admitted accidents apparently do happen to children (Tr., at 110).

The Home Study and Custody Evaluation by Steven Watson could not collaborate the overuse of paragoric with the children. The medication had been prescribed by a Dr. White for a severe stomach flu (Home Study, at 5). As to the alleged bruising to the thigh of Heather, by plaintiff's father, Mr. Watson could not account for the same. He noted Heather expressed no fear of Mr. Guiver and reportedly was virtually a "shadow" to him (Home Study, at 5).

POINT II: THE FINDINGS OF FACT ADOPTED BY
THE COURT ARE INSUFFICIENT TO
SUPPORT THE AWARD OF CUSTODY OF
HEATHER LYN DEEBEN TO DEFENDANT.

The Utah Supreme Court has clearly announced the principal that:

Notwithstanding the desires and contentions of the parties, the welfare of the children is the paramount consideration of the courts, and where custody has been determined and the children appear to be comparatively well adjusted and happy, they should not be compelled to change their home values there appears some substantial reason for doing so.
Hutchinson at 41.

In this case it is undisputed that Heather had been continuously in her mother's care all her entire life. Defendant, during the ten months before trial, was absent from the child's life except for visitation purposes. It is also

undisputed that Heather was observed to be bright, active, curious, quite well developed physically and mentally, who adapted to the life style of each home. There is no evidence Heather is not a comparatively healthy and well adjusted child.

In Pusey, at 120, the Supreme Court stated the prominent factor to consider is a custody award to the identity of the primary caretaker. In this case there is a finding that plaintiff has been the primary caretaker of Heather. The fact defendant was absent because he was in the military does not alter the fact plaintiff was the primary caretaker of Heather.

The trial court admitted there were no major reason for changing custody except defendant had been in the military and therefore was not on equal footing with the plaintiff (Tr., at 154). Also, it is to be noted the trial thought enough of plaintiff's parenting abilities to find her a fit and proper parent for joint custody of Heather and physical custody of Kevin. If plaintiff is good enough to be the primary custodian of Kevin why isn't she good enough to be the primary custodian of Heather.

It is submitted the trial court did not state any substantial reason for changing custody of Heather and relied upon disputed, immaterial allegations of diaper-rash, and of giving paragoric to a sick child. The Home Study and Custody Recommendation addressed every issue raised by defendant at

trial and found him to be lacking and the best interest of Heather to be served by plaintiff.

It is further submitted the other Findings of Fact adopted by the court are insufficient to support the award of custody of Heather to defendant. Upon review, the findings of the Court cannot be supported by reference to the trial record. The findings simply do not support a significant reason for taking Heather out of her present environment. The findings against the plaintiff are of a minor, insignificant nature not rising to the level warranting a change of custody. One would think there would be a fundamentally sound reason given for changing custody, but there is none given in this case.

The trial judge was apparently angered because plaintiff refused to accept his recommendation of joint custody made to the parties before trial. It is submitted the trial court's anger is revealed in his opening statement at the beginning of the trial (Tr. at 2), and in retrospect, the trial court predicted the results of the trial before it started.

CONCLUSION

For the reasons set forth herein, plaintiff respectfully requests that this Court modify the joint custody award of Heather Lyn Deeben by giving custody of Heather to plaintiff.

RESPECTFULLY, submitted this 16th day of December,
1988.

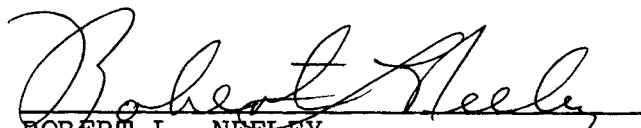
CAMPBELL & NEELEY



ROBERT L. NEELEY
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of December,
1988, I mailed eight copies of the above and foregoing Brief of
Appellant to the clerk of the Utah Court of Appeals, 400 Midtown
Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and four
copies to Dale E. Stratford, attorney for Defendant/ Respondent,
1218 First Securitiy Bank Bldg. Ogden, Utah 84401.



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Telephone: 393-7085

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

JANETTE DEEBEN)

Plaintiff,)

DECREE OF DIVORCE

-vs-)

Civil 40735

DERICK R. DEEBEN)

Defendant.)

The above entitled matter having come on regularly for hearing on the 13th day of November, 1987, and plaintiff appearing and being represented by her attorney, ROBERT L. NEELEY, and the defendant appearing and being represented by his attorney, DALE E. STRATFORD and each of the parties having called and presented witnesses and the Court having considered all evidence presented to it, including the written report of Steven L. Watson, psycho-therapist, and having considered the argument of counsel, and the Court having entered its Findings of Fact and Conclusions of Law, now therefore enters its Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that each of the parties are fit and proper persons to have the care, custody and control of the minor children and that each of the parties be and hereby are awarded joint custody of the two minor children,

with the defendant having primary care for the minor child Heather and the plaintiff having primary care for the minor child Kevin. It is further ordered that each of the parties share with one another, any and all medical matters, school matters, church matters or social matters involving the minor children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party has Health and Accident and/or dental insurance coverage for the children at this time, and be and hereby are required to pay one-half of all medical costs that are incurred by each child in each home.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant pay the sum of \$80.00 per month as and for child support for the minor child Kevin, which child resides in the home of the plaintiff. The Court will hold in abeyance any order that the plaintiff pay to the defendant child support for the support of the minor child Heather. That at such time as the plaintiff finishes her schooling, that the Court would expect the Uniform Child Support Schedule to apply in determining the child support that the plaintiff would be required to pay to the defendant for the support of the minor child Heather. As the defendants earning capacity increases the Uniform Child Support Schedule should be used to determine the support to be paid to the plaintiff for the support of the minor child Kevin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be an evaluation of the child support on the 1st of January of each

year to determine if the Uniform Schedule should dictate a payment of a greater child support than that heretofore ordered by the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that visitation for the children and the parents should be as follows:

The plaintiff shall visit with the minor child Heather every other weekend and have alternate holidays. The defendant shall have visitation rights with the minor child Kevin for 45 minutes prior to the time that the minor child Heather is delivered to the home of the plaintiff and 45 minutes when the defendant arrives at the home of the plaintiff to pick up the minor child Heather. Provided, however, the defendant may, if he so desires, visit with the minor child Kevin, between the hours of 3:00 p.m. and 7:00 p.m. on Saturday. If the defendant is going to exercise the visitation rights from 3:00 to 7:00 p.m. on Saturday, the plaintiff should be notified 24 hours in advance. However, after a period of one year, then the minor children shall visit with both of the parents on alternate weekends. It being the specific desire of the Court that both children be in the home of the same parent on weekends so that each of the parents will have the opportunity to have both children together in their home on alternate weekends. It is the intent of the Court that for the first year that the defendant make the necessary arrangements to deliver the child Heather to the home of the plaintiff, inasmuch as there is substantial travel distance between the homes of the two parties. Provided further, however, after a period of one year,

the transportation of the minor children shall alternate. One weekend it would be the responsibility of the plaintiff and the other the responsibility of the defendant.

Summer vacation with the minor children should include a full month in each of the homes of both parents, so that the mother would have both children in her home from June 15th to July 15th of each year. Provided, however, that one weekend in the middle of the month, the defendant would pick up both children for that weekend. The defendant should have both children in his home between July 16th and August 15th, provided however, the plaintiff would have one weekend with the children in the middle of the month. Each of the parties are to notify the other party as to which weekend during the summer visitation they would desire to exercise their visitation with the minor children.

That there are special events in the lives of both parties, such as family reunions and other activities which may not fall on the appropriate weekend or during the summer month visitation, and consideration for each others needs as to special events should in fact be considered and if possible, accomodated or schedules so arranged by both parties to meet those needs and desires so far as visitation with the minor children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties are capable of paying their own attorney fees and costs incurred in connection with this matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that certain property, including various quilts, clothing and various toys are

in fact the personal property of the minor child Heather and that her property should be with her, except that the plaintiff should retain such clothing and toys as would be necessary for her while she visits with the plaintiff in the plaintiff's home. The plaintiff also has possession of two keepsake dolls and cabbage patch dolls which are the property of the minor child Heather. Those items should remain in the possession of the plaintiff for the benefit of the minor child, Heather. All other items of personal property of the minor child should be turned over to the defendant for the use and benefit of the minor child, Heather.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties, prior to the commencement of this action, had their own personal property in their possession and those properties are to be the property of the person who has them in their possession. Provided, however, that there was introduced at the time of trial, a list of wedding gifts which the parties have agreed would be divided are listed on the attached sheet. All items bearing a check were to be turned over to the defendant as his sole and separate property. The remaining items of wedding gifts were to become the personal property of the plaintiff and should be delivered to the defendant immediately.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant be and hereby is awarded as his sole and separate property the 1978 Pickup truck, a VCR and television, which the plaintiff has indicated she does not claim an interest in and they should be the property of the defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all the quilts, other than the quilt that belonged to the child, Heather, be and hereby are the property of the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties be required to pay any debts that they may have incurred since the time of their separation. Inasmuch as the plaintiff, at the time of the birth of the minor child, Kevin, chose not to use the medical facilities available to her without her cost and which was provided by the defendant through his military service, that the plaintiff should be required to pay any and all medical bills that may have been incurred in connection with the birth of the child, Kevin. The defendant shall pay the debts and obligations due and owing to the Utah Valley Credit Union, of approximately \$2400.00 and the obligation for the jewelry purchased by the parties in the sum of approximately \$400.00 and the J. C. Penney Account in the sum of approximately \$300.00 and hold the defendant harmless therefrom.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the transfer of custody occur immediately after the court hearing of November 13, 1987 and the transfer of all properties occur immediately thereafter.

DATED this ^{19th} ~~4th~~ day of January, 1988.

STATE OF UTAH)
COUNTY OF DAVIS) ss
THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT I FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND SEAL OF SAID OFFICE

26th DAY OF JANUARY 1988

1515 Douglas L. Cornaby
DOUGLAS L. CORNABY
DISTRICT COURT JUDGE

DALE E. STRATFORD
Attorney at Law
1218 First Security Bank Bldg
Ogden, Utah, 84401
Telephone: 393-7085

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

JANETTE DEEBEN)	<u>FINDINGS OF FACT and</u>
Plaintiff,)	<u>CONCLUSIONS OF LAW</u>
-vs-)	
DERICK R. DEEBEN)	Civil 40735
Defendant.)	

The above entitled matter having come on regularly for hearing on the 13th day of November, 1987, and plaintiff appearing and being represented by her attorney, ROBERT L. NEELEY, and the defendant appearing and being represented by his attorney, DALE E. STRATFORD and each of the parties having called and presented witnesses and the Court having considered all evidence presented to it, including the written report of Steven L. Watson, psychotherapist, and having considered the argument of counsel, the Court now therefore enters its:

FINDINGS OF FACT:

1. That the plaintiff was a resident of Davis County, Utah for a period in excess of three months prior to the filing of this action.

2. That the plaintiff and defendant are husband and wife having been married on the 6th day of September, 1984.

3. That as a result of the marriage between the parties two children have been born as issue of the marriage, to wit: HEATHER LYN DEEBEN, born March 1, 1985 and KEVIN ROY DEEBEN, born July 1, 1987.

4. That since the marriage and particularly during the last number of months the parties have developed irreconcilable differences and each of the parties are entitled to be granted a divorce, one from the other.

5. That the each of the parties are equally capable of supporting the family as the other and the plaintiff, having made arrangements to work outside the home and the defendant having made arrangements to complete his education, the Court finds that no alimony need be awarded to either party.

6. The Court finds that the defendant is not delinquent in any of his child support obligations up to the time of the granting of the divorce and specifically finds that the August, 1987 payment of \$240.00 was paid as well as the other monthly obligations which the Court had ordered to be paid.

7. The Court finds that each of the parties are fit and proper persons to have the care, custody and control of the minor children and the Court finds that each of the parties should be awarded joint custody of the two minor children, with the defendant having primary care for the minor child Heather and the plaintiff having primary care for the minor child Kevin. It being

the specific intention of the Court that each of the parties share with one another, any and all medical matters, school matters, church matters or social matters involving the minor children.

8. The Court finds that neither party has Health and Accident and/or dental insurance coverage for the children at this time. Each should be required to pay one-half of all medical costs that are incurred by each child in each home.

9. Defendant is capable of paying \$80.00 per month as and for child support for the minor child Kevin, which child resides in the home of the plaintiff. The Court will hold in abeyance any order that the plaintiff pay to the defendant child support for the support of the minor child Heather. The court would find, however, that at such time as the plaintiff finishes her schooling, that the Court would expect the Uniform Child Support Schedule to apply in determining the child support that the plaintiff would be required to pay to the defendant for the support of the minor child Heather. As the defendants earning capacity increases the Uniform Child Support Schedule should be used to determine the support to be paid to the plaintiff for the support of the minor child Kevin.

10. The Court further finds that there should be an evaluation of the child support on the 1st of January of each year to determine if the Uniform Schedule should dictate a payment of a greater child support than that heretofore ordered by the Court.

11. The Court further finds that visitation for the children and the parents should be as follows:

The plaintiff shall visit with the minor child Heather every other weekend and have alternate holidays. The defendant shall have visitation rights with the minor child Kevin for 45 minutes prior to the time that the minor child Heather is delivered to the home of the plaintiff and 45 minutes when the defendant arrives at the home of the plaintiff to pick up the minor child Heather. Provided, however, the defendant may, if he so desires, visit with the minor child Kevin, between the hours of 3:00 p.m. and 7:00 p.m. on Saturday. If the defendant is going to exercise the visitation rights from 3:00 to 7:00 p.m. on Saturday, the plaintiff should be notified 24 hours in advance. However, after a period of one year, then the minor children shall visit with both of the parents on alternate weekends. It being the specific desire of the Court that both children be in the home of the same parent on weekends so that each of the parents will have the opportunity to have both children together in their home on alternate weekends. It is the intent of the Court that for the first year that the defendant make the necessary arrangements to deliver the child Heather to the home of the plaintiff, inasmuch as there is substantial travel distance between the homes of the two parties. Provided further, however, after a period of one year, the transportation of the minor children shall alternate. One weekend it would be the responsibility of the plaintiff and the other the responsibility of the defendant.

Summer vacation with the minor children should include a full month in each of the homes of both parents, so that the

mother would have both children in her home from June 15th to July 15th of each year. Provided, however, that one weekend in the middle of the month, the defendant would pick up both children for that weekend. The defendant should have both children in his home between July 16th and August 15th, provided however, the plaintiff would have one weekend with the children in the middle of the month. Each of the parties are to notify the other party as to which weekend during the summer visitation they would desire to exercise their visitation with the minor children.

The Court believes and finds, as a matter of fact, that there are special events in the lives of both parties, such as family reunions and other activities which may not fall on the appropriate weekend or during the summer month visitation, and consideration for each others needs as to special events should in fact be considered and if possible, accomodated or schedules so arranged by both parties to meet those needs and desires so far as visitation with the minor children.

12. The Court further finds that each of the parties are capable of paying their own attorney fees and costs incurred in connection with this matter.

13. The Court further finds that certain property, including various quilts, clothing and various toys are in fact the personal property of the minor child Heather and that her property should be with her, except that the plaintiff should retain such clothing and toys as would be necessary for her while she visits with the plaintiff in the plaintiff's home. The

plaintiff also has possession of two keepsake dolls and cabbage patch dolls which are the property of the minor child Heather. Those items should remain in the possession of the plaintiff for the benefit of the minor child, Heather. All other items of personal property of the minor child should be turned over to the defendant for the use and benefit of the minor child, Heather.

14. Each of the parties, prior to the commencement of this action, had their own personal property in their possession and those properties are to be the property of the person who has them in their possession. Provided, however, that there was introduced at the time of trial, a list of wedding gifts which the parties have agreed would be divided are listed on the attached sheet. All items bearing a check were to be turned over to the defendant as his sole and separate property. The remaining items of wedding gifts were to become the personal property of the plaintiff and should be delivered to the defendant immediately.

15. The defendant has in his possession the 1978 Pickup truck, a VCR and television, which the plaintiff has indicated she does not claim an interest in and they should be the property of the defendant.

16. During the course of the trial, testimony was given concerning the various quilts and the court finds, as a matter of fact, that all the quilts, other than the quilt that belonged to the child, should become the property of the plaintiff.

17. The Court further finds that with regard to the debts of the parties that each of the parties should be required

to pay any debts that they may have incurred since the time of their separation. Inasmuch as the plaintiff, at the time of the birth of the minor child, Kevin, chose not to use the medical facilities available to her without her cost and which was provided by the defendant through his military service, that the plaintiff should be required to pay any and all medical bills that may have been incurred in connection with the birth of the child, Kevin. The Court, however, finds that the defendant should pay the debts and obligations due and owing to the Utah Valley Credit Union, of approximately \$2400.00 and the obligation for the jewelry purchased by the parties in the sum of approximately \$400.00 and the J. C. Penney Account in the sum of approximately \$300.00.

18. The Court finds as a matter of fact that it would be in the best interests of the children that the transfer of custody occur immediately after the court hearing of November 13, 1987 and the transfer of all properties occur immediately thereafter.

From the foregoing Findings of Fact, the Court enters its:

CONCLUSIONS OF LAW

1. That each of the parties are fit and proper persons to have the care, custody and control of the minor children and that each of the parties should be awarded joint custody of the two minor children, with the defendant having primary care for the minor child Heather and the plaintiff having primary care for the

minor child Kevin. It being the specific intention of the Court that each of the parties share with one another, any and all medical matters, school matters, church matters or social matters involving the minor children.

2. That neither party has Health and Accident and/or dental insurance coverage for the children at this time. Each should be required to pay one-half of all medical costs that are incurred by each child in each home.

3. That defendant is to pay the sum of \$80.00 per month as and for child support for the minor child Kevin, which child resides in the home of the plaintiff. The Court will hold in abeyance any order that the plaintiff pay to the defendant child support for the support of the minor child Heather. That at such time as the plaintiff finishes her schooling, that the Court would expect the Uniform Child Support Schedule to apply in determining the child support that the plaintiff would be required to pay to the defendant for the support of the minor child Heather. As the defendants earning capacity increases the Uniform Child Support Schedule should be used to determine the support to be paid to the plaintiff for the support of the minor child Kevin.

4. That there be an evaluation of the child support on the 1st of January of each year to determine if the Uniform Schedule should dictate a payment of a greater child support than that heretofore ordered by the Court.

5. That visitation for the children and the parents should be as follows:

The plaintiff shall visit with the minor child Heather every other weekend and have alternate holidays. The defendant shall have visitation rights with the minor child Kevin for 45 minutes prior to the time that the minor child Heather is delivered to the home of the plaintiff and 45 minutes when the defendant arrives at the home of the plaintiff to pick up the minor child Heather. Provided, however, the defendant may, if he so desires, visit with the minor child Kevin, between the hours of 3:00 p.m. and 7:00 p.m. on Saturday. If the defendant is going to exercise the visitation rights from 3:00 to 7:00 p.m. on Saturday, the plaintiff should be notified 24 hours in advance. However, after a period of one year, then the minor children shall visit with both of the parents on alternate weekends. It being the specific desire of the Court that both children be in the home of the same parent on weekends so that each of the parents will have the opportunity to have both children together in their home on alternate weekends. It is the intent of the Court that for the first year that the defendant make the necessary arrangements to deliver the child Heather to the home of the plaintiff, inasmuch as there is substantial travel distance between the homes of the two parties. Provided further, however, after a period of one year, the transportation of the minor children shall alternate. One weekend it would be the responsibility of the plaintiff and the other the responsibility of the defendant.

Summer vacation with the minor children should include a full month in each of the homes of both parents, so that the

mother would have both children in her home from June 15th to July 15th of each year. Provided, however, that one weekend in the middle of the month, the defendant would pick up both children for that weekend. The defendant should have both children in his home between July 16th and August 15th, provided however, the plaintiff would have one weekend with the children in the middle of the month. Each of the parties are to notify the other party as to which weekend during the summer visitation they would desire to exercise their visitation with the minor children.

That there are special events in the lives of both parties, such as family reunions and other activities which may not fall on the appropriate weekend or during the summer month visitation, and consideration for each others needs as to special events should in fact be considered and if possible, accomodated or schedules so arranged by both parties to meet those needs and desires so far as visitation with the minor children.

6. That each of the parties are capable of paying their own attorney fees and costs incurred in connection with this matter.

7. That certain property, including various quilts, clothing and various toys are in fact the personal property of the minor child Heather and that her property should be with her, except that the plaintiff should retain such clothing and toys as would be necessary for her while she visits with the plaintiff in the plaintiff's home. The plaintiff also has possession of two keepsake dolls and cabbage patch dolls which are the property of the minor child Heather. Those items should remain in the

possession of the plaintiff for the benefit of the minor child, Heather. All other items of personal property of the minor child should be turned over to the defendant for the use and benefit of the minor child, Heather.

8. That each of the parties, prior to the commencement of this action, had their own personal property in their possession and those properties are to be the property of the person who has them in their possession. Provided, however, that there was introduced at the time of trial, a list of wedding gifts which the parties have agreed would be divided are listed on the attached sheet. All items bearing a check were to be turned over to the defendant as his sole and separate property. The remaining items of wedding gifts were to become the personal property of the plaintiff and should be delivered to the defendant immediately.

9. That the defendant be awarded as his sole and separate property the 1978 Pickup truck, a VCR and television, which the plaintiff has indicated she does not claim an interest in and they should be the property of the defendant.

10. That all the quilts, other than the quilt that belonged to the child, Heather, shall be the property of the plaintiff.

11. That each of the parties be required to pay any debts that they may have incurred since the time of their separation. Inasmuch as the plaintiff, at the time of the birth of the minor child, Kevin, chose not to use the medical facilities available to her without her cost and which was provided by the

defendant through his military service, that the plaintiff should be required to pay any and all medical bills that may have been incurred in connection with the birth of the child, Kevin. The defendant shall pay the debts and obligations due and owing to the Utah Valley Credit Union, of approximately \$2400.00 and the obligation for the jewelry purchased by the parties in the sum of approximately \$400.00 and the J. C. Penney Account in the sum of approximately \$300.00 and hold the defendant harmless therefrom.

12. That the transfer of custody occur immediately after the court hearing of November 13, 1987 and the transfer of all properties occur immediately thereafter.

13. That the transfer of custody occur immediately after the court hearing of November 13, 1987 and the transfer of all properties occur immediately thereafter.

DATED this 19th day of January, 1988.

151 Douglas L. Cornaby
DOUGLAS L. CORNABY
DISTRICT COURT JUDGE

DALE E. STRATFORD
ATTORNEY AT LAW
1218 First Security Bank Bldg
Ogden, Utah, 84401
Telephone: 393-7085

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH

AMENDED

JANETTE DEEBEN)	<u>FINDINGS OF FACT and</u>
Plaintiff,)	<u>CONCLUSIONS OF LAW</u>
		Civil 40735
DERICK R. DEEBEN)	
Defendant.)	

The above entitled matter having come on regularly for hearing on the 13th day of November, 1987, and plaintiff appearing and being represented by her attorney, ROBERT L. NEELEY, and the defendant appearing and being represented by his attorney, DALE E. STRATFORD and each of the parties having called and presented witnesses and the Court having considered all evidence presented to it, including the written report of Steven L. Watson, psychotherapist, and having considered the argument of counsel, the Court now therefore enters its:

FINDINGS OF FACT:

1. That the plaintiff was a resident of Davis County, Utah for a period in excess of three months prior to the filing of this action.

3. That as a result of the marriage between the parties two children have been born as issue of the marriage, to wit: HEATHER LYN DEEBEN, born March 1, 1985 and KEVIN ROY DEEBEN, born July 1, 1987.

4. That since the marriage and particularly during the last number of months the parties have developed irreconcilable differences and each of the parties are entitled to be granted a divorce, one from the other.

5. That the each of the parties are equally capable of supporting the family as the other and the plaintiff, having made arrangements to work outside the home and the defendant having made arrangements to complete his education, the Court finds that no alimony need be awarded to either party.

6. The Court finds that the defendant is not delinquent in any of his child support obligations up to the time of the granting of the divorce and specifically finds that the August, 1987 payment of \$240.00 was paid as well as the other monthly obligations which the Court had ordered to be paid.

7. The Court finds that each of the parties are fit and proper persons to have the care, custody and control of the minor children and the Court finds that each of the parties should be awarded joint custody of the two minor children, with the defendant having primary care for the minor child Heather and the plaintiff having primary care for the minor child Kevin. It being the specific intention

of the Court that each of the parties share with one another, any and all medical matters, school matters, church matters or social matters involving the minor children.

The Court further finds as follows:

A. The children's best interests and the special attributes of the parents determine the primary care and custody specified above.

B. At this time, the children's feelings are not susceptible to making an expression of choice between parents.

C. The child, Kevin, has a special need to be with the plaintiff while nursing.

D. The child Heather has no particular special need to be with the plaintiff

E. There is no particular special need created by any bond between siblings, there being no particular attachment of the sister to the new born brother at this time.

F. The general interest of the child Heather is any particular current environment is not great. She is happy and well adjusted in the defendant's care.

G. The character or status of both parents is the same.

H. The capacity or willingness to act as the custodial parent for Heather is very great in the defendant.

I. The moral character of both parents is the same.

J. Both parties exhibit emotional immaturity to some degree. However, the plaintiff has expressed suicidal tendencies on at least two occasions.

K. The depth of desire to be a responsible parent has been exhibited by the defendant. He gave up what would have been a good job in the military for the possibility of having custody of his children. He took a hardship discharge from the military so that he could hopefully have custody of one or both of these children.

L. Personal care for Heather will be shared with one or the other set of grandparents, no matter which party has primary custody. Both parents are limited by work and school. The plaintiff is further limited by the needs of the infant child Kevin.

M. Neither party suffers from impairment. Both parties love the children and want what is best for the children.

N. Past custody patterns and the role of primary caretaker must be put into the context of the defendant's military service. Had he not been in the military, both parents would have ranked as jointly being caretakers.

O. When the parties were together in Texas, the plaintiff did not provide primary care for Heather exclusively. Instances of diaper rash, the unwise use of paregoric on the child, meal patterns and neglect were ameliorated by the defendants concern to be with Heather, to

do things with the child, and to do things for these problems.

P. The plaintiff left the defendant in Texas, taking the children with her, and returned to her parent's home in Utah. Since then there have been indications of bruising on Heather.

Q. Religious factors rank equally with either party.

R. Kinship factors rank equally with either party.

S. Housing conditions for Heather are better with the defendant, and are somewhat constricted with the plaintiff. The defendant and his parents were not always given the visitation that they had a right to under the Court's preliminary orders with custody in the plaintiff. For the child, Heather to enjoy the association of both parents in the future, primary custody is better in the home of the defendant.

T. Each party is an equal contributor in whatever inability to get along in the marriage has been; no one more or less than the other. Both parties looked to "mom and dad" for decisions better made by the parties together.

U. Cooperation and the give and take in making decisions for the children will be facilitated with primary custody of Heather being with the defendant.

8. The court finds that neither party has Health and Accident and/or dental insurance coverage for the children at this time. Each should be required to pay one-

half of all medical costs that are incurred by each child in each home.

9. Defendant is capable of paying \$80.00 per month as and for child support for the minor child Kevin, which child resides in the home of the plaintiff. The Court will hold in abeyance any order that the plaintiff pay to the defendant child support for the support of the minor child Heather. The court would find, however, that at such time as the plaintiff finishes her schooling, that the Court would expect the Uniform Child Support Schedule to apply in determining the child support that the plaintiff would be required to pay to the defendant for the support of the minor child Heather. As the defendants earning capacity increases the Uniform Child Support Schedule should be used to determine the support to be paid to the plaintiff for the support of the minor child Kevin.

10. The Court further finds that there should be an evaluation of the child support on the 1st of January of each year to determine if the Uniform Schedule should dictate a payment of a greater child support than that heretofore ordered by the Court.

11. The Court further finds that visitation for the children and the parents should be as follows:

The Plaintiff shall visit with the minor child Heather every other weekend and have alternate holidays. The defendant shall have visitation rights with the minor child Kevin for 45 minutes prior to the time that the minor

child Heather is delivered to the home of the plaintiff and 45 minutes when the defendant arrives at the home of the plaintiff to pick up the minor child Heather. Provided, however, the defendant may, if he so desires, visit with the minor child Kevin, between the hours of 3:00 p.m. and 7:00 p.m. on Saturday. If the defendant is going to exercise the visitation rights from 3:00 to 7:00 p.m. on Saturday, the plaintiff should be notified 24 hours in advance. However, after a period of one year, then the minor children shall visit with both of the parents on alternate weekends. It being the specific desire of the Court that both children be in the home of the same parent on weekends so that each of the parents will have the opportunity to have both children together in their home on alternate weekends. It is the intent of the Court that for the first year that the defendant make the necessary arrangements to deliver the child Heather to the home of the plaintiff, inasmuch as there is substantial travel distance between the homes of the two parties. Provided further, however, after a period of one year, the transportation of the minor children shall alternate. One weekend it would be the responsibility of the plaintiff and the other the responsibility of the defendant.

Summer vacation with the minor children should include a full month in each of the homes of both parents, so that the mother would have both children in her home from June 15th to July 15th of each year. Provided, however, that

one weekend in the middle of the month, the defendant would pick up both children for that weekend. The defendant should have both children in his home between July 16th and August 15th, provided however, the plaintiff would have one weekend with the children in the middle of the month. Each of the parties are to notify the other party as to which weekend during the summer visitation they would desire to exercise their visitation with the minor children.

The Court believes and finds, as a matter of fact, that there are special events in the lives of both parties, such as family reunions and other activities which may not fall on the appropriate weekend or during the summer month visitation, and consideration for each others needs as to special events should in fact be considered and if possible, accommodated or schedules so arranged by both parties to meet those needs and desires so far as visitation with the minor children.

12. The Court further finds that each of the parties are capable of paying their own attorney fees and costs incurred in connection with this matter.

13. The Court further finds that certain property, including various quilts, clothing and various toys are in fact the personal property of the minor child Heather and that her property should be with her, except that the plaintiff should retain such clothing and toys as would be necessary for her while she visits with the plaintiff in the plaintiff's home. The plaintiff also has possession of two

keepsake dolls and cabbage patch dolls which are the property of the minor child Heather. Those items should remain in the possession of the plaintiff for the benefit of the minor child, Heather. All other items of personal property of the minor child should be turned over to the defendant for the use and benefit of the minor child, Heather.

14. Each of the parties, prior to the commencement of this action, had their own personal property in their possession and those properties are to be the property of the person who has them in their possession. Provided, however, that there was introduced at the time of trial, a list of wedding gifts which the parties have agreed would be divided and are listed on the attached sheet. All items bearing a check were to be turned over to the defendant as his sole and separate property. The remaining items of wedding gifts were to become the personal property of the plaintiff and should be delivered to the defendant immediately.

15. The defendant has in his possession the 1978 Pickup truck, a VCR and television, which the plaintiff has indicated she does not claim an interest in and they should be the property of the defendant.

16. During the course of the trial, testimony was given concerning the various quilts and the court finds, as a matter of fact, that all the quilts, other than the quilt

that belonged to the child, should become the property of the plaintiff.

17. The Court further finds that with regard to the debts of the parties that each of the parties should be required to pay any debts that they may have incurred since the time of their separation. Inasmuch as the plaintiff, at the time of the birth of the minor child, Kevin, chose not to use the medical facilities available to her without her cost and which was provided by the defendant through his military service, that the plaintiff should be required to pay any and all medical bills that may have been incurred in connection with the birth of the child, Kevin. The Court, however, finds that the defendant should pay the debts and obligations due and owing to the Utah Valley Credit Union, of approximately \$2400.00 and the obligation for the jewelry purchased by the parties in the sum of approximately \$400.00 and the J. C. Penney Account in the sum of approximately \$300.00.

18. The Court finds as a matter of fact that it would be in the best interests of the children that the transfer of custody occur immediately after the court hearing of November 13, 1987 and the transfer of all properties occur immediately thereafter.

From the foregoing Findings of Fact, the Court enters its:

CONCLUSIONS OF LAW

1. That each of the parties are fit and proper persons to have the care, custody and control of the minor children and that each of the parties should be awarded joint custody of the two minor children, with the defendant having primary care for the minor child Heather and the plaintiff having primary care for the minor child Kevin. It being the specific intention of the Court that each of the parties share with one another, any and all medical matters, school matters, church matters or social matters involving the minor children.

2. That neither party has health and Accident and/or dental insurance coverage for the children at this time. Each should be required to pay one-half of all medical costs that are incurred by each child in each home.

3. That defendant is to pay the sum of \$80.00 per month as and for child support for the minor child Kevin, which child resides in the home of the plaintiff. The Court will hold in abeyance any order that the plaintiff pay to the defendant child support for the support of the minor child Heather. That at such time as the plaintiff finishes her schooling, that the Court would expect the Uniform Child Support Schedule to apply in determining the child support that the plaintiff would be required to pay to the defendant for the support of the minor child Heather. As the defendants earning capacity increases the Uniform Child Support Schedule should be used to determine the support to

be paid to the plaintiff for the support of the minor child Kevin.

4. That there be an evaluation of the child support on the 1st of January of each year to determine if the Uniform Schedule should dictate a payment of a greater child support than that heretofore ordered by the Court.

5. That visitation for the children and the parents should be as follows:

The plaintiff shall visit with the minor child Heather every other weekend and have alternate holidays. The defendant shall have visitation rights with the minor child Kevin for 45 minutes prior to the time that the minor child Heather is delivered to the home of the plaintiff and 45 minutes when the defendant arrives at the home of the plaintiff to pick up the minor child Heather. Provided, however, the defendant may, if he so desires, visit with the minor child Kevin, between the hours of 3:00 p.m. and 7:00 p.m. on Saturday. If the defendant is going to exercise the visitation rights from 3:00 to 7:00 p.m. on Saturday, the plaintiff should be notified 24 hours in advance. However, after a period of one year, then the minor children shall visit with both of the parents on alternate weekends. It being the specific desire of the Court that both children be in the home of the same parent on weekends so that each of the parents will have the opportunity to have both children together in their home on alternate weekends. It is the intent of the Court that for the first year that the

defendant make the necessary arrangements to deliver the child Heather to the home of the plaintiff, inasmuch as there is substantial travel distance between the homes of the two parties. Provided further, however, after a period of one year, the transportation of the minor children shall alternate. One weekend it would be the responsibility of the plaintiff and the other the responsibility of the defendant.

Summer vacation with the minor children should include a full month in each of the homes of both parents, so that the mother would have both children in her home from June 15th to July 15th of each year. Provided, however, the plaintiff would have one weekend with the children in the middle of the month. Each of the parties are to notify the other party as to which weekend during the summer visitation they would desire to exercise their visitation with the minor children.

That there are special events in the lives of both parties, such as family reunions and other activities which may not fall on the appropriate weekend or during the summer month visitation, and consideration for each others needs as to a special event should in fact be considered and if possible, accommodated or schedules so arranged by both parties to meet those needs and desires so far as visitation with the minor children.

6. That each of the parties are capable of paying their own attorney fees and costs incurred in connection with this matter.

7. That certain property, including various quilts, clothing and various toys are in fact the personal property of the minor child Heather and that her property should be wit her, except that the plaintiff should retain such clothing and toys as would be necessary for her while she visits with the plaintiff in the plaintiff's home. The plaintiff also has possession of two keepsake dolls and cabbage patch dolls which are the property of the minor child Heather. Those items should remain in the possession of the plaintiff for the benefit of the minor child, Heather. All other items of personal property of the minor child should be turned over to the defendant for the use and benefit of the minor child, Heather.

8. That each of the parties, prior to the commencement of this action, had their own personal property in their possession and those properties are to be the property of the person who has them in their possession. Provided, however, that there was introduced at the time of trial, a list of wedding gifts which the parties have agreed would be divided are listed on the attached sheet. All items bearing a check were to be turned over to the defendant as his sole and separate property. The remaining items of wedding gifts were to become the personal property

of the plaintiff and should be delivered to the defendant immediately.

9. That the defendant be awarded as his sole and separate property the 1978 Pickup truck, a VCR and television, which the plaintiff has indicated she does not claim an interest in and they should be the property of the defendant.

10. That all the quilts, other than the quilt that belonged to the child, Heather, shall be the property of the plaintiff.

11. That each of the parties be required to pay any debts that they may have incurred since the time of their separation. Inasmuch as the plaintiff, at the time of the birth of the minor child, Kevin, chose not to use the medical facilities available to her without her cost and which was provided by the defendant through his military service, that the plaintiff should be required to pay any and all medical bills that may have been incurred in connection with the birth of the child, Kevin. The defendant shall pay the debts and obligations due and owing to the Utah Valley Credit Union, of approximately \$2400.00 and the obligation for the jewelry purchased by the parties in the sum of approximately \$400.00 and the J. C. Penney Account in the sum of approximately \$300.00 and hold the defendant harmless therefrom.

12. That the transfer of custody occur immediately after the court hearing of November 13, 1987 and the transfer of all properties occur immediately thereafter.

DATED this ² ~~19th~~ day of ^{November} ~~January~~, 1988.


DISTRICT COURT JUDGE

APPROVED AS TO FORM

ROBERT L. NEELEY
Attorney for Plaintiff

In the Second Judicial District Court
in and for the
County of Davis, State of Utah

JANETTE DEEBEN,)	
Plaintiff,)	ADDITIONAL FINDINGS
vs.)	OF FACT
DERICK R. DEEBEN,)	
Defendant.)	Civil No. 40735

This court received this case back from the Court of Appeals on June 10, 1988. On July 15, 1988, this court noticed it on the calendar for a hearing on August 9, 1988. On July 22, 1988, counsel for the defendant, Dale E. Stratford, filed a motion to amend findings of fact nunc pro tunc. This motion was accompanied by amended findings of fact. No one appeared for the August 9, 1988, hearing but the court was informed that Mr. Stratford had suffered a heart attack and been operated on and would be out of the office for at least one month. The court directed plaintiff's counsel, Robert L. Neeley to submit a memorandum. The court received this memorandum on September 14, 1988. The court received nothing further from the defendant so it had the court clerk phone defendant's counsel on October 20, 1988, and ask him to contact plaintiff's counsel and confer with the court. The plaintiff's counsel recently notified this court that he has not been contacted by defendant's counsel. The court is of the belief that it can proceed without anything further from either counsel and will proceed to make additional findings of fact.

The court originally found that both parties were fit and proper persons to be custodial parents. The court is not changing this basic finding.

It is in the best interest of the children that the plaintiff and defendant be awarded joint custody but that Janette Deeben be awarded the physical care, custody, and control of Kevin Roy Deeben, born July 1, 1987, and that Derick R. Deeben be awarded the physical care, custody, and control of Heather Lyn Deeben.

The court has this day adopted the amended findings of fact as its own which were submitted by the defendant on July 22, 1988. In addition the court is going to make more specific findings of fact as follows:

(1) The parties married on September 4, 1984, and in early 1986 the defendant entered military service in the Army. He was in New Jersey for basic training until the first of July. The parties then moved to Fort Hood, Texas. In January, 1987, the plaintiff returned to Utah. The parties were not getting along during this time. There were altercations. Each party used violence on the other party. The defendant hit and the plaintiff slapped and kicked. Both equally participated in provoking the fights and in fighting. Neither was just acting in reasonable self defense. The defendant was still in Fort Hood when this action was filed. He was forced to take a hardship discharge or be transferred to Germany. He chose the hardship discharge so that he could fight for custody of his children.

(2) The plaintiff has been the primary caretaker the majority of the time until the court's ruling on January 19, 1988. This was out of necessity, however, because of the defendant's military assignments during the year 1987. The plaintiff was not an ideal caretaker, however. The child was not always properly fed, diapered, or put to bed at a reasonable hour by the plaintiff. The defendant on returning at late hours from

military duty would on occasion have to fill those needs. The defendant spent as much time as a caretaker of the child as the plaintiff when he was in the home and not filling military duties.

(3) The plaintiff used paregoric on the child on occasions when it was not medically necessary. This made the child lethargic and unable to sleep properly and neared the point of being habit forming.

(4) The plaintiff has been a better custodian of the children, since returning to Utah and being in the home of her parents where she had the counsel and assistance of her parents and sisters.

The court clerk is directed to send copies of these findings of fact to counsel and to return the file to the Court of Appeals.

Dated November 2, 1988.

BY THE COURT:



JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Robert L. Neeley, 2485 Grant Avenue, Suite 200, Ogden, Utah 84401 and Dale E. Stratford, 1218 First Security Bank, Ogden, Utah 84401 on November 3, 1988.



Deputy Clerk

EMERGENCY CARE AND TREATMENT (Medical Record)

TREATMENT FACILITY (Stamp)

LOG NUMBER

41

ARRIVAL
DATE
MONTH 4 11 YR 86 TIME 1030

TRANSPORTATION TO HOSPITAL
(Attach care enroute sheet)
☒ PRIVATE VEHICLE ☐ AMBULANCE
☐ OTHER (Specify)

CURRENT MEDS. (tetanus immunization and other data)

N/A

HISTORY OBTAINED FROM
☐ PATIENT ☐ OTHER (Specify)

ALLERGIES

NONE

PATIENT'S HOME ADDRESS OR DUTY STATION (City, State and ZIP Code)

27 E. CHEROKEE DR

HACKER HEIGHTS

HOME TELE. NO. (Inc. area code)

699-8140

COMPLAINT(S) (Include symptom(s), duration)

EYE & EAR

SEX

F

AGE

22

POSSIBLE THIRD PARTY PAYER?

☐ YES ☐ NO

VITAL SIGNS

E
SE
P.
IP.
Chad

DESCRIBE (1) Subjective data (Pertinent History); (2) Objective data (Examination - include results of tests and x-rays); (3) Assessment (Diagnosis); (4) Plan (Treatment/Procedures - include medication given and follow-up)

Struck last PM - hand
of @ ear pain, jaw pain.

TIME SEEN BY PROVIDER

1145

CATEGORY (See reverse)

EMERGENT

URGENT

NON-URGENT

1055

ORDERS INITS. TIME

ASSESSMENT/DIAGNOSIS

1/2 @ hemifacial
asymmetry
and sparse hair

POSITION (Check all that apply)

HOME FULL DUTY

QUARTERS

24 Hrs. 48 Hrs. 72 Hrs.

MODIFIED DUTY UNTIL:

JAY MONTH YEAR

REFERRED TO (Indicate clinic)

SWS/GOC

EMERGENCY TODAY

72 HOURS ROUTINE

ADMIT. TO HOSP. UNIT/SERVICE

CONDITION UPON RELEASE

IMPROVED UNCHANGED

DETERIORATED

DATE OF RELEASE: 1145

(CONTINUE ON SE 502 IF NEEDED)

SIGNATURE OF PROVIDER AND ID STAMP

Dr. [Signature]

INSTRUCTIONS TO PATIENT (Include medications ordered, any limitations and follow-up plans)

Discussion - Dr. does not
desire my intervention
however I notified Dr. SWS
would be notified. Dr.
will conduct "Zonitex" (GWS)
(given)

DO NOT
SEEK
IN ER
YES

NO

CIRCLE ONE

DO NOT
SEEK
IN ER
YES

today

30 52927 4047
DEEDEN, JANETTE L
631200 F DEP AD ARMY
PV2 DEEDEN 00 1411

PSYCHOTHERAPIST

OGDEN, UTAH 84403

HOME STUDY AND CUSTODY EVALUATION

Subjects:

Derick Roy Deebeu 22 years
130 W. Aspen Way, Salem, Utah

Heather Lyn Deebe	2½ years
Kevin Roy Deebe	4 months

Clinical interviews with each subject
Home visits with each party at their residence
Observations of children in each residence
(with exception of youngest not seen in father's home)
Collateral contacts from references provided

Janette and Derick Deeben are ending a three year marriage at this time. They have two children as issue of this union and there has arisen some dispute as to which parent should have care and custody of the two children. The children are currently in the custody of the mother and the father has been exercising visitation rights. This evaluation and report is intending to investigate each of the parents circumstances and to render an opinion as to what custody arrangements are in the best interests of the children at this point.

The mother is presently living with her parents, Mr. and Mrs. Guiver in Sunset, Ut., with her two children. She is nursing the four month boy and also attending Weber State College where she is a few hours short of Junior status as an elementary education major. She is also working at NICE corp. as a telephone agent from ten to 30 hours per week.

Janette's schedule is tight. She is taking nine hours of classes at her college which requires her to rise early to clothe and feed the children, nurse her son just before leaving, attend school from 8:30 am to 11:00 am, come home immediately to

nurse her son again and to attend to Heather's needs. From Wed. to Sat. Janette has been working at her employment with NICE from 3 PM to 9 PM until recently when there have been fewer hours of work available. During the above time care of the children is typically divided between Janette's younger sisters (ages 20 and 13) and the grandmother of the children, Mrs. Guiver. Sunday, Monday and Tuesday the mother is with her children during the afternoon and evening. When none of the abovementioned, there are adult and teen age tenders readily available for short periods.

The Home:

The Guiver home in Sunset is a four bedroom house in a pleasant and typical suburban middle class area. They have been in the same home for over 25 years. The home is clean and well kept. There is, however, at this time a problem with crowding. The twenty year old sister, Sheryl, was attending Utah State University in Logan and she is temporarily home with her parents until she returns to Logan in January. Right now this forces Janette to room with her children in a converted playroom downstairs and the conditions are tolerable but less than ideal. It is assumed that with the sister moving back to college the space problem will be resolved.

Finances are adequate at this time with the help of her parents who are helping with attorney fees and who do not charge her for rent and food. Otherwise she is able to pay her bills from her earnings. Janette is anxious to complete her education so that the financial pressure can be alleviated to a considerable degree.

Mothers Concerns:

Janette states that when Derick lived with her he was very seldom home with the children. He was rarely supportive of her, that is, helpful to her with the children when she could use it. She cited an example of having to cook while holding Heather on her hip and Derick ignoring her and Derick reading a magazine or watching TV. When someone else came around, then he would make a show of helping or playing with Heather.

Janette states that Derick has an explosive temper that often erupted with her causing her to fear him. She is very doubtful that he will be able to hold his temper with Heather who is a child who will push the limits and be bullheaded.

Finally, Janette has some real doubts that it will be he who will actually raise any children but really wind up in the hands of his mother. She does not express any fears for this situation assuming that the grandmother Deeben would care for children well but she feels that since she is the parent, and Derick is the parent, the choice should be with each of them. Given that choice, she points out that she has been in fact the major caretaker of the children up to now.

The Father - Derick Deeben:

Derick Deeben has been granted a hardship ^(from the Army) discharge in order to deal with the pending divorce and what he considers are very serious concerns about how his wife can care for his two children. His present circumstance is similar to his wife's. He gives his address as being his parent's home but recently he took an apartment with other roommates and is helping to manage that complex as compensation in lieu of rent. When he has his daughter for the weekend Derick comes back to his parents home and he shares his room with the little girl there.

If custody should be granted to him, Mr. Deeben would depend upon his mother and teen age sisters for providing care in the late afternoon and evening should he have to be working. There are neighbors in the immediate vicinity who have expressed a keen interest in tending his children during the day when his sisters and mother are at school and work respectively.

The Deeben family home has a partially finished basement which could easily be converted to a three room apartment for Derick and the children should he be granted custody. This would take about a month to complete.

Mr. Deeben is also planning to attend school next term having been accepted to the Utah Community College (formerly the Utah Trade Tech) and will be working at least part time.

The Home:

The Deeben home is a five bedroom relatively new home in an upper middle class area of Salem, Ut, a community between Spanish Fork and Payson, a few miles south of Provo. It is clean, nicely decorated and comfortable. The Deebens have horses nearby that the children have access to.

The finances of the situation with Derick are a bit unclear at this time, but while he acknowledges that his parents have been and will be assisting him for awhile, he intends to be self supporting as soon as possible. Derick has been able to find employment in the past with relative ease.

The Fathers Concerns:

Derick has several concerns that he feels will be of major importance in regards to Janette's ability to take care of the children. He cites at least two occasions where Janette made threats to kill herself, once before marriage and once during the marriage. He states that she is anorectic, doesn't eat properly and jeopardizes her health.

Since separating, the father has had occasion to be very concerned with what seems to be overuse of Paragoric with the girl Heather, and possibly the infant boy, Kevin.

Finally, the father cites the instance of bruising found on Heather's leg which according to how the girl tells it, was made

by a stick (a ram rod to a black powder rifle) by her grandfather Guiver.

Derick also cites times when he found Heather unfed and unchanged and otherwise ill treated when he and Janette were together.

Mr. Deeben feels that the mother's instability and apparent neglect or abuse of Heather point to her inability to adequately care for his children.

Observation of the Children:

Heather was observed with her mother at the Guiver home in Sunset and she was observed at the Deeben home in Salem.

Heather is a bright and active child who is greatly curious and quite willing to push the limits when she wants to do something. She is judged to be quite well developed mentally and physically. Her command of language is a bit ahead of most children her age. (This is probably due to the fact of having about six adults and four teen agers doting upon her)

With the Deebens Heather was having a ball. Her young uncle and aunts were keeping her busy in active play. Heather also included the older folks (including the evaluator) in a game of catch with a basketball.

With the Guivers (Janette's family), her play was more muted, matter of fact, and casual. She was, to this observer, entirely at home with everyone. She gave the impression of knowing exactly how she stood with each family member. This would be consistent with having lived with a situation on a daily basis for several weeks.

In sum, what was observed seemed to reflect differences in family styles but relationships and physical care in both homes seemed good.

The infant boy, Kevin, was observed only in the mother's residence due to his being nursed at this time. He gave every appearance of being a healthy, happy child and a very mellow baby.

Collateral Contacts:

Four references from each party's list were contacted by phone. The people contacted from each side were mostly neighbors who lived close by each home. The following information and impressions were gleaned from their comments:

Both families are well respected within their neighborhoods. Observations of these people were that in each family the girl Heather was well taken care of and closely supervised at all times.

Two of the collaterals contacted in behalf of Janette had her as a babysitter while she was in her teen years. They regarded her as an excellent child care provider, knowledgeable, active with the children under her care (she didn't just watch TV and talk on the phone.)

Only one of the three references contacted in Derick's behalf could say that they had seen him on more than one or two occasions with his children. All had definite impressions of him as a very loving father highly concerned with his children's welfare.

Not one of the individuals contacted had any doubts about the familys' abilities to provide for the children.

Other impressions included the apparent fact that practically no one in either family sincerely wanted this marriage to occur. The fact of Janette's pregnancy probably pushed things to marriage but it is this evaluator's opinion that their were a lot of unhappy people involved with this marriage and it probably should never have happened regardless.

Another strong impression is the very different attitudes evident within each family system. This is not to say that either family was found to be lacking in any significant matter, but it very evident that each parent is the product of his and her family style and this probably feeds the tension that has always been felt between them.

Analysis;

1. Specific allegations concerning overuse of Paregoric with the children by Janette could not be corroborated. The medicine had been prescribed for a severe stomach flu by a Dr. White. Other bottles of the medication had been used by Mrs. Guiver for specific pain problems in the past.

2. The bruising of the girls leg, frankly remains unaccounted for. If the grandfather had struck her, the girl certainly did not manifest any fear of him while the evaluator was in the home. The neighbors contacted indicated that Heather was very close to her grandfather and they even said she was virtually "a shadow" to him.

3. The infant, Kevin, being nursed and at this stage in his life, closely bonded to the mother should not, in any case,

be absent from the mother for any great length of time. He probably should be weaned to a bottle and solid food before going more than a day at a time with his father.

4. It is apparent that Janette acted in ways that to the outside observer, would be considered to be disturbed while in her relationship with Derick. However, from what could be learned from others both before and after her involvement with Derick, this disturbance cannot be accounted for. It must be concluded therefore, that Janette's behavior was largely the product of the relationship. This is not to place blame upon her husband but only to point out that she was not prospering while being married for whatever reason.

5. Derick apparently tried very hard to control what he perceived as his wife's aberrations. That he did so without adequate sensitivity to his wife's particular needs is probable. That he may have been a bit too forceful or insistent is possible.

6. Inadequacies in parenting reported by either parent while living under the same roof could not be corroborated by direct observation or collateral report.

7. Both parents intend to pursue training and education toward the goal of obtaining good employment and providing for the needs of the children. In order to do this, both need to depend upon their respective families to a considerable degree. From this evaluator's reckoning of the present situation, it appears that Janette will do more actual parenting than will Derick due to work and class schedules. It also appears that the father's situation will require considerable use of baby sitters during day times because both grandparents are working and the brother and sisters will be in school. While Janette's situation is similar, use of baby sitters is not necessary as often.

8. That the girl, Heather, thoroughly enjoys being with her Deeben family is evident. That she is also quite concerned about her mother's whereabouts was also observed. It is evident that this child can profit from both associations.

Recommendations:

If there were good communications between these two young parents, it would be the recommendation of this evaluator to work out a joint custody arrangement with the mother as primary custodian. However, this does not seem like a viable possibility.

In comparing these two young parents and their families there could not be found much to differentiate between them. In

substance - providing for children's needs - they can both do very well. In style - an outgoing vs private "old fashioned approach to life - the children stand to learn a great deal as long as both families can respect the other's good intentions. It will be important to achieve a cooperative stance between the parents for the ultimate good of their children. The families should be supportive but definitely low key in influence.

It is my recommendation that the best interests of the children of this marriage would be served by having care custody awarded to the mother, Janette Deeben. Liberal visitations with the father should be part of the decree. It is hoped that these two young people can see their way to cooperation while they both seek the training and education needed for their future lives rather than seek to find faults. They could be very helpful to each other at various times in the next few years.

Respectfully,

A handwritten signature in cursive script, reading "Steven L. Watson". The signature is written in dark ink and is positioned above a horizontal line.

Steven L. Watson

1 IN THE SECOND JUDICIAL DISTRICT COURT

2 IN AND FOR DAVIS COUNTY

3 STATE OF UTAH

4 -o0o-

5
6 JANETTE DEEBEN, :

7 Plaintiff, :

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

8 vs. :

9 DERICK R. DEEBEN, :

Civil No. 40735

10 Defendant. :

11
12 BE IT REMEMBERED that on Tuesday, September 8, 1987,
13 the above-entitled matter came on for HEARING in the Second
14 Judicial District Court in and for Davis County, State of
15 Utah, before the HONORABLE DOUGLAS L CORNABY, Presiding.

16 * * * *

17 A P P E A R A N C E S:

18 For the Plaintiff:

ROBERT L. NEELEY
Attorney at Law
2485 Grant Avenue
Ogden, Utah

20 For the Defendant:

DALE E. STRATFORD
Attorney at Law
First Security Bank Bldg.
Ogden, Utah

1 THE COURT: Janette Deeben versus Derick Deeben.

2 MR. STRATFORD: If it please the Court, this matter
3 is an appeal from the Commissioner and we prepared an order
4 that has not been submitted to the Commissioner. I didn't
5 know whether the Court wished this before these proceedings,
6 but that has not been signed by the Commissioner, but was
7 prepared.

8 THE COURT: How long do you anticipate it taking
9 today?

10 MR. STRATFORD: Pardon me?

11 THE COURT: How long?

12 MR. NEELEY: I think we can do it by representation.

13 THE COURT: Okay. So represent to me how long it's
14 going to be.

15 MR. NEELEY: I would say three minutes on our part.

16 THE COURT: Your part?

17 MR. STRATFORD: Depends on what he says.

18 THE COURT: That always depends on that. That's what
19 makes it tough.

20 MR. STRATFORD: I think we can submit most of this by
21 stipulation. I believe, if it please the Court--

22 THE COURT: Any that can't be submitted by
23 stipulation?

24 MR. STRATFORD: I think not. There may be one
25 item that--I think this matter can be dealt with rather

1 summarily.

2 THE COURT: Okay. Go ahead.

3 MR. NEELEY: Your Honor, there was a pretrial hearing
4 in the above-entitled matter on the 12th of August of this
5 year before Commissioner Richards and at that time he entered
6 a recommendation. It's my understanding that in Davis County
7 at a pretrial the Commissioner is to determine what the issues
8 are and not make recommendations which become orders. The
9 only way that affects this particular case is that at the time
10 of the pretrial in August, Derick Deeben was enlisted in the
11 United States Army, stationed in Texas.

12 In paragraph 2, I think that is, in fact, reflected
13 and it goes on to say that his visitation rights, which he
14 would otherwise have shall be vested in his parents, the minor
15 children's maternal grandparents.

16 The issue that we had appealed had to do with the
17 visitation rights granted to the maternal grandparents which,
18 essentially, they wanted every other weekend from Friday at
19 6:00 until Sunday at 6:00.

20 THE COURT: I do gather that--is this Mr. Deeben
21 here?

22 MR. STRATFORD: Yes. He has since the hearing, he
23 received a discharge from the military service.

24 MR. NEELEY: Apparently, he arrived home taking a
25 hardship from the Army sometime this weekend. So, it appears

1 that the issue that we appealed is moot. The child in
2 question is two and a half years of age.

3 THE COURT: Well, have you got all this solved or is
4 this still just a pretrial?

5 MR. NEELEY: Well, we are agreeing to every other
6 weekend.

7 MR. STRATFORD: Well, go ahead.

8 MR. NEELEY: The only issue that we have is the issue
9 of child support. He was ordered to pay \$245--

10 MR. STRATFORD: Eight dollars per child.

11 MR. NEELEY: --to the plaintiff in this matter. Now
12 he has taken a hardship. I'm not quite sure what the hardship
13 is. He has come back and basically said, I am unemployed and
14 I don't have funds to pay for child support, but we agree that
15 since he is back that he can have visitation every other
16 weekend commencing this weekend, Friday at 6:00 until Sunday
17 at 6:00 with the two and a half year old. The six or seven-
18 week old child, he can see when he comes to pick up his
19 daughter on visitation.

20 MR. STRATFORD: If it please the Court, I wish
21 visitation was as simple as counsel states. Our problem,
22 basically, is that we believe that the mother of the child and
23 her family have determined that they are going to frustrate
24 and interfere with visitation in any way possible and they had
25 selected a time and the mother's family told him when the

1 Deeben family can come to Layton to pick up the child.

2 They arrived at the scheduled time and they have
3 reason to believe that the family was in the home and would
4 not answer the door. We believe that they will continue to
5 frustrate and interfere with visitation. We would like
6 visitation spelled out to be every other weekend and alternate
7 holidays, if we may, until the matter can be heard on its
8 merits which is set sometime in November and we would also ask
9 the Court--

10 THE COURT: It's set in November?

11 MR. STRATFORD: I thought it was.

12 THE COURT: Do we have a date?

13 MR. NEELEY: I think it's November 6th, your Honor.
14 November 9th.

15 THE COURT: What are the issues that are going to be
16 tried, then?

17 MR. STRATFORD: The issue--the primary issue will be
18 that of child custody as to which of the two parents shall be
19 entitled to custody of the children.

20 THE COURT: It's set for a half a day trial; is that
21 right?

22 MR. STRATFORD: I don't know how the Commissioner set
23 it.

24 THE COURT: There's no question that he set it for a
25 half a day trial and that's all that is available. That's

1 why I am checking with both of you today.

2 MR. STRATFORD: It may be.

3 MR. NEELEY: That's my understanding that it's a half
4 a day. I would anticipate longer than that, but I don't know.
5 Part of it will be depending upon discovery. We also had
6 difficulties. We asked the Commissioner to sign the order
7 which is included in this order that we be allowed to have a
8 home study made of the natural mother's home where she is now
9 residing with her parents and we have not been able to have
10 that home study conducted as of yet.

11 THE COURT: Home study by who?

12 MR. STRATFORD: The Court left that to our discretion
13 as to which psychologist or--

14 THE COURT: Usually, though, we don't want just a
15 home study. We want to have all parties.

16 MR. STRATFORD: And we have no objection and the
17 problem we had before that time while he was in the military
18 made it a little more difficult and he has now been released
19 from the military. Of course, he will be available for a home
20 study and we have no problem with that.

21 THE COURT: Well, do we need to change that trial
22 date right now while it's still early?

23 MR. STRATFORD: I would think we may. I think that
24 home study is going to take longer than we anticipated.

25 THE COURT: Well, normally you can get a home study

1 done in two months if you go to work right now.

2 MR. STRATFORD: But we haven't had him here.

3 THE COURT: Okay, but we got him here now and you
4 still have two months. If I take it off the 9th and put it on
5 the 13th, that's a full day. I only suggest this because if
6 you show up for a half a day you won't get more than a half a
7 day and if you are going to take more you might as well put it
8 on the calendar that way.

9 MR. STRATFORD: I would have no objection to the
10 13th. I would prefer that so we can at least be heard.

11 THE COURT: Is that agreeable to you?

12 MR. NEELEY: That would be fine, your Honor.

13 THE COURT: Okay. Let's put it on trial November
14 13th. That's Friday and show that that is at 9:00 a.m. Now,
15 go ahead with your spelling out of the visitation.

16 MR. STRATFORD: And visitation, the way the
17 Commissioner spelled it out was that the Deeben's can arrive
18 at 6:00 on Friday and then they would have 45 minutes with the
19 baby and with Heather, the two and a half year old, now in the
20 home of the natural mother, where they can visit with the
21 children outside of any influence one way or another.

22 Then the baby would be returned, I think his name is
23 Kevin, would be returned to the home and they would then take
24 Heather with them and they live in Salem, Utah. When they
25 return between 6:00 on Sunday evening--they have the child

1 between 6:00 and 8:00 on Sunday evening returning both
2 children back to the home by 8:00 p.m. that evening.
3 Deeben's do have relatives and have a home in the general
4 vicinity so they can, in fact, accomplish that.

5 We feel that they have attempted to frustrate that
6 if at all possible and we would also like to have every other
7 holiday included in the visitation rights which up to now we
8 have not had.

9 THE COURT: If you get it done, there probably won't
10 be any holidays between it, but--

11 MR. STRATFORD: Of any consequence, you may have
12 Columbus Day. You may have Halloween.

13 THE COURT: We don't call Halloween a holiday. The
14 general ones that we are talking about are those standard
15 state or national holidays that we include those in, which are
16 eight or nine. I don't remember which.

17 MR. STRATFORD: Utah used to have 12. Then the other
18 issue is the child support. The Commissioner's order, after
19 hearing circumstances of the parties, was that Mr. Deeben was
20 to pay \$80 per child per month while in the military service
21 and the question of alimony was held in abeyance. Since his
22 release from the service--he was injured and his occupation in
23 the military is vehicle mechanic. Basically, he was a tank
24 repairman and there isn't much call for tank repairmen, but at
25 the present time he was injured in those field exercises and

1 he does have to undergo surgery.

2 He has been released to the Veteran's Administration.
3 His first appointment is in two weeks.

4 MR. DEEBEN: Within three. Approximately two weeks.

5 MR. STRATFORD: And at that time they will determine
6 what kind of medical operation he must undergo. One of the
7 reasons that he left the military was that the military
8 indicated to him that as a result of the surgery there was
9 probably a 50/50 chance by the time they got through that he
10 would have permanent impairments in the knee.

11 THE COURT: Permanent what?

12 MR. STRATFORD: He would have loss of function in the
13 knee. He said that under the circumstances I will try, but in
14 any event, he does have this one problem.

15 He is seeking medical attention for the knee which
16 will require an operation and so, we would ask the Court--

17 THE COURT: That doesn't have any effect on income,
18 does it?

19 MR. STRATFORD: Well, it certainly does because when
20 he left the military service--this is the other problem. He
21 tells me that upon being released from the service he lost all
22 benefits and pay.

23 THE COURT: How do you lose that? Because he
24 voluntarily walked away? Is that what you mean?

25 MR. STRATFORD: Because he took a hardship discharge

1 rather than remain with the service to resolve this issue. As
2 I understand it, they indicated to you that you had no more
3 pay allotment or services from the military; is that correct?

4 MR. DEEBEN: That is correct, up until the time
5 Veteran's Administration can put this before a board and
6 decide whether they will do a medical disability or whether
7 they will just cover medical until the knee and injury is
8 properly taken care of.

9 MR. STRATFORD: And so, for that reason, we would ask
10 the Court to allow us to at least use the Uniform Schedule,
11 depending on what the wages are, based on the Uniform
12 Schedule. I don't know if I can do any better than that.

13 THE COURT: Well, I think what ought to be
14 appropriate is that he ought to pay \$80 per month per child.
15 I think he ought to pay that unless he shows he can't afford
16 it. Now, just because he gets out and can't afford it--
17 normally I know that's not the way--if he was disabled in the
18 service, I know that there's disability that is there and even
19 if you say I take a hardship discharge, that doesn't relieve
20 him of the responsibility already incurred--well, for medical
21 and disability that results from it.

22 So, I am going to leave it there on the assumption
23 that he is going to be paid and he ought to contribute toward
24 the support of his child. If it turns out to be otherwise we
25 will, of course, have to rethink it.