

1988

# Janette Deeben v. Derick R. Deeben : Brief of Respondent

Utah Supreme Court

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Dale E. Stratford; Attorney for Respondent.

Campbell and Neeley; Robert L. Neeley; Attorney for Appellant.

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**BRIEF**

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DOCKET NO.

IN THE UTAH COURT OF APPEALS

JANETTE DEEBEN

Plaintiff-Appellant

vs.

DERICK R. DEEBEN

Defendant-Respondent

)

) Case No. 880104-CA

) Priority 14b

)

)

BRIEF OF RESPONDENT

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

DALE E. STRATFORD, 3138  
Attorney for Defendant/Respondent  
1218 First Security Bank Building  
Ogden, Utah, 84401

CAMPBELL and NEELEY  
ROBERT L. NEELEY, 2373  
Attorney for Plaintiff/Appellant  
2485 Grant Avenue, Suite 200  
Ogden, Utah, 84401

**FILED**

JAN 25 1989

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☒ Argument

☒ Conclusion

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## IN THE UTAH COURT OF APPEALS

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| JANETTE DEEBEN       | ) |                    |
| Plaintiff-Appellant  | ) | Case No. 880104-CA |
| vs.                  | ) | Priority 14b       |
| DERICK R. DEEBEN     | ) |                    |
| Defendant-Respondent | ) |                    |

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## BRIEF OF RESPONDENT

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

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DALE E. STRATFORD, 3138  
Attorney for Defendant/Respondent  
1218 First Security Bank Building  
Ogden, Utah, 84401

CAMPBELL and NEELEY  
ROBERT L. NEELEY, 2373  
Attorney for Plaintiff/Appellant  
2485 Grant Avenue, Suite 200  
Ogden, Utah, 84401

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## IN THE UTAH COURT OF APPEALS

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JANETTE DEEBEN )

Plaintiff-Appellant ) Case No. 880104-CA

vs. )

Priority 14b

DERICK R. DEEBEN )

Defendant-Respondent )

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### BRIEF OF RESPONDENT

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#### STATEMENT OF JURISDICTION AND THE NATURE OF PROCEEDINGS BELOW.

Jurisdiction for the Court of Appeals to hear this case is governed by Section 78-2a-3(2)(g), Utah Code, as amended. The Court of Appeals has appellate jurisdiction over appeals from the district court involving domestic relations cases including, but not limited to, divorce, annulment, property division, child custody, support and visitation, adoption and paternity.

By original order on November 13, 1987, the Second Judicial District Court for Davis County, Utah, granted an Order of divorce to the parties herein, including a joint custody order for two minor children, with the defendant having primary custody of the minor child, Heather Deeben, and the plaintiff having primary custody of the minor child, Kevin Deeben.



Findings of Fact and Conclusions of Law were entered.

On December 31, 1987, the plaintiff made application to the trial court for a stay of Judgment, and upon hearing, January 19, 1988, the Court's order was entered that the primary custody of Heather should remain with the defendant and that the primary custody of Kevin should remain with the plaintiff.

It was further ordered that the Findings of Fact and Conclusions of Law be amended by the inclusion of a complete transcript of the Court's bench ruling of November 13, 1987.

Judgment and Decree of Divorce was then entered on January 20, 1988. On February 5, 1988, the plaintiff filed a Notice of Appeal in the District Court.

Upon Plaintiff's motion in the Court of Appeals, the case was remanded to the District Court with directions to amend the Findings of Fact to reflect the Court's determination of the "best interests of the child" under standards articulated in case law and to further enter judgment if necessary. The Court of Appeals retained jurisdiction for further consideration on the merits of the appeal.

On November 2, 1988, the trial court entered Amended Findings of Fact and made additional findings, but did not change its Judgment. It directed the Court Clerk to return

the file to the Court of Appeals, and this was done on November 18, 1988.

The Court of Appeals then directed that the Appellant's brief be served and filed on or before December 18, 1988. The brief was submitted on the 16th day of December and the Respondent's brief is due January 15, 1988.

#### STATEMENT OF ISSUES PRESENTED FOR REVIEW

The defendant/respondent chooses to make his own statement of the issues as follows:

1. The trial Court was not bound to accept as its own the Conclusions of a home Study and Custody evaluation made by order of the Court in not crediting the testimony of witnesses whom the trial Court was free to credit, regarding the plaintiff's past behavior and the effect on the children.

2. The trial Court has an independent responsibility to assure itself of the suitability of the parent to whom a child is primarily attached. Relative weight of various factors in a particular case to determine custody lies within the discretion of the trial court.

3. Title 30-3-10, Utah Code, as amended, states the proper basis for decision in the first instance of a custody determination.

4. The record does not support the plaintiff's claim that the trial court's determination of custody was

motivated by a desire to punish the plaintiff rather than by its' concern for the child's best interests.

5. The authority to exercise the judicial discretion under the circumstances revealed by the finding is conferred upon the trial court. Nothing short of a clear abuse of discretion can warrant interference with that Court's order.

#### STATUTES WHOSE INTERPRETATION IS DETERMINATIVE.

30-3-10, Utah Code, as amended. Custody of children in case of separation or divorce - custody consideration (as set forth in the Addendum below).

#### STATEMENT OF THE CASE

##### Nature of the Case

This is a divorce proceeding; trial was had before the Honorable Douglas L. Cornaby in the Second Judicial District Court for Davis County. The Decree of Divorce was entered on January 20, 1988, and not changed on November 2, 1988, after remand by the Court of Appeals. Additional Findings of Fact were made on November 2, 1988. Plaintiff/Appellant appeals the custody award of Heather Deeben, a minor child, to the defendant/respondent.

##### The Course of Proceedings

Plaintiff filed a Complaint for divorce on January 12, 1987. The defendant was personally served on January 23, 1987, in Bell County, Texas. On May 26, 1987, the

defendant filed his answer and Counterclaim for divorce. The plaintiff filed a reply on June 3, 1987.

A pre-trial settlement hearing was held August 12, 1987, establishing the issues for trial as "Custody, visitation, plaintiff's wedding rings, alimony, debts and attorney fees". Temporary custody and child support to the plaintiff and child visitation to the defendant were stipulated to. The pre-trial order provided for the paternal grandparents to have standard visitation "when defendant is in Texas". Visitation was further ordered by the Court on September 28, 1987. Witnesses at trial were Janette Deeben for the plaintiff, and Derick Deeben, Carlene Deeben and Bruce Van Dyke Deeben for the defendant.

#### Disposition in the Court below

The grounds for divorce were amended to be irreconcilable differences. The Court granted a mutual divorce to both parties. There was no alimony awarded to either party. The Court awarded joint custody of the minor children with the physical custody of Heather to the defendant and the physical custody of Kevin to the plaintiff. The defendant was ordered to pay monthly children support to the plaintiff for Kevin. The Court did not make a determination at this time for child support for Heather. The custody for Heather was to change on the Sunday following the order. The change took place.

The plaintiff moved for a stay of the order which was denied on January 19, 1988, and the divorce decree was entered January 20, 1988. The decree awarded joint custody of both minor children and ordered that each share with one another, any and all medical matters, school matters, church matters or social matters involving the minor children.

Statement of Facts Relevant to the issues Presented

The parties to this action were married on September 6, 1984, at a time when they were 19 and 20 years old. The wife was the older one. Both were pursuing educational goals at the time. They lived together at Logan, and he worked at Trimiller Packing Company.

At the end of 1985, the plaintiff went to live in Roy with the child, Heather, and the defendant went to New Jersey with the United States Army. Both parties expected to further family finances and meet the defendants future educational goals. (Transcript: page 127, Lines 9-14) They rejoined each other at Ft. Hood, Texas, in 1986.

However, the plaintiff/appellant did not adjust to army life. She did not eat well and she barely fed Heather or attend to the child's needs. (Transcript page 113-114). She left Texas in October, 1986, but returned in November.

Plaintiff left the defendant and Texas for good at the end of December, 1986, and brought this divorce action on January 12, 1987. (record page 1)

The army has chaplains (transcript page 113, Lines 14-15), compassionate assignments (transcript page 93, Line 14), hardship discharges (transcript page 92, Line 19) and reserve army units (transcript page 99, Lines 12-13). The defendant sought help with his family problems from the army. In March, 1987, he did visit Utah, but had to return to Texas. In July, 1987, the defendant received a hardship discharge from the Army and a reserve unit assignment in Utah. This was honorable service. (transcript page 99, line 4)

The Plaintiff/Appellant has suggested that the trial court has acted in an intemperate and angry manner in finding both parties fit and proper persons to be custodial parents and in expressing a need for cooperation in the care of their children.

In the bench ruling of November 13, 1987, the judge states:

"... I just explain why I am doing what I am doing. It's not to be cruel . . . but to let you know why I did what I did and its not always kind . . .

(Record: p. 131, lines 9-12)

and, "those are my reasons".

(Record: P. 139, Line 10)

Among those reasons:

(a) " . . . each party is an equal contributor in whatever (their) inability to get along.

(Record: P. 133, Lines 1 & 2)

(b) " . . . the husband has reacted violently on times.

(Record: P. 133, Line 6)

(c) "I don't condone it.

(Record: P. 133, Line 11)

(d) " . . . the wife was often the agitator and often the instigator.

(Record: P. 133, Lines 18 & 19)

(e) "I am absolutely satisfied that both parties love the children.

(Record: P. 134, Lines 8 & 9)

(f) "I am not sure one would be any more prime (as caretaker) than the other

(Record: P. 134, Lines 20 & 21)

(g) " . . . he was with the child and did things with the child."

(Record: P. 135, lines 1 and 2)

(h) "Both these parties have got these children to care for and they are both trying to get through school and both finding the necessity of working .."

(Record: P. 136, Lines 5-7)

(i) "In Texas ... the Court does not believe Janette primarily cared for the child Heather."

(Record: P. 137, lines 19 and 20)

(j) "... he recognized the problem to immediately do something about it."

(Record: P. 138, lines 4 & 5)

(k) "I can't exclude, Janette, the threats of suicide. I don't have to believe that they were serious, but they are certainly suggestive of psychological problems . . ."

(Record: P. 138, line 10)

(l) "I tend to believe that you (Janette) were using paregoric improperly . . ."

(Record: P. 138, Lines 18 & 19).

(m) "The wife's home seems to be almost too crowded . . ."

(Record: P. 139, Lines 4 and 5)

As to the matter of Visitation:

(a) "The children are to be in the same home each time there is weekend visitation."

(Record: P. 127, Lines 22 and 23)

(b) "For summer visitation . . . each party should have an opportunity of having both children in the home for an uninterrupted period of time ... a full month."

(Record: P. 6, Lines 3-6)

(c) "In the visitation . . . where one child is in each home, I suppose you just have to be . . . reasonable."

(Record: P. 136, Lines 23-25)

(d) "I don't think that the defendant and his parents having always been given the visitation under the Court's Order that they had a right to."

(Record: P. 137, Lines 15-17)

and, "I think Heather will be best cared for if she is in the home with his (the father's) parents."

(Record: P. 128, lines 20-25)

Under the provisions of 30-3-10(2), Utah Code, as amended, these are relevant and reasoned deliberations. These are not the pre-conceived pronouncements of an intemperate and angry judge. In awarding custody, the court



has considered which person is most likely to act in the best interests of the child, including allowing the child frequent and continuing contacts with the non-custodial parent.

The trial court heard testimony by Derick Deeben that the plaintiff did not care for the child in Texas. (Transcript: P. 82, Lines 20-25; Page 83, lines 8-13), and that the care had improved somewhat on the plaintiff's final return to Utah (Transcript: P. 85, Lines 4-12). However, another pattern of injury to Heather emerged (Transcript: P. 85, Lines 23-25; Page 86, Lines 1-25; Page 87, Lines 1-24). Heather had been medicated with paregoric for an extended period of time as well. (transcript: P. 89, Lines 3-25.)

Charlene Deeben testified as to the effects of the child's experience with the paregoric (Transcript: P. 120, Lines 1-25; Page 121, Lines 1-25; Page 122, Lines 1-25, and Page 123, Lines 1-10.)

The witness, Deeben, is a registered nurse with training in making the observations testified to. (Transcript: P 123, lines 12-24 and page 124, lines 20-23.)

The trial court found the concerns of the defendant/respondent justified and found that the hardship discharge from the army was motivated for a concern for the welfare of his children and the necessity for him to return to Utah. (Record: Page 135, Lines 1-6; page 137, lines 18-

25; page 131, lines 13-24). (Transcript: Page 96, liens 3-19) That was a primary reason why he left the military service.

#### SUMMARY OF THE ARGUMENT

The trial court has the independent responsibility and duty to make findings and draw conclusions from those findings as to an award of child custody. In an initial determination of custody in the divorce proceeding, the standard for determination is that enacted by the Legislature in 30-3-10, Utah Code. Change of circumstance is not a threshold requirement in making the determination.

The trial Court has wide discretion in weighing the circumstances found from the evidence and the credibility of the witnesses. Gender bias is not to be indulged in and the best interests of the child is weighed by all of the relevant factors, only one of which is the identity of a psychological parent. In some cases it may be a disadvantage for the child to be in the care of the psychological parent.

Moreover, the issue on appeal is not whether the trial court's exercise of its discretion accords with the views of a reviewing court on the circumstances, but whether its findings are supported by substantial evidence, so long as it is not so flagrantly unjust as to constitute an abuse of discretion.

## ARGUMENT

### POINT I

THE TRIAL COURT IS FREE TO RELY ON  
WHATEVER PARTS OF AN EXPERTS OPINION  
THE COURT FINDS PROBATIVE AND HELPFUL.

On the issue of custody of the parties two minor children, the Court found that both the plaintiff, mother and defendant, father were proper, fit and good parents. Having to choose between them, the court concluded that the defendant, father was in a better position, with the aid of his parents, to provide a stable home life for the older child.

On her appeal from the Judgment, the plaintiff argues that the Home Study and Custody Evaluation ordered by the Court which was in the proceedings before the Court, recommended that custody of both minor children be awarded to the plaintiff. That report also noted, however, that both the plaintiff and the defendant had at times used poor judgment and both have misgivings about the parenting abilities of the other. Also, the report discredited testimony by the defendant of abuse of the child Heather when in the temporary custody of the plaintiff. This was testimony which the trial court was free to credit regarding the plaintiffs behavior and its effect on the child.

It would be anomalous to require a trial court to assign particular weight to a report which is based on statements that the trial court may evaluate differently and

on circumstances that may have changed. The best interests of the child does not permit such a predetermined weighing of evidence.

The weight to be given to psychological reports by professionals in mental health is, in matters of custody, as it is elsewhere, a question for the trier of fact. Expert opinion must be evaluated in light of the expert's opportunity to come to a reasoned conclusions. Long-range forecasts about future child development are sometimes based upon relatively few and brief interviews and tests conducted under circumstances of stress. See: Martinez vs. Martinez 652 P2d 934, (Ut - 1982).

A Court has an independent responsibility to assure itself of the suitability of the parent to whom the child is primarily attached. On this record , the trial court exercised that responsibility.

## POINT II

IT IS THE DUTY OF THE COURT TO  
DETERMINE NOT WHICH PARENT WAS  
THE BETTER CUSTODIAN IN THE PAST  
BUT WHICH IS THE BETTER CUSTODIAN  
NOW.

In the exercise of awesome responsibility to find the most-likely custodial arrangement for the children of divorce, the court must take into account the parents' past behavior. It must evaluate their present and future parenting ability and the consistency of their parenting for the purpose of determining which parent will better foster

the childrens' growth, development, and well-being. See: 30-3-10(1) and (2), Utah Code, as amended (1988).

Where, as here, the record is void of any previous determination of custody, the court will apply the standard in Sec. 30-3-10 in lieu of the standard for change of custody outlined in Hogge vs. Hogge and its' progeny. Sanderson vs. Tryon, 739 P2d 623 (Ut - 1987).

Temporary custody of the children had been stipulated to the plaintiff before trial, but the custody of the children was to be an issue at trial. The circumstances had not been determined. There was no reason to find a change of circumstances to change custody. In fact, custody was not changed; it was determined in the first instance.

Although there was evidence favoring an award of custody to the plaintiff/Appellant, the award of the custody of Heather to the Defendant/Respondent was not flagrantly unjust nor an abuse of discretion. In some cases it is a disadvantage for the child to be in the care of the psychological parent, as the trial court has found.

The plaintiff was not an ideal caretaker. Speaking of Heather as an only child at the time, she was not always properly fed, diapered, or put to bed. The defendant/respondent, spent as much time as a caretaker when he was in the home. (Record: p. 151-152). It has been specifically found that the plaintiff/appellant used paregoric on Heather, after the birth of the second child,

when it was not medically necessary. This made the child lethargic and unable to sleep properly and neared the point of being habit forming. (Record: P. 152) In addition, the evidence shows that the newborn child could ingest paragoric from his mother's milk. There was evidence of past behavior by the plaintiff/appellant suggestive of psychological problems.

The Plaintiff/appellant has responded better as a caretaker with counsel and assistance. (Record P. 152). The custody award by the Court has spread the load and provided counsel and assistance over a long period of time pending any change in circumstances.

Moreover, if the findings seem terse, but still suggest the weight accorded to the testimony of the witnesses by the trial court and outline the basis of the custody award, appellate review can find that there was competent evidence to support the judgment. Pennington vs Pennington, 711 P2d 254 (Ut - 1985).

Should it appear at some future time that circumstances have changed to the extent that the child's interests and welfare will be best served by a review of custody, the matter may again be brought to the trial court upon a proper petition and showing. Fontenot vs. Fontenot, 714 P2d 1131 (Utah, 1986)

### POINT III

EVERY APPEAL IS NOT A SECOND CHANCE  
TO ACCOMPLISH WHAT SHOULD BE DETER-  
MINED AT TRIAL.

In initial custody awards, the trial court is given broad discretion. Appellate review of the findings is made under a "clearly erroneous" standard. Davis vs. Davis, 749 P2d 647 Ut, 1988).

It is a rare case in which a disappointed litigant will be able to demonstrate abuse of a trial courts broad discretion in family matters.

The authority to exercise the judicial discretion under the circumstances revealed by the Findings is not for the appellate court, but upon the trial court. A mere difference of opinion or judgment cannot justify appellate court intervention short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion.

The Utah Supreme Court in Alexander vs. Alexander 737 P2d 221 (Ut- 1987), Note 1 page 223, notes:

"Plaintiff urges us to apply our usual standard of review only in cases in which the trial court clearly applied the appropriate guidelines and rules, but to substitute our judgment for that of the trial court "materially or substantially" deviated from the best interests of the child rule. We think that standard would be ill-advised and would simply confuse the issue by forcing us to determine what is in the best interests of the child and then determine if the trial court materially and

substantially deviated from the decision we would have reached. Such a standard would be inappropriate and render every appeal a second chance to accomplish what should have been determined at trial

Where there is evidence to support a ruling the task of determining the best interests of the child in a custody dispute is for the trial judge, who has the opportunity to personally observe and evaluate the witnesses.

#### POINT IV

ASSESSMENTS OF THE APPLICABILITY AND  
RELATIVE WEIGHT OF THE VARIOUS FACTORS  
IN A PARTICULAR CASE LIE WITHIN THE  
DISCRETION OF THE TRIAL COURT.

The plaintiff/appellant argues that the trial court, as function related factors in custody awards, has (1) split custody of the two siblings, (2) interfered with previous custody arrangements, (3) overlooked the element of the personal care to be provided for Heather, and (4) failed to give proper deference to the element of the primary caretaker, all to the detriment of, and against the best interests of the minor child, Heather.

Function related factors were outlined by the Utah Supreme Court in Hutchison vs. Hutchison, 649 P2d 38 (Ut - 1982) at P.41, with the factors not necessarily listed in any particular order of importance.

Also, in Hutchison, the Court states that assessments of the applicability and relative weight of the various factors in a particular case lie within the discretion of the trial court.



However, it is well established that only where the trial court action is so flagrantly unjust as to constitute an abuse of that discretion should the appellant forum interpose its own judgment. Under Hutchison the applicability of the factors varies with the circumstances found by the trial court.

In the later case of Pusey vs. Pusey, 728 P2d 117 (Ut - 1986), the Utah Supreme Court stated that the time has come to discontinue support, even in dictum, for the notion of gender based preference in child custody cases. The choice instead should be based on function related factors. The identity of the primary caretaker during the marriage is prominent, though not exclusive. Another important factor should be the stability of the environment provided by each parent.

Also, in Pusey, at page 120, it observes that where the trial court found both parties to be fit custodial parents, its ultimate judgment on custody required an assessment of the complex situation before it. That choice is within its discretion.

In the instant case, the trial court assessed all of the factors. It made findings as to the primary caretaker, the prospects for personal care and the splitting of custody for the siblings. It determined that the element of the psychological parent was outweighed by other considerations. Moreover, bonding between the siblings was not great. In

Pusey, and many other cases, the court has affirmed split custody arrangements.

Both parties have shortcomings. Both testified as to their work patterns and their desire to continue with their schooling. (Transcript pages 5, 9, 90, 97) The defendant testified as to his intention to complete an apartment for him and the children in the basement of his parent's home in Salem. (Transcript p. 112.) The plaintiff testified as to her objective to afford an apartment of her own near her parents home, and perhaps have the aid of her mother and sisters with child care. (Transcript, p. 47.)

As to all of this, and to other weighty factors of stress upon each of the parties, the trial court stated its purpose to facilitate visitation. (Record: P. 136, lines 23-25); P. 125, lines 22-25), and that Heather will be best cared for if she is in the home of the defendant's parents. (Record 128, Lines 24 and 25).

The trial court weighed all of the factors raised by the plaintiff/appellant, and others of its choosing, and it made its order accordingly.

Moreover, the order is in keeping with the standards set out by the legislature in 30-3-10(2) Utah Code as amended. The judge has determined which parent is most likely to act in the best interests of the child, and has included an allowance for frequent and continuing contact with the non-custodial parent as well as the two siblings.

The order is well crafted in both regards, and as the court finds appropriate. There is no abuse of discretion here.

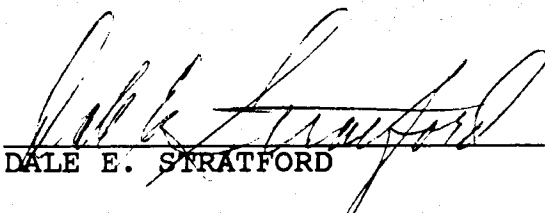
#### C O N C L U S I O N

Many of the circumstances of this case are regrettable, but they are common enough. The trial court must often weigh the least detrimental available alternative.

The Plaintiff/appellant has made no showing legally sufficient to require reversal of the trial courts' custody order. It is the trial court that must exercise the judicial discretion to determine what is in the best interests of a child. On the record here awarding custody of the minor child Heather to her father is not so unjust as to constitute an abuse of discretion.

The custody order of the trial court should be affirmed.

DATED this 13<sup>th</sup> day of January, 1989.

  
DALE E. STRATFORD

### CERTIFICATE OF SERVICE

I hereby certify that I served four copies of the foregoing Brief of Respondent to ROBERT L. NEELEY, Attorney for Appellant, 2485 Grant Avenue, Suite 200, Ogden, Utah, 84401 this 17th day of January, 1989.

  
DALE E. STRATFORD

## **ADDENDUM**

## UTAH CODE, AS AMENDED

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

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

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

1988

IN THE UTAH COURT OF APPEALS

FILED

APR 23 1988

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MICHAEL S. ALLEN, CLERK  
2ND DISTRICT COURT Utah Court of Appeals

Janette Deeben, )  
 )  
Plaintiff and Appellant, )  
 )  
v. )  
 )  
Derick R. Deeben, )  
 )  
Defendant and Respondent. )

BY ab  
ORDER

Case No. 880104-CA

Before Judges Jackson, Orme and Greenwood (On Law and Motion).

-----  
This matter is before the Court on appellant's Motion for Summary Disposition seeking reversal of the trial court's child custody determination on the basis of manifest error. This Court, having reviewed the record and the material submitted by the parties, and having heard oral argument on the motion now pending, makes the following determination.

IT IS HEREBY ORDERED THAT appellant's Motion for Summary Disposition on the basis of manifest error is denied.

IT IS FURTHER ORDERED THAT the case is remanded to the trial court with directions to amend the findings of fact to reflect the court's determination of the "best interests of the child" under the standards articulated in case law and to enter judgment accordingly. R. Utah Ct. App. 30(a); Smith v. Smith, 726 P.2d 423 (Utah 1986); Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982); Hogge v. Hogge, 649 P.2d 51 (Utah 1982).

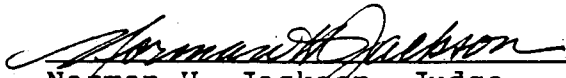
IT IS FURTHER ORDERED THAT this Court shall retain jurisdiction for further consideration of the merits of this appeal following entry of the amended findings and conclusions and an amended judgment.<sup>1</sup>

1. If appellant wishes to pursue the appeal after the lower court proceedings, a new notice of appeal need not be filed. Appellant instead should notify this Court and supplement the record as required, and a new briefing schedule will be issued by the Clerk of the Court. Our retention of jurisdiction means that appellant's issues concerning the propriety of the custody determination remain viable if not rendered moot by the new proceedings. See State v. Gibbons, 740 P.2d 1309, 1311 n.2 (Utah 1987). If respondent chooses to appeal from any decision after remand, he must initiate a new appeal.

FILED

DATED this 26<sup>th</sup> day of April, 1988.

FOR THE COURT:

  
\_\_\_\_\_  
Norman H. Jackson, 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.

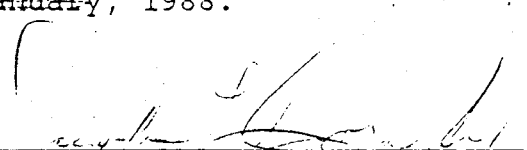
9. That the defendant be awarded as his sole and separate property the 1978 Pickup truck, a VCR and television, which the plaintiff has indicated she does not claim an interest in and they should be the property of the defendant.

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 ~~19th~~ day of ~~January~~, 1988.

  
DISTRICT COURT JUDGE

APPROVED AS TO FORM

\_\_\_\_\_  
ROBERT L. NEELEY  
Attorney for Plaintiff



In the District Court of the Second Judicial District  
IN AND FOR THE  
County of Davis, State of Utah

|                         |   |           |
|-------------------------|---|-----------|
| <u>JANETTE DEEBEN</u>   | } | Plaintiff |
| vs.                     |   |           |
| <u>DERICK R. DEEBEN</u> |   | Defendant |

MINUTE ENTRY  
January 19, 1988

Date

Case No. 40735

DOUGLAS L CORNABY, Judge

Nancy Davis, Reporter  
Kathy Potts, Clerk

This matter comes before the Court for Plaintiff's Motion to Stay Judgment. The plaintiff is present and represented by Robert Neeley. The defendant is present and represented by Dale Stratford.

Mr. Neeley presents oral argument. Mr. Stratford presents oral argument.

The transcript of the court's ruling will be appended to the findings of fact prepared by Dale Stratford. The court will deny Mr. Neeley's motion to reconsider entering the order of custody.

**FILMED**

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,

8 vs.

9 DERICK R. DEEBEN,

10 Defendant.

:

:

:

:

:

: REPORTER'S TRANSCRIPT OF  
: PROCEEDINGS

: Civil No. 40735

11  
12 BE IT REMEMBERED that on Friday, November 13, 1987,  
13 the above-entitled matter came on for TRIAL 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, Suite 200

Ogden, Utah 84401

20 For the Defendant:

DALE E. STRATFORD

Attorney at Law

1218 First Security Bank

Ogden, Utah 84401

1           THE COURT: The Court will make the following  
2 findings and decision: First, that the plaintiff was an  
3 actual and bona fide resident of Davis County for at least  
4 three months prior to the filing of this action, it having  
5 been filed on January 12, 1987. Plaintiff and defendant are  
6 husband and wife having married on September 6, 1984 at  
7 Sunset, Utah. Two children have been born issue of the  
8 marriage, Heather Lyn Deeben, born March 1st, 1985 and Kevin  
9 Roy Deeben, born July 1st, 1987.

10           The Court will allow the complaint to be amended as  
11 requested by counsel to provide for irreconcilable differences  
12 between the parties and we will find that there are  
13 irreconcilable differences that have made the continuation of  
14 the marriage impossible and we will grant a mutual divorce to  
15 each party. Award no alimony to either party. One appears as  
16 capable as the other of supporting the family.

17           While the plaintiff has the very small child in her  
18 home at the current time to raise and care for, she has,  
19 nevertheless, made arrangements to work outside of the home,  
20 apparently, at her own choice and so, expects her to go on  
21 doing that is not unreasonable. To suggest that the  
22 defendant, on the other hand, has not supported his family  
23 after getting out of the service is, apparently, not fair nor  
24 correct.

25           While he hasn't supported his wife, he, apparently,

1 paid on a regular basis \$80 per child per month. Apparently,  
2 that is the only thing he has been required by the Court to  
3 do. While he was in the service he was required to spend or  
4 pay \$240 a month which, apparently, he paid each and every  
5 month and the Court will find that he did pay it for the month  
6 of August, 1987 as well as the other months.

7 Perhaps the biggest concern in this matter today, of  
8 course, has been joint--or child custody and the Court is  
9 going to direct that there be joint custody between both the  
10 plaintiff and the defendant with the defendant to have the  
11 primary custody of Heather and the plaintiff to have the  
12 primary custody of Kevin. Each of the parties, apparently,  
13 neither party actually has health and accident and dental  
14 insurance covering the children at this time. Each will be  
15 required to pay one-half of all medical costs that are  
16 incurred by each child in each home.

17 This joint custody, while one parent that I have  
18 granted the primary custody to, it's stated specifically joint  
19 custody and it means joint in the sense that you will share  
20 medical matters, school matters, church matters and social  
21 matters.

22 This case has not been free of disagreements between  
23 the parties in visitation and so on. The only problem now is  
24 that I suppose any rubbing of the hands or the knee or  
25 whatever it may be on the sandpaper rubs both ways. So, I

1 assume that you will take the Court to heart in both and both  
2 cooperate. Without cooperation you will go on having the  
3 disappointments and problems between you.

4 At this time the Court is going to direct that the  
5 defendant pay \$80 per month child support to the plaintiff for  
6 the child Kevin. I am not going to make a determination at  
7 this time that the plaintiff should pay any child support to  
8 the defendant for Heather, but at such time as she finishes  
9 her schooling, would expect that the Uniform Child Support  
10 Schedule would come into place and at that point she would be  
11 required to pay the amount to him just exactly the same as any  
12 time that his job, through the Uniform Child Support Schedule,  
13 justifies a higher than \$80 a month, but it will not be less  
14 than that amount. Uniform Schedule indicates that he should  
15 be paying higher than that. It will be based on the schedule.  
16 Not that every single time there is a minor change, but  
17 certainly that needs to be evaluated at least on the first of  
18 January of every year.

19 MR. NEELEY: Your Honor, I am concerned--confused.  
20 Who have you awarded--

21 THE COURT: Defendant is going to Heather and the  
22 plaintiff is going to Kevin, even though counsel have argued  
23 that the children should not be split up, the bonding is not  
24 the same as with children when they are older, when they  
25 become better acquainted, when they have been long associated

1 with each other and I am not even so sure when the bonding  
2 becomes so strong that either party should be denied a right  
3 to have custody just so that the parent can be satisfied with  
4 the total custody or no custody, but that's not the basis for  
5 the Court doing it here.

6 Now, with regard to visitation. The visitation will  
7 continue for the defendant as it has been in the past so far  
8 as Kevin is concerned. Forty-five minutes each time he makes  
9 a trip up to see the child. However, if he wants to make a  
10 trip up on Saturday and spend a period of time like from 3:00  
11 to 7:00 with the child, the Court finds no problem in that  
12 whatsoever. If the mother can work from 3:00 to 7:00,  
13 certainly the father can take care of the child outside of the  
14 home from 3:00 to 7:00. I would think it would take some  
15 communication between the parties to arrange for the care of  
16 the child.

17 As such time as the child is one year old, I am  
18 going to direct that then alternating visitation will begin on  
19 the weekends and I am going to direct that when that takes  
20 place that the plaintiff is going to have the weekend and  
21 alternating holiday visitation with Heather and vice versa  
22 because the children are to be in the same home each time that  
23 there is weekend visitation.

24 So, when the mother is having visitation, they will  
25 both be there and when the defendant is having visitation,

1 they will both be there. Now, that's not now, but after the  
2 child is one year of age.

3 The Court thinks that for summer visitation that  
4 each party should have an opportunity of having both children  
5 in the home for an uninterrupted period of time, almost  
6 uninterrupted. A full month. I am going to let, during the  
7 time of June 15 to July 15, I am going to let the mother have  
8 both children in the home, except for one weekend visitation  
9 period right in the middle, unless the parties happen to be  
10 going out of state on a vacation and then during the month of  
11 July 15 or July 16 through August 15, then the defendant will  
12 have both children in the home.

13 When the one weekend of visitation occurs, I am  
14 going to require the defendant to take care of the  
15 transportation and when the next period of visitation comes, I  
16 am going to require the plaintiff to take care of the  
17 transportation both ways. I am going to come back to my  
18 reasons.

19 MR. STRATFORD: That's after the child reaches one?

20 THE COURT: That's right. Until that period of  
21 time, I am going to just require the defendant to make that  
22 trip because he needs the visitation with the child so I am  
23 going to require that he be the one that take it and, of  
24 course, these are based on the fact that I think that Heather  
25 will be best cared for if she is in the home with his

1 parents. I am not so sure that current living arrangements he  
2 has is persuasive to the Court that it's conducive to the  
3 raising of a daughter. I am not telling him he has to do it,  
4 but this is joint custody. It doesn't take a big change to  
5 change it and if I think there's anything of an untowarded  
6 nature that is going to make a change, I will have to make it,  
7 but I am not going to tell him how to run his life.

8 Now, there's some other questions and I am going to  
9 refer to them now. Each party will pay their own attorney  
10 fee. The defendant will be awarded those family portraits.  
11 The quilts that were argued over was a gift to the child and  
12 that property, along with all the clothes that belong to the  
13 child, except for enough for the plaintiff to be able to  
14 clothe Heather while she is there visiting, will be turned  
15 over to the defendant.

16 All of the clothes and all of the toys except for  
17 some of those on the same basis because those are the property  
18 of the child and not the property of the parents and likewise,  
19 the quilts. There's some question over what belongs,  
20 apparently, to the child.

21 Now, each party is awarded the property in their own  
22 possession with being specific, except for what I changed  
23 here. The defendant is awarded that '78 pickup that he talked  
24 about, VCR and TV. There are, apparently, more than one quilt  
25 and the one quilt I am talking about is the one quilt that



1 was spoken of as a quilt to the--a gift to the child, Heather.  
2 The others belong to the plaintiff.

3 The plaintiff will keep the two keepsake dolls and  
4 Cabbage Patch dolls for the sake of the child. They are the  
5 child's, but I am going to let her specifically keep that  
6 property in her possession.

7 MR. STRATFORD: The defendant or the plaintiff?

8 THE COURT: The plaintiff. What did I say.

9 MR. STRATFORD: The defendant.

10 THE COURT: Okay.

11 MR. STRATFORD: Then you said her and I couldn't put  
12 them two together.

13 THE COURT: The quilt, other than the one that  
14 belongs to the child--the quilts other than the one belonging  
15 to the child, the two keepsake dolls and Cabbage Patch dolls  
16 to the plaintiff. It's probably better off if I said husband  
17 and wife so we don't get the confusion.

18 With regard to the debts, each party is going to be  
19 required to pay any debts they may have incurred since the  
20 time of their separation. The plaintiff is going to be  
21 required to pay any medical bills that may have been incurred  
22 in the birth of the child because she chose not to use that  
23 medical attention which was available to her without cost  
24 through the military service.

25 On the other hand, the Court is going to require

1 the defendant to pay the debt to the Utah Valley Credit Union  
2 of about \$2,400, jewelry of about \$400 and the J. C. Penney  
3 bill of \$300.

4 Now, my reasons and these, of course, need to be  
5 stated as to why I have done what I have with the custody.  
6 Parties are really not going to like what I say about it but  
7 we don't lightly change custody as parties know and there's  
8 always the temptation, of course, to immediately file an  
9 appeal and I don't care if parties file an appeal. I just  
10 explain why I am doing what I am doing. It's not to be cruel  
11 to each other but to let you know why I did what I did and  
12 it's not always kind in what I have to say.

13 So, first, I think there has been some criticism of  
14 the defendant because of his military service. That he quit  
15 the military service when he had a good job and could have  
16 gone on making good money and supporting the family. The  
17 Court finds that the defendant gave up what would be a good  
18 job for the benefit of the possibility of having custody of  
19 his child and to be a responsible parent. That's why he--if  
20 not the primary reason, certainly one of the primary reasons  
21 he left the military service. There was no chance in the  
22 world he would have been granted that custody if he remained  
23 in the military service with assignments that would certainly  
24 take him to Germany.

25 There is another consideration just with the

1 military that we can't--normally our appellate courts have  
2 said we will talk about custody matters. We will pretty much  
3 leave the children where they have been unless there's some  
4 major reason for changing them. If we followed that in this  
5 kind of a case we would never consider the person who is in  
6 the military service for custody because they are always  
7 subject to that kind of a change of duty and that like the  
8 plaintiff--or not like the defendant, husband, was on his six  
9 months of basic training, there was no way that the family  
10 could be together.

11 So, you can say, well, see, the mother was the  
12 primary custodian during that period of time and she was.  
13 Then, of course, they spent six, seven months together while  
14 they were down in Texas and then major problems developed that  
15 caused them to separate and she moved back to Utah which made  
16 for practical purposes visitation impossible or custody  
17 impossible without some court granting custody there. So,  
18 there is a special consideration that must be given to these  
19 military circumstances that would not be there if both parties  
20 were in the State of Utah.

21 Now, there have been problems between the parties  
22 while they were married. This report that I have got from  
23 Steven Watson says the parties have argued a good deal and had  
24 problems between them in their marriage and, of course, he has  
25 listened to both parties to get that information and then what

1 he could observe. It would seem to the Court that each party  
2 is an equal contributor in whatever inability to get along in  
3 the marriage has been. One no more or less than the other.

4 With regard to the physical altercations they have  
5 had and, apparently, they have had a number of them and it has  
6 been pointed out that the husband has reacted violently on  
7 times and has shaken or slapped the wife, but not greatly out  
8 of control. Not the violence that so often we see in  
9 marriages where one doubles up a fist and breaks a jaw or  
10 breaks an eye or breaks an arm or something else.

11 Now, mind you, I don't condone it. No man, no woman  
12 has the right, married or unmarried, to use physical force on  
13 another person. The fact of a marriage relationship does not  
14 give one the right to do something that is otherwise illegal.  
15 It's still illegal. It's still improper, but I am saying that  
16 I recognize that it occurred.

17 I recognize, too, that these didn't always occur  
18 just because the defendant or husband got angry. The wife was  
19 often the agitator and often the instigator. It involved  
20 slapping and kicking and almost always taunting and while,  
21 what we normally--if we take this outside of the home and  
22 something like this happens and a battery takes place or an  
23 assault takes place where somebody punches somebody in the  
24 mouth and we look to the provocation and we say, what's the  
25 provocation. Why do they do what they do? If there's great

1 provocation, we don't excuse them but my goodness, we  
2 certainly take it into account when we impose a sentence for  
3 it.

4 That's all I say in this case. There's a good deal  
5 of provocation and also actual involvement on the part of the  
6 wife as it was on the part of the husband. I am not condoning  
7 either one because it's improper in a marriage as it is out.

8 With regard to love of the children, I am absolutely  
9 satisfied that both parties love the children. They want what  
10 is best for the children. Certainly, as the husband took a  
11 hardship discharge from the military so that he could  
12 hopefully have custody of one or both of these children, I'm  
13 sure if the same option were left to the wife she would do the  
14 same thing.

15 The evidence does show that the wife has been the  
16 primary caretaker, but the primary caretaker must be put in to  
17 context of this military service that I spoke of and being in  
18 the military service, had he not been in the military service,  
19 they would have probably ranked in my mind as jointly being  
20 caretakers. I am not sure one would be any more prime than  
21 the other, while I am recognizing that the wife said he was  
22 basically a lazy bum and wouldn't do things. He would watch  
23 TV and so on while I worked and I am not saying you said that  
24 today, but I am just repeating it from what Mr. Watson has  
25 stated in his report here.

1 I think that he had enough concern that he was with  
2 the child and did things with the child and probably hadn't  
3 come to the point that so many of us are today in this world  
4 that ERA is demanding equality. I don't know if we are ever  
5 going to get it, but it certainly has changed lifestyles,  
6 anyway, as this hearing is evident of.

7 Now, I think both parties are tied to their parent's  
8 apron strings and there's some positive and some negative  
9 aspects to that. As I listened to both parents tell what  
10 their son or son-in-law or daughter-in-law and in the report  
11 what they did and didn't do, I am not so sure these young  
12 people are making all the decisions they need to make for  
13 themselves. When there's hard problems between them, they  
14 shouldn't have been asking mom and dad. They should have been  
15 asking each other.

16 And sure, they will make mistakes and in doing that--  
17 but, you grandparents stop and tell me if you didn't make the  
18 same mistakes, you know, when you were young. I know you did.  
19 I made a lot of the same mistakes and now that I know my  
20 parents a little better, I know they made some of those same  
21 mistakes. They were not perfect, but they had a son that was  
22 not perfect either. I have six children and my children don't  
23 think their dad is perfect and is not. I have six children  
24 and my six children are not perfect either.

25 What I am trying to point out is that sometimes,

1 hopefully not very often, we learn by experience and we learn  
2 good through experience and there needs to be a point where  
3 both of these parties cut those ties with the parent's apron  
4 strings. I am not suggesting that be done right now. I think  
5 while both these parties have got these children to care for  
6 and they are both trying to get through school and both  
7 finding the necessity of working, that is probably a great  
8 support, but they still ought to basically be able to make  
9 some of those basic decisions themselves and parents ought to,  
10 being a little crude, keep your nose out or make them or even  
11 insist they make them.

12           You know, I recall back when I got married and my  
13 wife's mother wanted to know if she could give her a coat and  
14 I said, "No." And she said, "Why not?" I said, "Because you  
15 need it." I was willing that anything that she didn't need  
16 they could give to her, but anything she needed I didn't want  
17 them to give to her because I didn't want to undermine my  
18 right as a husband and, you see, as a father in that home.

19           I am telling them that these same kind of decisions  
20 have to be made by these two and I recognize there is a  
21 difference today. Not a counseling session to get them back  
22 together.

23           Now, another problem. There have been problems in  
24 the visitation and where one child is in each home, I suppose  
25 you just have to be as reasonable with one as you are with the

1 other and I know we are talking about another six, eight  
2 months, but that's such a small length of time. We are  
3 talking about 18 years here today. We are just not talking  
4 about six or eight months and I think you need to cooperate  
5 with each other. You need to try to think about what is fair  
6 and if some special event is important to the other party and  
7 they want some visitation and they have got no entitlement to  
8 it, you ought to let them take and vice versa. If your family  
9 is having a family reunion and you wanted the children and  
10 it's his time to have them, boy, I think there ought to be  
11 give and take.

12 But, I have been pretty definite in what I ruled out  
13 because I know there have been problems in the past and I  
14 think that the Gyver family have contributed to that somewhat.  
15 I don't think that the defendant and his parents have always  
16 been given the visitation under the court's order that they  
17 have a right to.

18 Now, a consideration for this, too, is that at the  
19 time while the parties were in Texas together, the Court does  
20 not believe Janette primarily cared for the child, Heather.  
21 Where there was the claim of severe diaper rash and the Court  
22 is inclined to--understanding that people today--I am inclined  
23 to believe that and I think in that case, while I don't think  
24 the husband is what I call a fully-matured person, that's not  
25 a terrible criticism, but I don't think you are a



1 fully-matured person.

2 Basically, in that Texas situation, he showed a  
3 disposition, both to visit with the children and to--and when  
4 he recognized the problem, to immediately do something about  
5 it and even recognized when there was a problem that something  
6 was done about it. He had no choice as to his thing, his work  
7 goes on. That's part of his military and I suppose that may  
8 create a lot of problems, but that's part of his military  
9 life, even if it's for a short period of four years.

10 I can't exclude Janette, the threats of suicide. I  
11 don't have to believe that they were serious, but they are  
12 certainly suggestive of psychological problems and I am not  
13 even sure that you haven't put them all behind you. I hope  
14 you have. Certainly, the husband has shown nothing of a  
15 psychological nature that would interfere with his ability to  
16 properly care for Heather.

17 There has been an allegation of the paregoric and I  
18 have listened to it. I think I tend to believe that you were  
19 using paregoric improperly and without a doctor's prescription  
20 on the children. I would hope that you never do that. That  
21 any prescription drug for young children had never ought to be  
22 done and even the suggestion, of course, and you may not have  
23 known about it, is that, of course, Kevin, if you take  
24 paregoric it may, of course, have an effect on Kevin as you  
25 have to ask doctors about when you are nursing a young child

1 because they can often be transmitted from one to the--from  
2 the mother to the child through the milk.

3 Certainly there's a consideration that the  
4 plaintiff's home or the wife's home seems to be almost too  
5 crowded for the whole family, but it's not in and of itself a  
6 determining factor. It's just another one of those things,  
7 when you put it all together, while I find that the  
8 defendant's home has plenty of room, if we talk about the  
9 parent's home in Salem as opposed to the apartment.

10 Those are my rulings, my reasons. Any questions  
11 from either one of you? You did submit a list called  
12 Defendant's Exhibit 1. You agreed by stipulation that that  
13 would be part of it and I suppose wherever it is, that's the  
14 part that if it is there, that the defendant is going to be  
15 given; is that correct?

16 MR. STRATFORD: That's our agreement, yeah.

17 THE COURT: Yes. Anything else?

18 MR. STRATFORD: Anything that has the name of  
19 Janette on it, we--

20 MR. NEELEY: When does it take place, your Honor?

21 THE COURT: It takes place immediately but I think  
22 where there is going to be a change, you hadn't ought to talk  
23 about the change until Sunday evening since we are on Friday.  
24 Then, do you want me to spell out when every other weekend  
25 starts or I suppose you can easily calculate it to two weeks

1 from today as I can.

2 MR. NEELEY: No.

3 THE COURT: Direct that Mr. Stratford, that you draw  
4 the papers.

5 MR. STRATFORD: Thank you, your Honor.

6 THE COURT: Any questions? Okay. That's all.  
7 Thank you.

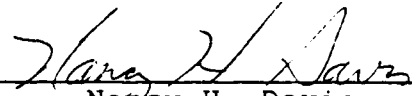
8 (Whereupon, the proceedings were concluded.)

9 -o0o-

REPORTER'S CERTIFICATE

STATE OF UTAH )  
COUNTY OF DAVIS ) ss:

I, Nancy H. Davis, Certified Shorthand Reporter,  
State of Utah, do hereby certify that the foregoing  
transcript, consisting of 18 pages, were stenographically  
reported by me at the time and place hereinbefore set forth;  
that the same was thereafter reduced to typewritten form, and  
that the foregoing is a true and correct transcription of  
those proceedings requested to be transcribed.

  
Nancy H. Davis

My Commission Expires:

9/22/88

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

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COUNTY OF DAVIS, UTAH  
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|--|--|--|
| <p>JANETTE DEEBEN,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>DERICK R. DEEBEN,</p> <p style="text-align: center;">Defendant.</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>ADDITIONAL FINDINGS<br/>OF FACT</p><br><br><br><br><br><p>Civil No. 40735</p> |
|--|--|--|

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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.

FILMED

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.

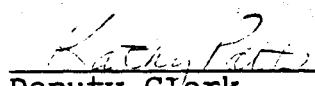
Dated November 2, 1988.

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

**TESTIMONY (IN PART) OF  
DERICK R. DEEBEN**



1 hit and kick at me.

2 Q Would she stand nose to nose with you and say these  
3 words?

4 A Yes, she would.

5 Q And did she ever threaten to destroy herself on more  
6 that one occasion?

7 A Yes.

8 Q On numerous occasions?

9 A Yes.

10 Q Would you tell us what led up to these types of  
11 things?

12 A On one occasion I am unsure what the occasion was.  
13 It was before we were married. I stopped at her apartment.

14 Q This is prior to the time you were married?

15 A Yes, to see her and her roommate answered--let me  
16 into her room. She was passed out on the bed. There were  
17 several beer cans in evidence as well as a bottle of  
18 paregoric. I picked her up and walked her around the room  
19 trying to get her to wake up. She finally woke up and she had  
20 been trying to kill herself with paregoric and beer together.

21 On a following occasion when she had grown up we was  
22 arguing because she had agreed to go to my family. We had  
23 gone to her family and she agreed to go to my family and in  
24 trying to get ready we had the argument about what we should  
25 have Heather wear and she argued and she never wants to go

1 to my parent's at all. Heather was wanting to go. Then she  
2 picked up the knife, held it against her chest and said she  
3 was going to commit suicide. I told her I would divorce her  
4 if she kept threatening things like this and not changing my  
5 daughter's diaper, not keeping the rashes off.

6 Q Let's get back to the knife incident before we leave  
7 that. Was the point of the knife pressed against her body or  
8 clothing?

9 A Yes, it was.

10 Q She indicated it was just held out in front of her.

11 A It was not held out in front of her. It was held  
12 against her chest.

13 Q Did it appear she had every intention of doing  
14 something with that knife?

15 A Yes, it did.

16 Q What did you do in response to that knife?

17 A I slapped the knife out of her hand. I had my  
18 daughter in my left arm. I then, with my forearm, shoved her  
19 back against the wall, laid my daughter on the table that was  
20 right there by the telephone.

21 Q What did you do with the knife?

22 A I left the knife laying in the middle of the floor  
23 and I called the police immediately.

24 Q What was the purpose in calling the police rather  
25 than the doctor?

1       A     To try to get some help to control her. She was  
2 being very vicious, hitting, kicking and clawing at me and  
3 several of these hittings were coming extremely close to my  
4 daughter.

5       Q     Now, you indicated also that there are various times  
6 that you noticed some difficulty with her care of Heather.

7       A     Yes.

8       Q     Have you noticed any difference between the care of  
9 Heather when she was by herself or within the family  
10 relationship with you as opposed to the care of Heather now?

11      A     Yes, I have.

12      Q     What is the difference?

13      A     The difference now it seems is that she is either  
14 grown up enough to keep Heather's diapers changed where rashes  
15 aren't on her and that Heather is being fed consistently now.

16           THE COURT: Isn't she potty trained yet?

17           THE WITNESS: Yes. Heather is potty trained now.

18           THE COURT: Okay.

19           THE WITNESS: While I was in Texas with her on  
20 several occasions I would come home as late as midnight, even  
21 two in the morning on one incident. Heather was in front of  
22 the fridge screaming because she had not eaten all night.  
23 Janette was in front of the TV. I asked her why. Janette  
24 stated that she was a big girl and that she could take care of  
25 herself.

1 Q (By Mr. Stratford) Did you have occasion on more  
2 than one time to form an opinion or see--let's back up. Did  
3 you have occasion to see any problems, physical problems with  
4 Heather as a result of the care or lack of care by her mother  
5 when you returned from the field?

6 A Yes.

7 Q Would you tell us what you found and what you saw.

8 A On several occasions upon returning from the field,  
9 I would find Heather extremely diaper-rashed. Her bottom  
10 would be bleeding from the rashes. At these times we did take  
11 her into the doctor on a couple of occasions and he did  
12 prescribe some medication. He stated then that the diapers  
13 needed to be consistently changed.

14 Q And while you were present in the home, did you have  
15 occasion to change diapers and participate in the care of the  
16 child?

17 A Oh, yes. Several times. My daughter would, in  
18 fact, tell her mother she did not want her mother to bathe her  
19 and she would ask for me by name.

20 THE COURT: I think at this point we will take a  
21 noon recess. Be back at 1:30

22 (Whereupon, a luncheon recess was taken.)

23 THE COURT: Have your witness come back up and let's  
24 proceed.

25 MR. STRATFORD: By way of housekeeping items, if

1 it please the Court, we have introduced Exhibit 1, Defendant's  
2 Exhibit 1, which was a list of wedding gifts received and  
3 during the noon hour we wrote up a handwritten list which I  
4 think the parties have agreed would satisfy the questions we  
5 are asking and so if we can have some copies made, then we can  
6 supply copies to each counsel and we can substitute this in  
7 lieu of the other list. Is that agreeable?

8 MR. NEELEY: Sure.

9 DIRECT EXAMINATION (Continued)

10 BY MR. STRATFORD:

11 Q Now, you are Derick Deeben who was on the stand  
12 prior to the noon break.

13 A Yes.

14 Q Do you recognize the oath you took this morning is  
15 still binding upon you and you still have an obligation now as  
16 you did then.

17 A Yes, I do.

18 Q Now, then, at the time we concluded this morning,  
19 you were concerned about what change you noticed between the  
20 time that she--that your wife, Janette, has returned to her  
21 family home as opposed to when she was taking care of the  
22 children when she was by herself. I believe that's where we  
23 left it; was it not?

24 A Yes, it was.

25 Q Would you tell the Court what differences you have

1 noticed or what appears to you to be different than it was at  
2 the time that Janette was by herself or with you and her  
3 ability to tend to the children.

4 A Since she has been home with her family I feel that  
5 she has actually put a little more, shall I say, desire into  
6 insuring that the children's welfare is better. When she was  
7 in Texas there was no real concern with the children. She,  
8 having stated that she is old enough and that she can take  
9 care of herself, as far as getting food out of the fridge,  
10 making Heather actually open the fridge and getting her own  
11 food out, macaroni and cheese, to be exact, and in Tupperware  
12 containers.

13 Q Now, there has also been some question raised about  
14 your concern about marks appearing on the child's body. Would  
15 you indicate to the Court--Janette made the statement. You  
16 heard the statement during her direct examination.

17 A Yes.

18 Q That she had been referred for purposes of child  
19 abuse as far as the mark was concerned.

20 A Yes, I did.

21 Q Would you tell the Court what you observed and what,  
22 if anything, that Heather did in connection with those marks.

23 A Yes. When Heather came down to our home we noticed  
24 a bruise on her thigh, approximately a 33-degree angle coming  
25 down from the front towards the back on the outside of her

1 thigh in the upper two-thirds of her thigh.

2 Q So, we are not talking about a small round bruise.  
3 What are we talking about?

4 A We are talking about something that was  
5 approximately three-eighths inch wide and approximately an  
6 inch to an inch and a half in length. The bruise was fairly  
7 black. It was a couple days old before I saw it for the first  
8 time which was when I picked her up to take her home. We do  
9 have a picture of that on video tape.

10 Q And did anything unusual happen when you returned  
11 Heather to the Gyver home after that weekend?

12 A Yes, it did. Heather went in and we entered through  
13 the kitchen or the back door into the kitchen. Heather  
14 stepped into the living room area.

15 Q All right. Who was present at that time?

16 A Myself, my little brother, my little sister,  
17 Mrs. Gyver and Janette. I am not sure if Janette's sisters  
18 were there or not. I am not sure of that. Heather walked  
19 into the corner of the living room and picked up, what I would  
20 say would be a black powder ramrod. Walked out and said,  
21 "My grandpa hit me with this," at which time, Mrs. Gyver turned  
22 around and grabbed the ramrod, put it back in the corner, took  
23 Heather's arm and said, "No, your grandpa couldn't have hit you  
24 with that because he is not here right now."

25 Then she led her into the kitchen and they started--she

1 put a fingerful of frosting into her mouth and then Janette  
2 said, don't eat too much frosting, you will get sick and at  
3 the same time still giving her more frosting.

4 Q Did you try to explore or ask what happened or what  
5 this was all about?

6 A Yes, I did. I asked what had happened and Janette  
7 stated, well, she fell off of her bike and I said, okay and I  
8 left it at that. I believe what my daughter said and I was  
9 extremely concerned. Before we had taken her back, which was  
10 Sunday, that morning I had taken her over to the church house  
11 where our family physician was at the time and I got him out  
12 of the meeting and I asked him if he would take a look at it  
13 so he could see how he felt about it because I didn't want to  
14 jump to any conclusions.

15 Q And based upon what he said, what did you do?

16 A Based upon what he said, he said--

17 Q I don't want to know what he said. Just tell me  
18 what you did as a result of what he told you.

19 A Yes, that is correct.

20 Q What did you do? What was your reaction?

21 A Well, what I done is, I took Heather back and asked  
22 them what had happened.

23 Q By them, you mean the people at the Gyver home?

24 A Meaning the Gyvers and I was told by Dr. Clark  
25 that--



1           Q     That's hearsay, what Dr. Clark told you. I want to  
2 know what you did after he examined the child and based upon  
3 his examination, what you then did.

4           A     Okay. I took Heather back to our home and got her  
5 ready and we took her, at that time, back up to the Gyver's  
6 residence where the above mentioned occurred.

7           Q     You said you turned her in for child abuse. Was any  
8 report filed?

9           A     I did not file a report.

10          Q     So, you do not know of any report of child abuse  
11 being filed per se on that?

12          A     No. I don't know for sure that a child abuse report  
13 was filed.

14          Q     So, if one was filed, it was filed by a physician or  
15 someone other than yourself?

16          A     That is correct.

17          THE COURT: You didn't go to Social Services at all  
18 about it?

19          THE WITNESS: We had contacted Social Services at a  
20 time before and asked them about it, your Honor, and what we  
21 could do.

22          THE COURT: All right. That's all. All right. I  
23 just wanted to know.

24          Q     (By Mr. Stratford) Now, then, this question about  
25 the paregoric. You raised some considerable concern about

1 that. Would you tell the Court what causes you concern about  
2 that and why you registered this concern.

3 A Yes. On several occasions when we would pick up  
4 Heather for the weekend, upon trying to put her to bed, she  
5 wouldn't go to sleep. She would either be completely  
6 lethargic but not willing to sleep or she would be almost  
7 hyperactive and she would stay up extremely late at night,  
8 much like--I have seen people on drug withdrawals. She then  
9 would say before she would go to bed, I need my medicine.

10 Q Has that happened on more than one occasion?

11 A Yes. Several occasions.

12 Q Now, then, when you have returned Heather to the  
13 Gyver home and you had occasion to take the young child,  
14 Kevin, have you noticed anything unusual or out of the  
15 ordinary so far as Kevin is concerned?

16 A Yes. Up until the report was filed with the  
17 Division of Family Services about the paregoric, after Heather  
18 asked for it by name, Kevin was exceedingly lethargic, being  
19 not like a young child should be at that time of evening and  
20 we would have a rough time waking him up for anything.

21 When he was awake he would lay there. He wouldn't play.  
22 We would have toys there for him. He wouldn't even watch  
23 them. After the report was made, the next time we picked him  
24 up he was active and like a child his own age.

25 Q So, you noticed a substantial difference?

**TESTIMONY (IN PART) OF  
CHARLENE DEEBEN**

1 have indicated that you noticed some things that concerned you  
2 about Heather's well-being and about her receiving medication  
3 and/or care in the Gyver home. Would you indicate to the  
4 Court what your concerns were and the reasons therefore.

5 A We picked her up on every other weekend and the  
6 last, probably from the mid of September--I'm not sure of the  
7 exact dates. I have it documented. Anyway, Heather--we would  
8 get her ready for bed and she would ask for medication. We  
9 discussed it, what medication would Heather be getting and we  
10 would talk to her and we would say, "Heather, you don't need  
11 medication."

12 Then in October Derick would try to get her to bed and I,  
13 of course, with the rest of the family and finally at 3:00 he  
14 came to me and said, "Mom. She keeps asking for medication  
15 and she said she has a tummy ache." He said, "Do you think  
16 she is getting the flu?" Well, when we got up and she didn't  
17 have a fever or anything like that but she kept asking for  
18 this medicine--and I said, "Well, I don't know what  
19 medication, but she has asked for it a lot of times."

20 Usually Heather is not one that wanted to take medication  
21 and that surprised me that she had been asking for it because  
22 any time, you know, when we got medication from the doctor to  
23 give her when she had strep throat, she didn't want to take it  
24 and we would have to talk to her about it and then she would  
25 take it.

1        Anyway, it was 3:00 in the morning and so we decided that  
2        maybe she did need something. Maybe she was having a flu and  
3        we had some Pepto-Bismol and baby Tylenol. We had gotten the  
4        Tylenol when she had the strep throat and I said, "Do you  
5        think if she has a tummy ache, with the Pepto-Bismol, we can  
6        give her a teaspoon of that." I tried to give her two baby  
7        Tylenols and she told me that that wasn't the medicine I take.  
8        "This is the wrong medicine, Grandma." She would not take the  
9        Tylenol at all until I crushed it up and mixed it in some  
10       water and put it in a teaspoon, then she did take that. It  
11       was 4:30 before we got her to bed. 7:00 she was up. She went  
12       the whole day, no nap, no nothing, other than she slept about  
13       half hour when we were traveling home from Ephraim. We had  
14       gone down to get wood.

15       Again, when Derick was trying to get her ready for bed  
16       she started asking for medicine. She needed medicine to go to  
17       bed.

18       Q       Did something unusual happen?

19       A       Later on, yes. She finally said to me, "I have to  
20       have my grandpa. I can't sleep without it. I have a tummy  
21       ache. I need my paregoric. I get my paregoric before I go to  
22       bed at night."

23       Q       Those are the words that she used?

24       A       Those are the words she said and I said, "Oh,  
25       Heather. They are not giving you paregoric," and she said,

1 "Yes. I have to have my paregoric. I can't sleep without it.  
2 I have a tummy ache."

3 Q And did you notice anything different in her  
4 behavior?

5 A She was agitated. She wouldn't sleep but yet  
6 sometimes she played really good, but other times she would be  
7 so much more uptight, more nervous. I was concerned, the fact  
8 that she just wouldn't sleep and we couldn't get her settled  
9 down and now she takes a nap each day we have her and she goes  
10 to bed good at night. We don't have any problems and she goes  
11 right to sleep.

12 Q That's after the question arose as to the paregoric  
13 was settled?

14 A Yes. It has been the last two weekends we noticed.

15 Q A change?

16 A A change in her.

17 Q Did you notice anything unusual about the child,  
18 Kevin?

19 A Oh, yes.

20 Q Would you tell us what, if anything, you observed  
21 about the child, Kevin. Let me preface that. As I understand  
22 it, you had the child for 45 minutes when you picked up  
23 Heather and then when you came back Sunday night you had the  
24 child approximately for approximately two hours. What, if  
25 anything, unusual did you notice about the child?

1       Q     Well, he would lay in his little chair. There was  
2 no motion. He never kicked. He never played. He would lay  
3 and look at us. You try to talk to him and there was no  
4 nothing. Once in a while we did finally get a smile but never  
5 moved his arms or lets.

6       If we held him he was immediately asleep. We never could  
7 keep him awake. At times he acted like he was hungry. We  
8 did, on two occasions, give him a bottle of water which he did  
9 take, but then he would drop off to sleep. We couldn't keep  
10 him awake.

11       Q     Did you think that was somewhat unusual?

12       A     Oh, yes. We were very concerned about it. In fact,  
13 I spoke to our family physician about it and asked him. You  
14 know, I had looked into a paper. I am an R.N. and I looked to  
15 see what a child between three and four months should be doing  
16 and he wasn't doing any of them.

17       Of course, we had Derick's friend, who had a child the  
18 same age as Heather and there was a total difference and so I  
19 spoke to the family physician and said that he was not doing  
20 these things. Is there anything we should be concerned about.  
21 Should we have tests or what should be done. He is not  
22 developing right and he didn't know. He just said--told us to  
23 let him know kind of what we found each time that we picked  
24 him up from there after.

25       Q     And after this question was determined about the

1 paregoric being in the house and some of the problems that,  
2 apparently, you were concerned about and after the report was,  
3 in fact, made, did you notice any change about the child?

4 A Yes. We picked him up on Friday night. I didn't  
5 notice too much change then, but then when we came back for  
6 two hours Sunday night he was totally different. We could  
7 crinkle paper off to the side and he would turn his head where  
8 before he would never do that. There was no eye movement at  
9 all before. He was watching objects as we moved them. He  
10 could lift himself up in his little seat and he would hand  
11 onto my fingers whereas before he was just slumped. There was  
12 nothing there. He was laughing. He was kicking. He was  
13 playing with his hands. These are all normal things that a  
14 child should be doing at that age and he didn't go to sleep  
15 until we would bring him home and he would fall asleep in the  
16 car when we were coming home.

17 Q Now, you indicated that you have some medical  
18 experience by way of background. What is your medical  
19 experience?

20 A I am a registered nurse and I work for I.H.C. Home  
21 Health and I worked there for three years and I worked for the  
22 county for three years previous to that and then I had  
23 experience in the hospital and in doctor's offices.

24 Q So, how long have you been a registered nurse?

25 A Oh, dear. I would tell my age. Since 1959. The