

1992

## Hartwig v. Hartwig : Brief of Appellant

Utah Court of Appeals

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920496

**Mary T. Noonan**  
**Clerk of the Court**

**UTAH COURT OF APPEALS**

LISA HARTWIG,

**Plaintiff/Appellee,**

**vs.**

DAVID HARTWIG,

**Defendant/Appellant,**

## BRIEF OF APPELLANT

**Case No. 920496-CA**

**Priority 15**

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, UTAH  
HONORABLE ANNE M. STIRBA, DISTRICT COURT JUDGE

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## STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the appellate court pursuant to section 78-2a-3, Utah Code Annot. (1953, as amended).

## STATEMENT OF THE ISSUES

There are three basic issues presented to this court for review. Each issue has a number of sub-issues related and contributing to the main issue involved.

1. What is the appropriate standard for determining visitation when the custodial party relocates out of the State of Utah with the minor children of the parties. Should the court continue to use the actual extended visitation which occurred prior to the move, which was limited by the custodial parent, as a controlling basis or rationale for the visitation awarded after the move? How does one reconcile the differences between the recommendation of the Domestic Relation Commissioner, who has great expertise in this area, and the order of the court which was based upon the history of visitation prior to the relocation out-of-state. Is it in the best interests of the children who are caught up in interstate visitation to split the visitation based on age, which in this case requires that one child be sent home to the custodial parent while the other remains to exercise his full

visitation?

2. The second issue involves all aspects of the interpretation and implementation of an order for reimbursement of work-related day care expenses under §78-45-7.16 and 78-45-7.17, Utah Code Annot. (1953, as amended). Does the statute contemplate requiring payment of one-half of the day-care expenses without a requirement of an itemization or accounting of the expenses claimed and without verification that the recipient was actually employed and not on vacation or engaged in some other activity? Does this statute contemplate the full cost of a day-care provider who provides laundry, cleaning, cooking and other household services in the custodial parent's home? Does it require reimbursement for both the day-care provider and concurrent private preschool or school, even though public school is available, where the children are in school, not with the day-care provider, for a good portion of the day?

3. Should the court consider a second employment in setting the amounts to be paid, without any historic basis for that second income?

4. May findings contain matters which were not found by the court pursuant to a review of the transcript and entered over the objection of the other party. The standard of review for this issue is that of "clearly erroneous". *Maughn v. Maughn* 770 P. 2d 156 (Utah App. 1989).



**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,  
AND RULES**

The following are the citations for the provisions which Defendant believes may be determinative of the issues presented. Each provision, statute or rule is set forth in its entirety in section "C" of the attached addendum.

A. Statutes: Sections 30-3-5; 78-45-7.5; 78-45-7.16; 78-45-7.17; and, 78-45-7.18, Utah Code Annot. (1953, as amended).

B. Rules: Rule 52, Utah Rules of Civil Procedure.

C. Defendant is not aware at this time of any constitutional provisions, ordinances or Utah cases which are dispositive on the issues raised herein.

**STATEMENT OF THE CASE**

A. Nature of the case:

Defendant filed a petition for modification of a decree of divorce seeking a change of visitation due to Plaintiff's move to California with the children of the parties. Plaintiff counter-petitioned seeking modification of the amount of day care reimbursement Defendant was required to pay to Plaintiff.

B. Course of proceedings:

The petition and counterpetitions for modification of the decree of divorce filed in this matter came on for trial on April

2, 1992, after having been before a domestic relations commissioner for a pretrial and after a pretrial before the trial judge.

C. Disposition at trial court:

An order modifying the decree of divorce was entered June 30, 1992, in the Third Judicial District Court. No motions were made under Rules 50(a) and (b), 52(b), 54(b), or 59, Utah Rules of Civil Procedure. The notice of appeal was filed on July 23, 1992. Record at 239. A copy of the order entered is set forth in Addendum "A" attached hereto.

#### RELEVANT FACTS

A decree of divorce was entered by the trial court on August, 22, 1990. Record at 118-129. Plaintiff was awarded custody of the two minor children of the parties subject to Defendant's visitation. Record at 119-121.

Defendant was awarded the following as his extended visitation: i.) Christmas Day from 6:00 PM through December 26th at 8:00 PM; ii.) Prior to the children entering school, two one-week blocks in the summer and once the children reach the age of nine, six weeks in the summer, not to exceed four weeks for one visitation block; iii.) Upon the children entering school one-half of the Christmas break and one month in the summer for two two-week

periods. Record at 119 - 121. In addition to the extended visitation, Defendant was granted reasonable visitation defined as: Alternate weekends from Friday at 6:00 PM to Sunday at 6:00 PM; Alternate holidays; One evening on the off week from 5:30 PM to 8:30 PM; Father's day; and, the afternoon and evening of each child's birthday or one day in the week of that birthday. *Id.*

Defendant fully exercised his rights of visitation. Transcript, at 50. He had the children with him as often as he could, and Plaintiff had him care for the children at additional times. Transcript, at 51, and 57.

At the end of August, 1991, Plaintiff moved to California with the minor children and her new husband. Transcript, at 27 and Record at 145. Her sole reason for the move was to allow her husband to attend school. Transcript, at 28. Record at 157-158.

Prior to this relocation, Plaintiff gave to Defendant notice of her intentions to move to California. Discussions to settle changes to the visitation failed. Record at 149. On August 15, 1991, Defendant filed his petition for modification of the decree of divorce on the issue of visitation. Record at 131-136. Plaintiff was served with process on August 15, 1991. Record at 157-158.

Plaintiff counterclaimed on the issue of the amount of day-care to be reimbursed to her from Defendant. Record at 142-151. Plaintiff alleged that day-care under the statute should include

paying for private preschool and paying for a full-time day care provider who would be present in the home while the minor children were in school. Record at 193-195, 208-209. Transcript at 38.

The claims came on for a pretrial settlement hearing on October 28, 1991, before Commissioner Arnett. Record at 174-175. He recommended the Defendant be granted one-half of the school summer vacation. *Id.* These recommendations were accepted by Defendant, but rejected by Plaintiff. Transcript, at 3 and 24.

The case went to trial on April 2, 1992. Record at 207. The court received and utilized information of Defendant's second employment, a fledgling solo legal practice, without historical review of Defendant's actual income, determined based thereon that Defendant was capable of paying more, and based the award of day-care thereon. Transcript, at 13 and 78. The court found it reasonable that Defendant reimburse total day-care expenses which included housekeeping services in Plaintiff's home, i.e., including doing the children's laundry, cleaning the children's rooms, preparing the children's meals and cleaning up after them, staying in the home while the children were in school and being on call; and that the day-care reimbursement should be at a flat rate without any proof as to utilization of the day care in a work-related manner. Transcript, at 77 - 79. Further, the court

found that Plaintiff may continue the five year old child in private preschool or private school, with one-half of the expense of both school and a full-time day care provider being charged to Defendant as work related day-care while the day-care provider remains alone at the Plaintiff's home during school hours. Transcript at 80 - 82. The costs of private school were to be charged to Defendant on an order to show cause without a full hearing on any allegations raised by Plaintiff in support of her position. Transcript, at 81 - 82. The result of this is the shifting of the burden of proof onto the Defendant to rebut the schooling. The judge indicated that it was her personal opinion that it is reasonable to split the children up for visitation purposes during the two years while the transition from age seven to age nine occurs for the younger child, despite both parties indicating that the children should be treated equally. Transcript, at 52 and 73.

The findings presented by Plaintiff and signed by the court contained a number of additional matters which were not found by the court as a review of the transcript shows. Record at 211 - 213. These findings and the order based there on were entered over the objection of Defendant. Record at 216 -217. This appeal was filed on those findings and order.

## SUMMARY OF ARGUMENT

I. The trial court, in limiting extended visitation, abused its discretion in light of the standardized visitation schedule in effect and the nature of the changed circumstances. It is an abuse of discretion to require siblings to be split up for any portion of the extended visitation.

In arriving at its findings, the trial court erred in hearing or considering any actual extended visitation which occurred prior to the change in circumstance, as the parties had been divorced for only one year prior to the change and as Plaintiff, the custodial parent, controlled any other visitation than that which was ordered prior to the change.

II. The trial court committed reversible error in its award of day care and in the findings supportive of that award.

A. The provisions of 78-45-7.16 and -7.17, Utah Code Annot. (1953, as amended) should control any order of day care reimbursement. It was an abuse of the court's powers to set a flat fee without the requirement of documentation contemplated by those statutes particularly in light of the facts that the day care provider is performing service to Plaintiff other than day care and that the children are absent for significant periods of time during the day.

B. "Reasonable day care" (emphasis added) requires that

the court consider all factors including the necessity of the expense of private school; it was error for the court to award the amount of day care which it did, It was further error to speculate regarding future secondary income in that award without a proven history of that secondary income.

C. The Plaintiff should be required to substantiate the use of the day care provider for work-related purposes in order to obtain reimbursement from Defendant to alleviate abuses which have occurred in the past and to insure that the expenses truly are work-related.

III. It is clearly erroneous for a trial court to sign and enter findings of fact which do not comport with the oral pronouncement of its finding as reflected by the transcript particularly when an objection is filed addressing those errors.

## ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING LIMITED VISITATION, IN SPLITTING UP THE CHILDREN FOR VISITATION AND IN USING THE VISITATION WHICH ACTUALLY OCCURRED PRIOR TO THE CHANGE IN CIRCUMSTANCES AS THE BASIS FOR THE AWARD UNDER THE MODIFICATION.

The trial court retains jurisdiction over this matter and has the power to modify a decree of divorce upon a showing of a substantial change in circumstances. *Walton v. Walton*, 814 P. 2d 619, 621 (Utah App. 1991). See also, *Maughn v. Maughn*, 770 P. 2d 156, 159 (Utah App. 1989) and § 30-3-5, Utah Code Annot. (1953, as amended). This is true even though Plaintiff, during the proceedings below, relocated to California with the minor children of the parties. *Curtis v. Curtis*, 789 P. 2d 717, 722-725 (Utah App. 1990).

Defendant has located no Utah cases directly on point on the issue of modification of visitation orders based upon relocation of the parties. Therefore Defendant is unable to cite the exact standard of review for this court. The above cited Utah cases involve custody issues and are concerned with the "ping-pong" effect that changes of custody can create. See, *Maughn*, 770 P. 2d at 159-161. The standard applied there was the abuse of discretion or manifest injustice. *Id.* As the need to protect the children from the "ping-pong" effect and the attendant need



to protect the children is not present in this case, a lower standard of review of the trial court would be appropriate.

There has been a material change of circumstances in this case. Plaintiff, who has custody of the minor children of the parties, moved to California with those children. This was done solely to allow Plaintiff's new husband to attend school, and not for any reason beneficial to Plaintiff or the minor children. The net effect is a substantial decrease in the amount of visitation which Defendant could have with the children, thereby depriving him of meaningful contact with the children.

*Creech v. Creech*, 367 So. 2d 1244 (La. App., 1979) deals directly with modifying a divorce decree on the issue of visitation due to the noncustodial parent's relocation from Louisiana to Mexico. The virtual inability to exercise the decreed visitation was recognized and the court found it appropriate to substantially change the visitation award. *Creech* 367 So. 2d at 1246.

In *Creech*, the father, the noncustodial parent, was originally granted visitation rights of one weekend per month, the last week in December and two weeks in the summer. *Id.* This comes out to about forty-five days of visitation a year.

The trial court in that case found that "the best interest of the children would be served and fairness would prevail upon

the part of all parties if a summer visitation period was increased from two weeks to five weeks ... .' By enabling meaningful visitation with their father, this arrangement could be more beneficial to the children." *Id.* This finding was affirmed by the Louisiana court of appeals. *Id.* The net effect of this finding was that the father ended up with forty-two days of visitation a year. He only lost three days of visitation per year.

In the instant case, Defendant was previously awarded reasonable visitation which amounted to eighty-seven days per year. Under the order being appealed, Defendant has thirty-five days of visitation per year. Under that order, visitation will, in three years, increase to forty-nine days of visitation. This is a truly significant decrease.

Plaintiff was questioned about concerns other than those arising from the reasons for the divorce. Transcript at 54, and 57 - 58. She did not provide any other concerns. In fact she admitted at that point that the parties did not have blocks of time in which Defendant could visit with the children the summer before the move to California. Transcript at 57. She stated, that Defendant was limited to the time Plaintiff would allow before that move. *Id.*

Defendant asserts that the doctrine of *res judicata* applies in this matter and that all of the alleged problems and concerns

raised by Plaintiff concerning conduct prior to the entry of the decree of divorce have been adjudicated. We do not have the concerns raised in *Maughn* concerning the basis of the initial determination. *Maughn* 770 P. 2d at 160. Therefore all of the Plaintiff's worries and concerns about the conduct of the Defendant prior to the entry of divorce decree were improperly before the court. Those concerns did not prevent Plaintiff from stipulating to the visitation described above at the time divorce case was entered. Yet within just days over a year after the decree of divorce was entered, Plaintiff moved to California and asserts that Defendant's visitation should be reduced for the same reasons. Transcript at 58.

In deciding the visitation issue, the court mentioned concern about the ages of the children a number of times. Transcript at 71 - 71. The children were five and seven at the time of the hearing. Transcript at 71. The standardized visitation schedule in effect at the time of the trial specified a four week block of time for visitation for in-state parties. (No standardized visitation schedule was in effect at the time of the original divorce.) The four week extended standardized visitation begins upon the children entering school. The denial of more than two weeks at any time grants less time than the in-state standardized visitation schedule. Further, the domestic

relations commissioner recommended that Plaintiff be granted one-half of the school summer vacation.

*In re Marriage of Susan Hatzievgenakis and Vassilis Hatzievgenakis*, 434 NW 2d 914 (Iowa App, 1988), provides illumination on this issue. That case involved a divorce rather than modification of a decree. The father was a citizen of Greece while the mother was a U. S. citizen. The child of the parties held a dual citizenship. *In re Hatzievgenakis*, 434 NW 2d at 915. The father maintain a Greek residence and was a Staff Captain on a Greek cruise ship. *In re Hatzievgenakis*, 434 NW 2d at 914 - 915.

The mother raise numerous concerns about the father removing the child from the United States, about how various aspects of Greek society and culture may affect the child, and about the father failing to return the child. *In re Hatzievgenakis*, 434 NW 2d at 916 - 917. The court of appeals allowed extended visitation outside of the United State and the child was only six years of age at the time. *In re Hatzievgenakis*, 434 NW 2d at 915 and 917.

Greece is certainly much farther from Iowa than California is from Utah. Concerns about enforcement of the decree of divorce do not exist, particularly as the Defendant in this matter is a resident of Utah. Hence if a child of six can travel abroad for extended visitation, children of six can travel one hour by air to Utah for extended visitation.

II. THE TRIAL COURT ERRED IN ITS AWARD OF DAY CARE AND IN ITS FINDINGS SUPPORTING THAT AWARD.

A. THE PROVISIONS OF §78-45-7.16 AND -7.17, UTAH CODE ANNOT. (1989, AS AMENDED) CONTROL THE AWARD OF DAY CARE REIMBURSEMENT, IT WAS IMPROPER FOR THE TRIAL COURT TO SET A FLAT FEE WITHOUT THE REQUIREMENT OF DOCUMENTATION PARTICULARLY IN LIGHT OF THE FACT THAT THE DAY CARE PROVIDER IS PERFORMING ACTIVITIES OTHER THAN DAY CARE AND THAT THE CHILDREN ARE NOT WITH THAT DAY CARE PROVIDER FOR A SIGNIFICANT PERIOD OF TIME DURING THE DAY.

The standard to be applied to this entire issue is in question. No Utah cases have been located on the narrow issue of a modification of a day care award. Plaintiff suggests that §78-45-7.16 and -7.17, Utah Code Annot. (1953, as amended), clearly controls and if a standard is required, the "clearly erroneous" standard of review should be utilized.

These statutes concern "reasonable work-related day care costs actually incurred on behalf of the dependent children of the parents...". §78-45-7.16(1) Utah Code Annot. (1953, as amended). *See also*, §78-45-7.17 (1), Utah Code Annot. (1953, as amended). It is further stated that if the amount ceases to be incurred, payment may be suspended without modifying the prior order of the court. §78-45-7.16(2) Utah Code Annot. (1953, as

amended).

Plaintiff asserted at trial that an in-home day care provider was required for the entire day despite the fact that the minor children were in school for a good portion of the day while Plaintiff was at work.

The statute states that the costs in question be actually incurred on behalf of the children. 78-45-7.16 (1) Utah Code Annot. (1953, as amended). The children are deriving no benefit from the day care provider if they are not with that person, as when they are in school. Hence it is violative of the statute to require Defendant to pay for one-half of the costs of a day care provider to simply sit in Plaintiff's home while the children are away from the home.

Plaintiff alleged the need for a contact person for the school in the event of illness or problem with a child as justification for the day care provider sitting at home while the children are in school. Plaintiff is remarried and has asserted that her new husband be treated as an appropriate provider for the children. See, Plaintiff's counterclaim at ¶¶2d, 3g. Record at 146 and 148 respectively. This means that Plaintiff has herself and her new husband as contact people with the children's school in the event of a problem. The possibility of having to leave employment due to a problem with a child at school is

simply part of being a parent whether divorced or not.

Until the children are essentially emancipated there is always a potential need for someone to be "on call" should problems arise at school. At what age does this day care obligation terminate?

Day care under Utah's statutes appears to consist of taking care of the children themselves. It should be reduced as the children enter school and eventually terminate as the children get older, and so the trial court found. Transcript at 78. Therefore to be ordered to pay for "on call" goes well beyond the scope of these statutes and contrary to the court's own findings. Furthermore, while in California, and until just prior to trial, Plaintiff utilized a day care provider just after school, Transcript at 45. She did not historically have someone "on call".

Plaintiff also admitted that the day care provider performed various household chores and that Plaintiff pays her no more for those duties. Transcript at 39-40. When the children are home, the day care provider, while performing these chores, is again unavailable to give the children her attention and attend to them. When the children are not at home, the day care provider is, in essence, a house keeper for Plaintiff or caring for another child of Plaintiff's who is not part of this action.

The court, in addition to allowing the "on call" nature of this matter also found that it was reasonable to require Defend-

ant to pay for one-half of private preschool for one of the children and that the cost of the private preschool, \$655 per month, was reasonable. Transcript at 75 and 78. Not only is Defendant required to pay one-half of the expenses for an "on call" person but also one-half of the private schooling for the one child, all purportedly as day care. This has the effect of requiring Defendant to pay twice for day care.

**B. THE DAY CARE EXPENSES MUST BE REASONABLE. IT WAS AN ABUSE OF DISCRETION TO AWARD AN AMOUNT IN EXCESS OF REASONABLE DAY CARE AND TO CONSIDER ANY SECONDARY INCOME IN THAT AWARD**

The statutes state reasonable day care costs. Defendant asserts that the costs incurred by Plaintiff are not reasonable.

In addition to the above arguments, it must be remembered that Plaintiff did not move to California to advance her career, employment, or to benefit the minor children. She moved solely because her new husband desired to attend school there. Transcript at 28.

In fact, Plaintiff testified that she actually did incur a slight decrease in her personal income as a result of this move, though her family income had increased. Plaintiff also knew that the cost of living would be higher as a result of her choice to please her new husband. Plaintiff's joint income at the time of



trial was substantial in comparison to Defendant's. Transcript at 12, 26, and 48, and Record at 169 - 175. This raised Plaintiff's standard of living to a level at which a housekeeper might be appropriate, but it is not appropriate to Defendant in his circumstances.

While Plaintiff was married to Defendant, there was an in-home day care provider for a period of that time. Plaintiff testified at trial that while in Utah the cost of this in-home day care provider averaged around \$500 to \$600 per month. At that time both of the children were preschool age. As a result of this voluntary move Plaintiff has almost doubled the cost of day care and seeks to have Defendant pay one-half of that doubling. Defendant's share of the cost of the Utah day care provider was reduced in the original decree because that provider was also performing household duties.

The court required, and considered, evidence of a second income by Defendant despite objection. Transcript at 13 - 14. While there is no guideline in determining income for day care, §78-45-7.5 (2), Utah Code Annot. (1953, as amended), does indicate a limitation of income being equivalent to one full-time job. That action was error on the part of the trial court, particularly as there had been no history of that secondary income.

**C. PLAINTIFF SHOULD BE REQUIRED TO SUBSTANTIATE THE USE OF THE DAY CARE PROVIDER FOR WORK-RELATED PURPOSES IN ORDER TO OBTAIN REIMBURSEMENT.**

The flat nature of the order of the trial court opens the order to abuse in favor of the Plaintiff and to the detriment of the Defendant. The statutes contemplate an accounting through the use of the words "actually incurred" and the ability to terminate payments without the need for a modification if payments are not incurred.

The flat payment as ordered allows Plaintiff to take vacations, trips, or even be unemployed or on sick or disability leave without notice to Defendant. See transcript at 28. Record at 253 - 254 and 256 - 257. Defendant would then make his contribution and without knowing it be paying for day care which is not work-related, if it was incurred at all. In fact, as the order is worded, one could interpret that wording so as to require that Defendant make the day care payment even when the children are with him in Utah. Record at 259-261. This would mean a wind fall to Plaintiff as she may not actually be incurring these expenses.

The record of the case below shows that such abuses have occurred. Record at 253 - 254, 256 - 257, and 259 - 261. Plaintiff attempted to charge Defendant for day care expenses while she was on her honeymoon with her new husband. Transcript at 22

and 24. The statute clearly states that if "the actual expense ... ceases to be incurred, the obligor may suspend making monthly payment of that expense...". 78-45-7.16(2). In order to do that, Defendant has a right to know when such expenses are not actually incurred.

Finally on this issue, the court erred in allowing Plaintiff to bring an action to require ongoing private school for the younger child, despite public school being available, by way of an order to show cause. The order to show cause, by its very nature shifts the burden of proof upon the Defendant, who would have no knowledge of the problems of the minor child involved nor would Defendant have any ability to develop the proof, such as expert or medical testimony, to refute the allegations. Plaintiff, being the proponent of the request and being the one with access to the needs and concerns of that child should be the burden of proving the need. To hold otherwise places the Defendant in a totally untenable position.

Is private school reasonable? There is no evidence in the record that the younger child is disabled or dysfunction, nor is he. Under these circumstances, private school is not reasonable.

**III. IT WAS CLEARLY ERRONEOUS FOR THE TRIAL COURT TO SIGN AND ENTER FINDINGS OF FACT AFTER AN ORAL PRONOUNCEMENT OF ITS**

FINDINGS WHICH CONTAIN PROVISIONS WHICH WERE NOT ENUNCIATED BY THE COURT AT THE TIME IT ANNOUNCED ITS FINDINGS AND WHICH WERE PROPERLY OBJECTED TO BY A PARTY.

The trial court made oral findings of fact at the time of trial, pursuant to Rule 52, Utah Rules of Civil Procedure. Counsel for the Plaintiff prepared written findings, supposedly based upon the oral announcements of the court and submitted them to the court for signature.

Those findings contained a number of additional paragraphs and items which were not included in the oral findings of the court as reflected by the transcript of those pronouncements. Defendant made a timely objection to those inappropriate conclusions and the findings were signed and entered over those objections. That was clearly erroneous and should be reversed. See, *Maughn*. Further, this court is not limited to the written findings and may properly examine those findings expressed from the bench by way of the transcript. *Merriam v. Merriam*, 799 P. 2d 1172 (Utah App. 1990).

## CONCLUSION

Defendant should be awarded extended visitation as recommended by Commissioner Arnett, to wit, one-half of the school summer vacation. This visitation should begin immediately and there should be no splitting of the children during these periods of visitation. Such an order would best serve the purpose of fostering the children's relationship with their father.

The order of day care as set forth by the trial court is erroneous and should be set aside. Plaintiff should have to abide by the statute in providing proof of actually incurred work-related day care expenses. This is required so as to protect Defendant from continued abuses of the day care charges and potential wind fall profits to Plaintiff to Defendant's detriment. The day care should be limited to services provided to the children and not for housekeeping, "on call" or other non-child care activities. Further, the trial court should not be allowed to consider income, other than that equivalent to one full-time employment, in determining day care awards without a properly developed history of that secondary income.

The written findings of fact submitted by the Plaintiff and signed entered by the trial judge must be amended to conform to the oral findings set forth by the trial judge as reflected by

the transcript of the proceedings.

Respectfully submitted this \_\_\_\_ day of November, 1992.

---

KATHRYN S. DENHOLM, ESQ.  
Attorney for Defendant / Appellant

KATHRYN S. DENHOLM, #0866  
ATTORNEY FOR APPELLANT  
263 EAST 2100 SOUTH  
SALT LAKE CITY, UTAH 84115  
Telephone (801) 484-0091

UTAH COURT OF APPEALS

-----o000o-----		
LISA HARTWIG,	)	
	)	
Appellee,	)	CERTIFICATION OF DELIVERY
	)	
vs.	)	
	)	Case No. 920496-CA
DAVID HARTWIG,	)	
	)	
Appellant,	)	
	)	
-----o000o-----		

The Defendant/Appellant above-named, by and through counsel, Kathryn S. Denholm, Esq., and pursuant to Rule 21, Utah Rules of Appellate Procedure, served a true and correct copy of Defendant's Brief upon Plaintiff by hand delivering two copies to:

Sharon Donovan, Esq.  
310 South Main Street  
Suite 1330  
Salt Lake City, UT. 84101

Attorney for Plaintiff

DATED this \_\_\_\_ day of November, 1992.

\_\_\_\_\_  
KATHRYN S. DENHOLM, ESQ.  
Attorney for Defendant / Appellant

## ADDENDUM "A"



JUN 29 1992

SHARON A. DONOVAN (0901)  
DART, ADAMSON & DONOVAN  
Attorneys for Plaintiff  
310 South Main, Suite 1330  
Salt Lake City, Utah 84101  
Telephone: (801) 521-6383

*Charles* Clerk 3rd Dist Court

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oOo-----

LISA FITHIAN (HARTWIG),	:	
	:	ORDER MODIFYING
Plaintiff,	:	DECREE OF DIVORCE
	:	
v.	:	
	:	Civil No. 894900194
DAVID HARTWIG,	:	
	:	Judge Anne M. Stirba
Defendant.	:	
	:	215/9105
	:	

-----oOo-----

Both parties' Petitions for Modification of Decree of Divorce came on regularly for trial on April 2, 1992, before the Honorable Anne M. Stirba, one of the Judges of the above-entitled Court, Plaintiff appearing in person and by and through her attorney, Sharon A. Donovan, and Defendant appearing in person and by and through his attorney, Kathryn S. Denholm, and the Court having heard testimony of Plaintiff and Defendant and having received documentary evidence, and counsel for the parties having met in chambers and having resolved certain visitation issues and submitted the issue of summer visitation and amount of day care to the Court, and the Court being fully advised in the premises, and the Court having made and entered its written Findings of Fact and Conclusions of Law herein,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant's visitation shall be modified as follows:

A. Alternate school breaks, not to exceed a one-month block.

B. One-half of the Christmas break, with Christmas Day to be included in Defendant's visitation period in odd-numbered years beginning in 1993, with the further provision that the children not be required to travel on Christmas Eve or Christmas Day.

C. In the summer of 1992, Defendant shall have both of the children for two two-week blocks. Plaintiff shall pay for the round-trip ticket for the second block of time for the children, in addition to one-half of two other visits throughout the year, as stated in paragraph 1(G) below.

Defendant shall notify Plaintiff by May 15, 1992, and thereafter by May 1st of each year of the times requires for summer visitation.

D. Commencing in 1993, Defendant shall have summer visitation for two three-week periods, and this visitation should continue until each child reaches the age of nine. As each child turns the age of nine, the visitation shall increase to six weeks, with two blocks

of time and with no block of time being longer than one month.

E. One long weekend not to exceed six days only during the time the children would not be in school, upon reasonable notice. Defendant shall pay for the transportation costs for the visit.

F. Reasonable weekly telephone visitation with the parties children on Sunday evenings at 8:00, Salt Lake City time, provided that Defendant pay the costs thereof.

G. Reasonable visitation in the home state of the children, upon fourteen days notice, as long as the visitation does not interfere with previously scheduled activities, i.e., Defendant to transport the children to and from any previously planned activities.

H. The parties shall split the transportation costs for Christmas and shall obtain the best fare possible, with the parties exchanging the information necessary by the deadline necessary in order to obtain the cheapest fare.

I. Defendant shall drop the children off to Plaintiff's husband, babysitter or relative.

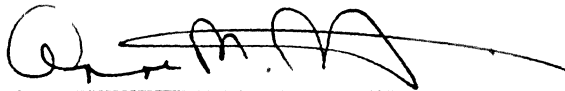
2. Defendant should be required to pay an additional \$258.75 per month for day care, until the Montessori education is concluded, for a total of \$508.75 per month, commencing in April, 1992. When the child ceases the Montessori experience, then that

will be reduced down by one-half of the total tuition of \$265.00 per month, to \$132.50 per month for day care.

3. Each party shall pay their own attorney's fees incurred herein.

DATED this 4th day of June, 1992.

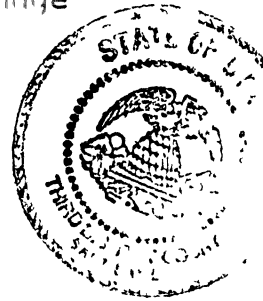
BY THE COURT:



ANNE M. STIRBA  
District Court Judge

Approved as to form

\_\_\_\_\_  
KATHRYN S. DENHOLM  
Attorney for Defendant



JUN 29 1992

*Charles L. Schuman*  
Clerk 3rd Dist. Court

SHARON A. DONOVAN (0901)  
DART, ADAMSON & DONOVAN  
Attorneys for Plaintiff  
310 South Main, Suite 1330  
Salt Lake City, Utah 84101  
Telephone: (801) 521-6383

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oOo-----

LISA FITHIAN (HARTWIG),	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
v.	:	
	:	Civil No. 894900194
DAVID HARTWIG,	:	
	:	Judge Anne M. Stirba
Defendant.	:	
	:	
	:	
	:	

-----oOo-----

Both parties' Petitions for Modification of Decree of Divorce came on regularly for trial on April 2, 1992, before the Honorable Anne M. Stirba, one of the Judges of the above-entitled Court, Plaintiff appearing in person and by and through her attorney, Sharon A. Donovan, and Defendant appearing in person and by and through his attorney, Kathryn S. Denholm, and the Court having heard testimony of Plaintiff and Defendant and having received documentary evidence, and counsel for the parties having met in chambers and having resolved certain visitation issues and submitted the issue of summer visitation and amount of day care to the Court, and the Court being fully advised in the premises, does now make, adopt and find the following:

### FINDINGS OF FACT

1. The Court finds that on or about August 22, 1990, a Decree of Divorce was entered in this matter, which provided, in relevant part, as follows:

Custody/Visitation. Plaintiff was awarded the permanent care, custody and control of the parties' two minor children, Benjamin James Hartwig, age 5, born on October 17, 1984, and Nathan Meade Hartwig, age 3, born on January 19, 1987, subject to specified rights of visitation on behalf of Defendant as follows:

A. Alternate weekends, from Friday at 6:00 p.m. to Sunday at 6:00 p.m.

B. Alternate holidays, with the following holidays: New Years Day; Martin Luther King Jr. Day; President's Day; Easter; Memorial Day; Independence Day; Pioneer Day; Labor Day; Columbus Day; Halloween; Veterans' Day; and Thanksgiving Day.

C. One evening on the off week from 5:30 p.m. to 8:30 p.m.

D. Christmas Day from 6:00 p.m. through December 26th at 8:00 p.m.

E. Prior to the children entering school, two one-week blocks in the summer, with notification by June 15th for 1990 and thereafter by May 1st of each year. Once the children reach the age of nine, Defendant shall be entitled to have the children for six weeks in the summer, not to exceed four weeks for one visitation block.

F. Upon the children entering school, one-half of the Christmas break and one month in the summer for two two-week periods of time. In the event that the children are in year-round school, Defendant shall be entitled to one-half of all breaks, with no block to exceed two weeks at a time and not to exceed one month total on an annual basis prior to the children reaching nine years of age, or to exceed six weeks total on an annual basis after the children reach the age of nine, not to exceed four weeks for one visitation block.

G. Each Father's Day, regardless of whose weekend upon which this holiday may fall.

H. Each Mother's Day will be with the Plaintiff, regardless whose weekend upon which this holiday may fall.

I. The afternoon and evening of each child's birthday, or one day in the same week as that child's birthday as determined by the child.

J. If Defendant works every weekend as his primary job and primary source of income, he shall be entitled to one overnight visitation per week on a consistent night to be agreed between the parties. At such time as Defendant no longer works every weekend as his primary job and primary source of income, the other visitation provisions provided herein, i.e., alternate weekends, one evening on the off week, etc., should be implemented.

K. The parties shall have equal access to medical, school records and other important records for the children. Plaintiff shall sign any releases that are necessary to allow the children's school to provide Defendant with a schedule of all the upcoming school activities. In the event any significant school or social events occur that are not on the schedule, Plaintiff shall provide Defendant reasonable notice in advance of those activities. Defendant shall be notified of non-routine medical treatment and shall have access to the children's medical files.

L. Each party shall keep the other advised of their current address and telephone numbers, as well as that same information concerning the children's regular care givers. Neither party shall move their residence outside Salt Lake County without thirty (30) days prior written notice to the other party.

Child Support. Defendant was ordered to pay a base amount of child support in the amount of \$140.50 per month, per child, for a total of \$281.00 per month. In addition, Defendant was ordered to pay up to \$250.00 per month for his one-half portion of the reasonable work-related day care, and there was a cap of \$250.00 for the day care expenses, for a total monthly support of \$531.00, after giving Defendant a credit for medical insurance premiums of \$50.00 per month for the children. Said support was to be paid through the Clerk of the

Court, one-half on the 5th and 20th days of each month, until the children reach the age of eighteen and graduate from high school in their expected senior year.

2. Since the entry of the Decree of Divorce, the circumstances of the parties have materially and substantially changed, including, but not limited to the following:

A. Plaintiff has remarried and at the end of August, 1991, moved to the State of California with her new husband and the children, where her new husband is starting Theology School. Plaintiff's employment in the State of Utah was also in the process of being phased out.

B. After the move to California, Plaintiff was unemployed for a period of time and is now employed, earning a gross income of \$4,166.00 per month, which is less than what she was earning at the time of the entry of the Decree of Divorce of \$4,468.00 gross per month.

C. The day care expenses for the children have substantially increased and have gone from approximately \$600.00 per month to \$1,017.15, which includes Montessori preschool and day care expenses. The overall cost of living is also higher in California, with Plaintiff's mortgage payment being \$1,200.00 per month for a very modest home.

D. Defendant has remarried and his income has increased since the entry of the Decree of Divorce. At



the time of the entry of the Decree of Divorce, his income was \$1,988.00. His present income is \$2,370.00 per month, and pursuant to Defendant's testimony, he also earned approximately \$5,000.00 in 1991 from his private law practice, after business expenses.

3. The Court finds that the parties have had ongoing problems with visitation, but the parties have stipulated to the following visitation:

A. Alternate school breaks, not to exceed a one-month block.

B. One-half of the Christmas break, with Christmas Day to be included in Defendant's visitation period in odd-numbered years beginning in 1993, with the further provision that the children not be required to travel on Christmas Eve or Christmas Day.

C. In the summer of 1992, Defendant should have both of the children for two two-week blocks. Plaintiff should pay for the round-trip ticket for the second block of time for the children, in addition to one-half of two other visits throughout the year, as stated in paragraph 3(G) below.

Defendant should notify Plaintiff by May 15, 1992, and thereafter by May 1st of each year of the times requires for summer visitation.

D. One long weekend not to exceed six days only during the time the children would not be in school, upon reasonable notice. Defendant should be ordered to pay for the transportation costs for the visit.

E. Reasonable weekly telephone visitation with the parties children on Sunday evenings at 8:00, Salt Lake City time, provided that Defendant pay the costs thereof.

F. Reasonable visitation in the home state of the children, upon fourteen days notice, as long as the visitation does not interfere with previously scheduled activities, i.e., Defendant to transport the children to and from any previously planned activities.

G. The parties should split the transportation costs for Christmas and shall obtain the best fare possible, with the parties exchanging the information necessary by the deadline necessary in order to obtain the cheapest fare.

H. Defendant should drop the children off to Plaintiff's husband, babysitter or relative.

4. The Court further finds, with regard to the summer visitation issue, that the non-custodial parent is entitled to reasonable visitation, and the Court views visitation issues in light of what is in the best interests of the children and in light of the non-custodial spouse's parents' entitlement to reasonable visitation. The Court finds that the parties have agreed that for

1992, there may be two two-week periods for both of these children and that it seems to be in the best interests of the children and reasonable in light of the stipulation of the parties.

With regard to subsequent years, the Court finds that visitation must be set in recognition of the rights of the natural parents and what is in the best interests of the children. In making such orders, the Court considers the age of the children, the relationship of the children to the non-custodial parent, the stability of the home environment of the non-custodial parent and other issues that pertain to what is in the best interests of the children regarding visitation. In the Court's view, age is a significant factor, and the ages of the children, Nathan having just turned five in January, 1992, and Ben being seven years old at this time.

The Court finds that it is reasonable to change visitation during the summer months gradually, rather than making a significant change from two two-week periods to all of a sudden a volume of a six week period of time, from the four-week period of block of time, or even as Defendant has requested, even six weeks at a time. After hearing all of the testimony in this matter, the Court does not believe that it is in the best interests of these children, given their ages and given the fact that they have not had the opportunity to have visitation with their father for more than one week to ten days at a time to date.

Defendant testified that one of the reasons he wanted a larger block of time for visitation was due to his work schedule, and he also felt that it would benefit the children to be able to spend a larger block of time with him and that he would attempt to arrange his work schedule. The Court finds, however, that if because of his work schedule there were other problems and he were not able to fulfill the four-week arrangement, that he would then return the children to the natural mother. The Court has some concerns about that arrangement in and of itself, because even if Defendant would be able to make those kinds of changes, once the children have it in their minds and expectation of a certain period, then obviously the Court finds it is in the best interests to fulfill that expectation so long as there aren't other problems that would outweigh that in any particular circumstance.

Defendant has proposed larger blocks of time because he wants to be able to do things with the children, such as take off work and do things with them and he felt that longer blocks of time would be valuable in and of themselves. The Court has considered that issue, as well. The Court has also heard evidence from the Plaintiff concerning Defendant's marital situation and the problems he experienced in the marriage and arguments that have ensued between Defendant and his current wife in front of the children in the summer of 1992. This was not disputed by Defendant.

In light of the ages of the children and their best interests, the Court specifically finds that after 1992, the summer visitation

should occur in a gradual fashion and increase in length of time, until they reach the age of nine. The Court finds that Plaintiff's proposal is reasonable in this matter, and the Court finds that there should be two three-week periods in 1993, and that visitation should continue until each child reaches the age of nine. The Court finds that as each child turns the age of nine, the visitation should increase to six weeks, with two blocks of time and with no block of time being longer than one month. The Court specifically recommends that there will be a period of time when the older child will be staying longer and the younger child would come home. The Court finds, however, that a nine year old can better handle a longer period of visitation than a seven year old could under the same circumstances. The Court finds that it is important for the parties to encourage communication with the children.

5. With regard to the day care issue, the Court has considered the testimony that has been presented and arguments of counsel with regard to this particular issue. The Court finds that Defendant has been paying \$250.00 per month, which is less than one-half of the actual day care costs incurred by Plaintiff when she resided in Utah. That was the amount that the parties agreed to at the time of the divorce. Plaintiff's day care expenses now amount to \$1,017.15 per month, with \$265.00 going towards payment of the Montessori Preschool/day care tuition. The Court believes that is a reasonable amount for Montessori tuition. The Court is

aware that when Nathan enters kindergarten that the Montessori school amount should disappear because when he goes to kindergarten, presumably at a public school, that tuition amount will no longer apply. It is not clear, based upon the testimony, as to when Nathan will go to kindergarten, but when he does, that expense should no longer exist.

The Court finds that if the preschool expense for Montessori continues after Nathan enters kindergarten, that issue should be reserved by this Court, with Plaintiff to present justification at that time if she feels it appropriate for him to continue to go to a Montessori program and require Defendant to pay one-half of the costs thereof, which may be done by way of Order to Show Cause.

With regard to the other child care expense, that amount is \$752.50 according to Plaintiff's testimony. First of all, with regard to Plaintiff's mother-in-law who resides with the parties in California, the Court is not persuaded that expenses of child care represented in Plaintiff's figures covers any expenses for Plaintiff's mother-in-law, who is elderly (age 83), but self-sufficient. There is no credible evidence otherwise, and the Court finds that that amount does not pertain to the care, and whatever care is attributable in the family, not to the mother-in-law.

Second of all, with regard to whether the mother-in-law could step up and be a child care provider, the Court finds that the custodial parent has to have discretion in determining who is to care for the children. Obviously, part or some of the functions of

this child care provider goes to things that the mother-in-law is not able to provide, specifically, transporting the children to and from Spanish lessons, karate lessons, baseball games, try-out practices and that sort of thing, and there may be others. Some discussion has to be given to the child care so that it is apparent who is best able to provide appropriate child care. In this particular circumstance, the Court is satisfied that there has not been an unreasonable decision in not choosing the mother-in-law to care for the children, but that that person could look to outside care.

The Court finds that \$752.50 per month is a reasonable amount of expense to pay on a monthly basis for in-home child care, especially in light of the duties that were testified to in Court, namely, getting the children ready for school; getting them breakfast; taking the children to school; bringing the children home from school; providing lunch for the child that comes home midday; taking the children to these various activities; and attending to their laundry. The Court is aware of what laundry the children could generate, and household disarray that they could create, taking care of the home insofar as it relates to the child care. There is no credible evidence otherwise in this Court's view that the day care expense was in part attributable to other household duties. All of the evidence that has been presented to the Court really indicates that the child care provider is, in fact, providing child care and not providing other household

duties. Therefore, The Court finds that the child care expense of \$752.50 per month is reasonable and also necessary to provide child care. The Court finds that that covers everything with regard to the child care expense.

Accordingly, the testimony of Defendant was that it would be difficult for him to come up with the extra money, but the Court is satisfied that there is an ability to pay, to contribute the additional amounts towards child care expense. The Court finds that \$1,117.50 is a reasonable amount of total monthly child care under the circumstances and for the reasons indicated previously, and therefore, until the Montessori education is concluded, Defendant should be required to pay an additional \$258.75 per month, for a total of \$508.75 per month, which is half of that amount for day care, to commence with the month of April, 1992. When the child ceases the Montessori experience, then that will be reduced down by one-half of the total tuition of \$265.00, or a reduction to \$376.25 per month for day care.

With regard to someone being in the home at times when the child is not at home, the Court finds that there is not anything unusual about that particular practice here, given the fact that that person has to be on call in case a child is sick or that provides an opportunity of time in which to take care of other child-related issues at home. The Court does not think that is unreasonable under the circumstances. This again may change when the children are in school full-time. The Court finds that there



will have to be a re-evaluation of this at that time because presumably the child care expense would be substantially affected by having two children in school full-time. There is no evidence before the Court on which to rule on that particular issue now.

6. The Court finds that Plaintiff has had great difficulty in collecting the work-related day care expenses.

7. The Court further finds that the parties have agreed that they should each pay their own attorney's fees incurred herein.

From the foregoing Findings of Fact, the Court now makes and adopts its:

#### CONCLUSIONS OF LAW

1. The Defendant's visitation shall be modified as follows:

A. Alternate school breaks, not to exceed a one-month block.

B. One-half of the Christmas break, with Christmas Day to be included in Defendant's visitation period in odd-numbered years beginning in 1993, with the further provision that the children not be required to travel on Christmas Eve or Christmas Day.

C. In the summer of 1992, Defendant shall have both of the children for two two-week blocks. Plaintiff shall pay for the round-trip ticket for the second block of time for the children, in addition to one-half of two other visits throughout the year, as stated in paragraph 1(G) below.

Defendant shall notify Plaintiff by May 15, 1992, and thereafter by May 1st of each year of the times requires for summer visitation.

D. Commencing in 1993, Defendant shall have summer visitation for two three-week periods, and this visitation should continue until each child reaches the age of nine. As each child turns the age of nine, the visitation shall increase to six weeks, with two blocks of time and with no block of time being longer than one month.

E. One long weekend not to exceed six days only during the time the children would not be in school, upon reasonable notice. Defendant shall pay for the transportation costs for the visit.

F. Reasonable weekly telephone visitation with the parties children on Sunday evenings at 8:00, Salt Lake City time, provided that Defendant pay the costs thereof.

G. Reasonable visitation in the home state of the children, upon fourteen days notice, as long as the visitation does not interfere with previously scheduled activities, i.e., Defendant to transport the children to and from any previously planned activities.

H. The parties shall split the transportation costs for Christmas and shall obtain the best fare possible, with the parties exchanging the information

necessary by the deadline necessary in order to obtain the cheapest fare.

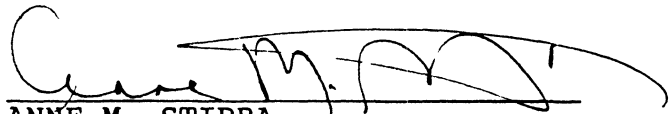
I. Defendant shall drop the children off to Plaintiff's husband, babysitter or relative.

2. Defendant should be required to pay an additional \$258.75 per month for day care, until the Montessori education is concluded, for a total of \$508.75 per month, commencing in April, 1992. When the child ceases the Montessori experience, then that will be reduced down by one-half of the total tuition of \$265.00 per month, to \$376.25 per month for day care.

3. Each party shall pay their own attorney's fees incurred herein.

DATED this 29th day of June, 1992.

BY THE COURT:



ANNE M. STIRBA  
District Court Judge



Approved as to form:

\_\_\_\_\_  
KATHRYN S. DENHOLM  
Attorney for Defendant

# JUDGEMENT

FILED DISTRICT COURT  
Third Judicial District

SHARON A. DONOVAN (0901)  
DART, ADAMSON & KASTING  
Attorneys for Plaintiff  
310 South Main, Suite 1330  
Salt Lake City, Utah 84101  
Telephone: (801) 521-6383

AUG 22 1990

SALT LAKE COUNTY  
By S. Orville Deputy Clerk

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

LISA HARTWIG,

Plaintiff,

v.

DAVID HARTWIG,

Defendant.

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:  
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:  
:

DECREE OF DIVORCE

Civil No. 894900194

Judge Leonard H. Russon

2159105  
8-23-90-804am

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This matter having come on regularly for Pre-Trial Settlement Conference on May 8, 1990, before Commissioner Sandra N. Peuler, Judge Pro Tem of the above-entitled Court, Plaintiff appearing in person and by and through her attorney, Sharon A. Donovan, and Defendant appearing in person and by and through his attorney, Kathryn Schuler Denholm, and counsel for both parties having met with the Court in chambers to advise the Court of the issues remaining to be resolved, and thereafter both counsel having discussed and resolved these matters with the parties involved herein, and the agreement of the parties having been read into the record in the presence of Plaintiff and Defendant, and Plaintiff and Defendant having confirmed said agreement and

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Defendant having agreed to withdraw his pleadings on file herein, and Plaintiff having been sworn and examined on the basis of the Complaint, and the Court having made and entered herein its written Findings of Fact and Conclusions of Law, and upon motion of Sharon A. Donovan of Dart, Adamson & Kasting,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Divorce. The Plaintiff be and she is hereby awarded a Decree of Divorce from the Defendant upon the grounds of irreconcilable differences, and the marriage between Plaintiff and Defendant be and the same is hereby dissolved, and the parties are hereby free and absolutely released from the bonds of matrimony and all the obligations thereof with said Decree to become final upon signing and entry.

2. Custody/Visitation. Plaintiff be and she is hereby awarded the permanent care, custody and control of the parties' two minor children, Benjamin James Hartwig, age 5, born on October 17, 1984, and Nathan Meade Hartwig, age 3, born on January 19, 1987, subject to Defendant's reasonable rights of visitation as follows:

A. Alternate weekends, from Friday at 6:00 p.m. to Sunday at 6:00 p.m.

B. Alternate holidays, with the following holidays: New Years Day; Martin Luther King Jr. Day; President's Day; Easter; Memorial Day; Independence Day; Pioneer Day; Labor Day; Columbus Day; Halloween; Veterans' Day; and Thanksgiving Day.

C. One evening on the off week from 5:30 p.m. to 8:30 p.m.

D. Christmas Day from 6:00 p.m. through December 26th at 8:00 p.m.

E. Prior to the children entering school, two one-week blocks in the summer, with notification by June 15th for 1990 and thereafter by May 1st of each year. Once the children reach the age of nine, Defendant shall be entitled to have the children for six weeks in the summer, not to exceed four weeks for one visitation block.

F. Upon the children entering school, one-half of the Christmas break and one month in the summer for two two-week periods of time. In the event that the children are in year-round school, Defendant shall be entitled to one-half of all breaks, with no block to exceed two weeks at a time and not to exceed one month total on an annual

basis prior to the children reaching nine years of age, or to exceed six weeks total on an annual basis after the children reach the age of nine, not to exceed four weeks for one visitation block.

G. Each Father's Day, regardless of whose weekend upon which this holiday may fall.

H. Each Mother's Day will be with the Plaintiff, regardless whose weekend upon which this holiday may fall.

I. The afternoon and evening of each child's birthday, or one day in the same week as that child's birthday as determined by the child.

J. If Defendant works every weekend as his primary job and primary source of income, he shall be entitled to one overnight visitation per week on a consistent night to be agreed between the parties. At such time as Defendant no longer works every weekend as his primary job and primary source of income, the other visitation provisions provided herein, i.e., alternate weekends, one evening on the off week, etc., should be implemented.

K. The parties shall have equal access to medical, school records and other important records for the children. Plaintiff shall sign any

releases that are necessary to allow the children's school to provide Defendant with a schedule of all the upcoming school activities. In the event any significant school or social events occur that are not on the schedule, Plaintiff shall provide Defendant reasonable notice in advance of those activities. Defendant shall be notified of non-routine medical treatment and shall have access to the children's medical files.

L. Each party shall keep the other advised of their current address and telephone numbers, as well as that same information concerning the children's regular care givers. Neither party shall move their residence outside Salt Lake County without thirty (30) days prior written notice to the other party.

3. Mutual Restraining Order. The parties are mutually restrained from harming, harassing, bothering the other or making denigrating comments about the other in front of the children. To the extent that they have control over any other third person, the parties shall restrain any third person from making derogatory comments about the other in the presence of the children.



4. Grandparent Visitation Rights. The maternal and paternal grandparents may be entitled to reasonable rights of visitation with the children, upon reasonable advance notice. Any extended visitation with the children's paternal grandparents shall occur during Defendant's visitation with them or as otherwise agreed between Plaintiff and Defendant's parents. Plaintiff shall not unreasonably withhold any consent to reasonable visitation with the paternal grandparents. Neither Plaintiff's nor Defendant's parents shall interfere with Defendant's visitation with the children. The grandparent visitation shall not be tacked on to Defendant's visitation.

5. Child Support. Defendant shall pay a base amount of child support in the amount of \$140.50 per month, per child, for a total of \$281.00 per month. Defendant shall also pay up to \$250.00 for his one-half portion of the reasonable work-related day care and there will be a cap of \$250.00 per month for the day care expenses, for a total monthly support amount of \$531.00, after giving Defendant a credit for medical insurance premiums of \$50.00 per month for the children. Said child support shall be paid through the Clerk of the Court, one-half on the 5th and 20th days of each month, until the children reach the age of eighteen and graduate from high school in their expected senior year.

6. Withhold and Deliver Order. An Order to Withhold and Deliver, pursuant to Utah Code Ann., Section 62A-11-401, et. seq., be and is hereby ordered to be issued should the Defendant become thirty (30) days delinquent in his child support obligation.

7. Alimony. Neither party shall be awarded alimony.

8. Real Estate. Plaintiff is hereby awarded the exclusive possession and use of the parties' home, based upon the appraisal by Jerry Webber, appraising the home for the sum of \$62,000.00, with the appraisal cost to be born equally between the parties. Plaintiff shall be awarded any and all equity in said home, and Defendant shall Quit-Claim his interest in the home to Plaintiff. Plaintiff shall use her best efforts to release Defendant's V.A. Certificate, with the parties sharing equally the reasonable cost to effectuate the release.

9. Personal Property. The parties' personal property shall be distributed as follows:

A. To the Plaintiff: 1987 Aerostar; the household goods, furniture and furnishings not otherwise hereinbelow disposed; the children's goods, furniture and furnishings; her personal effects and belongings; the woodburning stove and sleeper sofa which were purchased (stove) or

refurnished (sofa) with funds from Defendant's practice, with Defendant being given a credit of \$1,000.00 toward any child support or day care arrearage that may exist.

B. To the Defendant: 1989 Mazda B2200 pickup; the wood shelve, work bench, decorations and other wood items made by him; all electronics and radio equipment; all wood working tools and equipment; Sears radial arm saw; all law books; all equipment and materials obtained for and used in his practice; Osborne computer, Zenith monitor and Epson MX 80 printer; his medical and other books.

C. All property and all property rights that may be vested in either party as a result of family inheritance, trusts, or similar sources shall be awarded to the party from whose family it was received. Specifically, Defendant received the following personal property as part of inheritance: circular oak table; various hand tools; large mechanic's style tool box on castors; shotguns, handgun and rifles; two end table/bookcase units; bohemian china set; and antique Zenith radio.

D. Prior to the marriage, Defendant acquired the following items to which the Plaintiff is not

entitled to assert any claim: Sears color television; rocking chair; electronics equipment; Heathkit stereo receiver; Girard turntable; Akai reel-to-reel tape deck; three pairs of speakers; Sears Craftsman hand tools and tool boxes; gold flatware; the model railroad equipment and other assorted toys remaining which were saved from Defendant's childhood; all cameras and photographic equipment; Meade 3.1 inch telescope; Swift microscope; five drawer file cabinet; 1978 Yamaha 750 cc motorcycle.

10. Debts and Obligations. Each party shall pay and hold the other party harmless from liability on the following debts:

A. The Plaintiff: her student loans; the mortgage payment on the house; the debt on the 1987 Aerostar.

B. The Defendant: his student loans; the debt on the 1989 Mazda.

C. All remaining debts and obligations shall be the responsibility of the party as they have so divided it.

D. Each party shall assume, pay and hold the other party harmless from liability all debts

incurred by that party individually since the date of the parties' separation on January 23, 1989.

11. Medical Insurance. Both parties shall maintain coverage for the children of the parties under the group policy of major medical and dental insurance available to them through their employment while each child remains within the age limits allowed by this policy, with the minor children of the parties named as beneficiaries thereunder.

Each party shall pay one-half of any deductible amounts and one-half of any uncovered medical, dental, optic or orthodontic expenses reasonably incurred for the benefit of the parties' minor children.

12. Life Insurance. Both parties shall maintain in full force and effect the life insurance policies they each have on their lives in the amount of \$100,000.00, until such time as the last of the parties' minor children reaches the age of eighteen years or is otherwise emancipated.

During such period, each party shall designate irrevocably the other party as trustee for the minor children as sole and exclusive beneficiary on said life insurance policy.

13. Pension and Related Assets. The Court finds that Plaintiff has a pension and/or profit sharing plan through

her place of employment. Plaintiff shall receive all benefits accrued pursuant to such plans.

14. 1989 Tax Returns. Both parties shall file separate tax returns for the year 1989.

15. Tax Exemptions. As long as Defendant is paying to Plaintiff \$200.00 per month towards the child support and one-half of the work-related day care expenses and is current with said obligation for the preceding tax year, Defendant shall be entitled to claim the youngest child as a deduction for federal and state income tax purposes.

16. Delinquent Support. Defendant shall pay to Plaintiff the sum of \$2,500.00, which represents a compromise on the delinquent support owed to Plaintiff pursuant to the Temporary Order in this matter. If this amount is not paid to Plaintiff by December 31, 1990, a judgment will enter against Defendant for the unpaid balance on said sum, with interest running accordingly. Said \$2,500.00 represents delinquent support through the first half of May, 1990.


17. Maiden Name. Plaintiff is hereby restored to her maiden name of Mariea.

18. Attorney's Fees and Costs. Each party shall assume and pay his and her own costs and attorney's fees incurred in prosecuting this action.


19. The parties be and they are each hereby ordered to do and perform all matters and things required by each of them to be done herein.

DATED this 22 day of August, 1990.

BY THE COURT:

  
SANDRA N. PEULER  
~~Judge Pro Tem~~ *Commissioner*

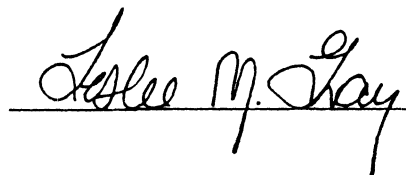
Approved as to form:

  
KATHRYN SCHULER DENHOLM  
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the 17<sup>th</sup> day of August, 1990,  
a true and correct copy of the foregoing Decree of Divorce  
was mailed, postage prepaid, to the following:

Kathryn Schuler Denholm  
Attorney at Law  
263 East 2100 South  
Salt Lake City, Utah 84115



## ADDENDUM "B"



IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

---

HARTWIG, LISA	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 894900194 DA
	:	DATE 10/28/91
VS	:	HONORABLE THOMAS N. ARNETT
	:	COURT REPORTER NO TAPE
HARTWIG, DAVID	:	COURT CLERK KAD
DEFENDANT	:	

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TYPE OF HEARING: MODIFICATION/DIVORCE  
PRESENT: DEFENDANT

P. ATTY. DONOVAN, SHARON A  
D. ATTY. DENHOLM, KATHRYN SCHULER

---

COMMISSIONER CERTIFIES THIS FOR TRIAL ON THE FOLLOWING CONTESTED ISSUES:

1. VISITATION. THE PARTIES HAVE STIPULATED THAT THE DECREE SHOULD BE MODIFIED TO PROVIDE VISITATION AS FOLLOWS:
  - A. ALTERNATING SCHOOL BREAKS
  - B. LONG WEEKENDS, WHEN THE CHILDREN ARE NOT IN SCHOOL AND TO OCCUR NO MORE THAN FOUR TO SIX WEEKS APART.
  - C. NON-SCHEDULED VISITS IN THE CHILDRENS' HOME STATE WITH 14 DAYS NOTICE AND SAID VISITS NOT TO INTERFERE WITH THE CHILDRENS' ACTIVITIES.
  - D. TELEPHONE VISITATION TO OCCUR AT SAID DAY AND TIME.
  - E. ALTERNATING CHRISTMAS WITH DEFENDANT TO BEGIN IN 1991.THE PARTIES COULD NOT AGREE ON SUMMER VISITATION AND THE COMMISSIONER RECOMMENDS THAT THE DEFENDNANT BE GRANTED ONE-HALF OF THE SCHOOL SUMMER VACATION.
2. PERSONS ENTITLED TO DELIVER OR PICK UP CHILDREN. COMMIS-  
SIONER RECOMMENDS THAT THE PLAINTIFF'S PRESENT HUSBAND BE ENTITLED TO PICK-UP OR DELIVER THE CHILDREN WHEN THE PLAIN-  
TIF IS UNABLE FOR THOSE DUTIES.
3. TRANSPORTATION COSTS. THE PARTIES DISPARITY IN INCOMES IS REFLECTED IN THE VERY MODEST CHILD SUPPORT AWARD, AND THE

"CAP" ON THE DEFENDANT'S OBLIGATION TO SHARE IN THE PLAINTIFF'S CHILD CARE EXPENSES. THEREFORE, THE COMMISSIONER RECOMMENDS THAT THE PARTIES CONTRIBUTE EQUALLY TO TRANSPORTATION COSTS FOR TWO VISITS PER YEAR. FURTHER, THAT THE "DESTINATION PARENT" BE THE ONE RESPONSIBLE FOR TRANSPORTATION AT THE BEGINNING OR CONCLUSION OF EACH VISIT. THIS RECOMMENDATION IS ALSO BASED ON THE FACT THAT THE PLAINTIFF MOVED TO THE STATE OF CALIFORNIA TO ENABLE HER PRESENT HUSBAND TO ENTER THE SEMINARY AND WAS NOT FOR THE PURPOSE OF INTERFERING WITH THE DEFENDANT'S VISITATION RIGHTS.

4. MEDICAL EXPENSES. COMMISSIONER RECOMMENDS THAT THE PLAINTIFF SUBMIT MEDICAL EXPENSES TO THE DEFENDANT WITHIN 90 DAYS THIS ISSUE MAY BE MOOT AS SET OUT BELOW.
5. CHILD CARE EXPENSES. THE PARTIES HAVE BEEN UNABLE TO COOPERATE BETWEEN THEMSELVES TO EFFECT PAYMENT OF PAST CHILD CARE EXPENSES, WITH EACH PARTY DISPUTING WHAT IS REASONABLE AND IT WAS WORK-RELATED. THE PLAINTIFF'S CURRENT CHILD CARE EXPENSES ARE IN EXCESS OF \$900.00/MO. AND THE "CAP" IN THE DECREE OF DIVORCE LIMITS THE TOTAL OBLIGATION ON THE PART OF THE DEFENDANT TO \$250.00. THEREFORE, THE COMMISSIONER RECOMMENDS THAT THE DEFENDANT SIMPLY PAY AN ONGOING MONTHLY AMOUNT OF \$250.00 TOWARD CHILD CARE EXPENSES AND THAT THE PARTIES NOT BE REQUIRED TO DEAL WITH EACH OTHER IN TERMS OF INVOICES OR ACCOUNTINGS. ON THE ISSUE OF PAST CHILD CARE EXPENSES, THE COMMISSIONER RECOMMENDS THAT THE PARTIES EXCHANGE ACCOUNTINGS THROUGH COUNSEL TO RESOLVE THIS MATTER.
6. HEALTH INSURANCE. THE PARTIES APPARENTLY HAVE JUST LEARNED THAT THE DEFENDANT'S HEALTH CARE COVERAGE MAY BE RESTRICTED TO THE STATE OF UTAH. THEREFORE, THE COMMISSIONER RECOMMENDS THAT WHICHEVER PARTY CAN OBTAIN HEALTH INSURANCE AT THE LOWEST PREMIUM COMBINED WITH THE BEST COVERAGE SHOULD DO SO AND THE CREDIT TO THE DEFENDANT FOR HEALTH INSURANCE PREMIUM BE ADJUSTED IF HE IS NO LONGER THE PARENT REQUIRED TO CARRY THE SAME.
7. ATTORNEYS FEES. THE COMMISSIONER FINDS THAT BOTH PARTIES ARE ACTING IN GOOD FAITH AND, THEREFORE, EACH PARTY SHOULD BE ORDERED TO ASSUME AND PAY HIS OR HER OWN ATTORNEYS FEES.

James L. Ogilby

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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LISA FITHIAN (HARTWIG),	:	MINUTE ENTRY
Plaintiff,	:	CIVIL NO. 894900194
vs.	:	COMMISSIONER SANDRA PEULER
DAVID HARTWIG,	:	UNDER ADVISEMENT RECOMMENDATION
Defendant.	:	COURT CLERK: SPO
	:	DATE: 9/29/92
	:	

-----

TYPE OF HEARING:	MOTION HEARING ON PLAINTIFF'S MOTION
PLAINTIFF'S ATTORNEY:	SHARON A. DONOVAN
DEFENDANT'S ATTORNEY:	KATHRYN SCHULER DENHOLM

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COMMISSIONER RECOMMENDS:

THE COMMISSIONER HAVING HEARD ARGUMENT OF COUNSEL AND HAVING FURTHER REVIEWED PLEADINGS FILED HEREIN, THE COMMISSIONER RECOMMENDS AS FOLLOWS:

1. AS TO THE ISSUE OF CHILD SUPPORT, THE DEFENDANT SHOULD PROVIDE DOCUMENTATION OF PAYMENTS MADE, TO SUPPORT HIS ASSERTION THAT HE IS CURRENT. THE ISSUE OF ANY JUDGMENT SHOULD BE RESERVED AT THIS TIME, PENDING THAT ACCOUNTING BEING PROVIDED. COUNSEL MAY SCHEDULE A CONFERENCE CALL WITH THE COMMISSIONER TO CONCLUDE THIS ISSUE, IF IT REMAINS UNRESOLVED AFTER THE ACCOUNTING HAS BEEN DONE.

2. AS TO CHILD CARE, THE PLAINTIFF SHOULD BE AWARDED A JUDGMENT IN THE SUM OF \$369.87, REPRESENTING CHILD CARE EXPENSES OWED BY DEFENDANT FOR JUNE AND JULY 1992. THE COMMISSIONER FINDS THAT CHILD CARE EXPENSES REMAIN OWING TO THE PROVIDER EVEN DURING PERIODS OF VACATION OR VISITATION, IN ORDER TO HOLD THE CHILD'S PLACE WITH THAT PROVIDER, AND THAT DEFENDANT SHOULD PAY HIS SHARE.

3. AS TO CHILD CARE EXPENSES INCURRED FROM AUGUST 1992 THROUGH THE PRESENT DATE, NO JUDGMENT SHOULD ENTER, AS THE COMMISSIONER FINDS THAT PLAINTIFF HAS NOT BEEN EMPLOYED.

4. THE DEFENDANT SHOULD BE ORDERED TO REFRAIN FROM DEDUCTING AMOUNTS FROM COURT-ORDERED CHILD SUPPORT OR CHILD CARE PAYMENTS, EXCEPT AS AUTHORIZED BY THE COURT, OR AGREED BY THE PARTIES.

5. THERE IS NOT SUFFICIENT EVIDENCE REGARDING THE ISSUE OF CONTEMPT; THEREFORE, NO CONTEMPT IS RECOMMENDED.

6. THE DEFENDANT SHOULD PROVIDE HIS RESIDENCE ADDRESS TO PLAINTIFF, THROUGH COUNSEL.

7. EACH PARTY SHOULD PAY HIS OR HER OWN FEES.

PLAINTIFF'S COUNSEL IS DIRECTED TO PREPARE AN ORDER CONSISTENT WITH THIS RECOMMENDATION.

*Thomas J. Dwyer*

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 29<sup>th</sup> day of September, 1992:

Sharon A. Donovan  
Attorney for Plaintiff  
310 S. Main, Suite 1330  
Salt Lake City, Utah 84101-2167

Kathryn Schuler Denholm  
Attorney for Defendant  
263 East 2100 South  
Salt Lake City, Utah 84115

Lydia P. Davis

FILED DISTRICT COURT  
Third Judicial District

MAY 13 1992

KATHRYN SCHULER DENHOLM 0866  
Attorney for Defendant  
263 East 2100 South  
Salt Lake City, Utah 84115  
Telephone: 484-0091

By [Signature] SALT LAKE COUNTY  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY  
STATE OF UTAH

---

LISA FITHIAN (HARTWIG),	*	OBJECTION TO PROPOSED FINDINGS,
Plaintiff,	*	CONCLUSIONS AND ORDER
	*	
vs	*	
	*	
DAVID HARTWIG,	*	Civil No. 894900194
Defendants	*	Judge Stirba

---

Comes now Defendant, by counsel, and objects to the proposed Findings, Conclusions and Order in this matter as follows:

1. The court considered but made no finding concerning the contents of the Decree heretofore entered in this matter, the contents of which are not an appropriate part of the Findings.

2. The court made no findings concerning the contents of paragraphs 2a, 2b, and a portion of 2c in the proposed findings and related paragraphs in the Order. Defendant specifically objects to the sentence in paragraph 2a "Plaintiff's employment in the state of Utah was also in the process of being phased out" which was not found by the Court and the sentence "the overall cost of

living . . . for a very modest home".

3. Defendant further proposes that the Court find, as a part of paragraph 2c that the children had a full time inhouse day care provider in Utah, but did not attend Montessori in Utah.

4. Defendant objects to the two full paragraphs beginning at the top of page 8 of the proposed Findings of Fact and the related provisions in the Conclusions and Order. These paragraphs are direct quotes from Judge Stirba's comments and reflect her thought processes rather than findings in this matter; in fact, her findings are contained in the next succeeding paragraph.

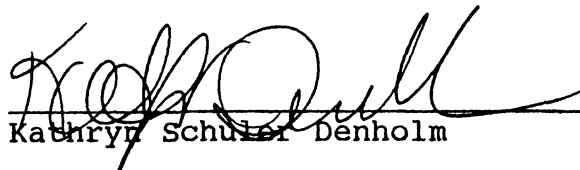
5. Defendant objects to the phrase in paragraph 5 "which is less than one-half the actual day care costs incurred by Plaintiff when she resided in Utah" which phrase is not included in the judge's comments and which is, in fact, not accurate in that the Plaintiff's day care expenses at the time the Decree of Divorce was entered were adjusted in part by reason of the fact that Plaintiff received house keeping benefits from the day care provider, and in part because Defendant's income was substantially less than Plaintiff's.

6. Defendant objects to paragraph 6 for the reason that the same was not found by the court and is not, in fact, accurate.

WHEREFORE, Defendant having specified his objections to the proposed Findings, Conclusions and Order, prays that an Order enter

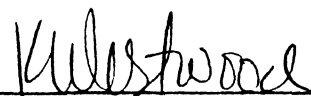
consistent with these objections.

DATED this 13 day of May, 1992.

  
Kathryn Schuler Denholm

**MAILING CERTIFICATE**

I hereby certify that I mailed a copy of the foregoing  
Objection to Sharon Donovan, Attorney for Plaintiff, at 310 South  
Main, Suite 1330, Salt Lake City, Utah 84101 on this 13<sup>th</sup> day of  
May, 1992.

  
Secretary



## **ADDENDUM "C"**

Reasonable visitation should be defined as the parents may agree. If they are not able to agree, reasonable visitation will routinely be defined for school-age (beginning kindergarten) children as follows:

1. Alternate Weekends: Friday 6 p.m. - Sunday 6 p.m.
2. Midweek: alternate Wednesday, 5:30 p.m. until 8:30 p.m.
3. Holidays:
  - (A) Christmas - non-custodial parent to have Christmas day beginning at 1:00 p.m. and continuing through 1/2 of the child's total Christmas school vacation.
  - (B) Thanksgiving and Easter - non-custodial parent to have Thanksgiving in even years (1990, 92, 94, etc.); Thanksgiving holiday is Wednesday 6 p.m. until Sunday 6 p.m. Non-custodial parent to have Easter in odd years (1991, 93, 95, etc.); Easter holiday is Friday 6 p.m. until Sunday 6 p.m.
  - (C) Other Holidays - New Year's Day, Martin Luther King Day, President's Day, Memorial Day, July 4th, July 24th and Labor Day. These are to be alternated, with the non-custodial parent to have visitation beginning 6 p.m. the day before the holiday until 6 p.m. on the holiday.

Holidays take precedence over the weekend visitation and no changes should be made to the regular rotation of the alternating weekend schedule.
4. Father's Day-Mother's Day: as appropriate, 6 p.m. the day before until 6 p.m. the day of.
5. Birthdays: one evening, 5:30 p.m. until 8:30 p.m. during the week of the child's birthday and the non-custodial parent's birthday.
6. Extended visitation:
  - (A) Summer - 4 weeks continuous, with written notice of dates provided to custodial parent by May 1st. Custodial parent to have alternate weekends, holiday and phone visitation.
  - (B) Year Round school - two 2 week periods, with written notice of dates to custodial parent at least 30 days prior to visitation. Custodial parent to have holiday and phone visitation.
  - (C) Each parent shall be allowed two weeks per year uninterrupted possession of the children for purposes of vacation, provided the same does not interfere with holiday visitation per above. Each parent shall notify the other in writing of such two week period at least 30 days in advance.
7. Telephone: reasonable, before 8 p.m.
8. Other times as agreed.

**30-3-4.1 to 30-3-4.4. Repealed.**

**Repeals.** — Laws 1990, ch 230, § 4 repeals authority, duties, and jurisdiction of court commissioners, effective April 23, 1990 these sections, as last amended by L 1989, ch. 104, §§ 2 to 5, providing for the appointment,

**30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.**

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

- (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;
- (b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and
- (c) pursuant to Section 15-4-6.5:
  - (i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;
  - (ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and
  - (iii) provisions for the enforcement of these orders.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

**History:** R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 4.

**Amendment Notes.** — The 1991 amendment, effective April 29, 1991, inserted "debts or obligations" in the introductory paragraph of Subsection (1), added Subsection (1)(c), and inserted "and obligations for debts" near the end of Subsection (3).

## NOTES TO DECISIONS

### ANALYSIS

Alimony.  
—Amount.  
—"Equitable restitution."  
—Modification.  
—Standard of living.  
—Termination.  
—Waiver.  
Appeal and review.  
—Findings required.  
Children.  
—Custody.  
—Modification.  
—Support.  
—Availability.  
—Effect of child's absence.  
—"In-kind" agreement.  
—Modification.  
Costs.  
—Partnership.  
Court's powers and jurisdiction.  
Property division.  
—Advanced degrees.  
—Antenuptial agreement.  
—Closely-held corporations.  
—Contributions.  
—Discretion of court.  
—Gifts.  
—Partnership.  
—Postnuptial agreement.  
—Professional practice.  
—Retirement funds.  
—Right to reproduce creative work.  
—Time of valuation.  
—Valuation.  
Res judicata.  
Stipulations and agreements of parties.  
Visitation rights.

### Cited.

#### Alimony.

Alimony should, so far as possible, equalize the parties' standards of living. *Munns v. Munns*, 790 P.2d 116 (Utah Ct. App. 1990).

Proper distribution of property interests of one sort or another should come first, and only then would alimony need to be considered. *Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990).

Exact equality of income is not required, but sufficient parity to allow both parties to be on equal footing financially as of the time of the divorce is required. *Howell v. Howell*, 806 P.2d 1209 (Utah Ct. App.), cert. denied, 817 P.2d 327 (Utah 1991).

Divorce decree provision requiring the husband to continue to pay utilities for as long as the wife lived at the marital residence was in the nature of continuing spousal support and, therefore, considered to be alimony. *Hagan v. Hagan*, 810 P.2d 478 (Utah Ct. App. 1991).

Usually the needs of the spouses are assessed in light of the standard of living they had during marriage. In some circumstances, it may be appropriate to try to equalize the spouses' respective standards of living. *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991).

When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change, unless unrelated to the efforts put forward by the spouses during marriage, should be given some weight in fashioning the support award. Thus, if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial

**78-45-7.4. Obligation — Adjusted gross income used.**

Adjusted gross income shall be used in calculating each parent's share of the child support award. Only income of the natural or adoptive parents of the child may be used to determine the award under these guidelines.

**History:** C. 1953, 78-45-7.4, enacted by L. 1989, ch. 214, § 6. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.  
**Effective Dates.** — Laws 1989, ch. 214 be-

**78-45-7.5. Determination of gross income — Imputed income.**

- (1) As used in the guidelines "gross income" includes:
  - (a) prospective income from any source, including nonearned sources, except under Subsection (3); and
  - (b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.
- (2) Income from earned income sources is limited to the equivalent of one full-time job.
- (3) Specifically excluded from gross income are:
  - (a) Aid to Families with Dependent Children (AFDC);
  - (b) benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid, Food Stamps, or General Assistance; and
  - (c) other similar means-tested welfare benefits received by a parent.
- (4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.
  - (b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.
- (5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.
  - (b) Each parent shall provide suitable documentation of current earnings, including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year to provide verification of earnings over time and shall document income from nonearned sources according to the source. Verification of income from records maintained by the Office of Employment Security may be substituted for employer statements and income tax returns.

- (c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.
- (6) Gross income includes income imputed to the parent under Subsection (7).
- (7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.
- (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.
- (c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.
- (d) Income may not be imputed if any of the following conditions exist:
- (i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;
  - (ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;
  - (iii) a parent is engaged in career or occupational training to establish basic job skills; or
  - (iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.
- (8) (a) Gross income may not include the earnings of a child who is the subject of a child support award, nor benefits to a child in the child's own right, such as Supplemental Security Income.
- (b) Social Security benefits received by a child due to the earnings of a parent may be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

**History:** C. 1953, 78-45-7.5, enacted by L. 1989, ch. 214, § 7; 1990, ch. 100, § 5.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, added the last sentence in Subsection (5)(b), in Subsection (7)(b) substituted "If income is imputed to a

parent, the income shall be based" for "Income shall be imputed to a parent based," and made a stylistic change in Subsection (7)(c).

**Effective Dates.** — Laws 1989, Chapter 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

#### NOTES TO DECISIONS

##### ANALYSIS

**Modification of award.**  
Cited.

##### Modification of award.

When the parties had agreed to the amount of child support before the effective date of the child support guidelines, the trial court erred in modifying child support when no petition to modify had been filed and in modifying the

support amount without finding that a material change of circumstances had occurred since the previous order had been entered. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990) (applying § 78-45-7.2(1)(b) prior to 1990 amendment regarding impact of guidelines on existing support orders).

Cited in *Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991).

**Effective Dates.** — Laws 1989, ch 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec 25.

### **78-45-7.15. Medical and dental expenses — Insurance.**

(1) Only the costs of health and dental insurance premiums for children are included in the base combined child support obligation table.

(2) Uninsured medical and dental expenses are not included in the table. The child support order shall require:

(a) the custodial parent to pay uninsured routine medical and dental expenses, including routine office visits, physical examinations, and immunizations; and

(b) both parents to share all other reasonable and necessary uninsured medical and dental expenses in a ratio to be determined by the appropriate court or administrative agency.

(3) (a) If health insurance is available to both parents at a reasonable cost and the children would gain more complete coverage by doing so, both parents shall be ordered to maintain insurance for the dependent children.

(b) If insurance is not available to both parents at a reasonable cost or if no advantage to the children's coverage would result, the parent who can obtain the most favorable coverage shall be ordered to maintain that insurance.

**History:** C. 1953, 78-45-7.15, enacted by L. 1989, ch. 214, § 17; 1990, ch. 100, § 11.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, in Subsection (2)(b), deleted "equally" after "share" and added the language beginning "in a ratio"

**Effective Dates.** — Laws 1989, ch 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec 25

### **78-45-7.16. Child care expenses — Expenses not incurred.**

(1) The monthly amount to be paid for reasonable work-related child care costs actually incurred on behalf of the dependent children of the parents shall be specified as a separate monthly amount in the order.

(2) If an actual expense included in an amount specified in the order ceases to be incurred, the obligor may suspend making monthly payment of that expense while it is not being incurred, without obtaining a modification of the child support order.

**History:** C. 1953, 78-45-7.16, enacted by L. 1989, ch. 214, § 18; 1990, ch. 100, § 12.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, in Subsection (1) deleted "(a) The monthly amount of all known reasonable and necessary uninsured extraordinary medical expenses and" from the beginning, deleted "in addition to the base child support award" after "to be paid," and substituted "a separate monthly amount" for "two separate monthly amounts"; redesignated

former Subsection (1)(b) as Subsection (2), and deleted former Subsection (2), which read "Unless the expenses described in Subsection (1) are included in the child support order, or the parents enter into a written agreement to share the expenses, one parent may not obligate both parents to pay the expenses"

**Effective Dates.** — Laws 1989, ch 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

**78-45-7.17. Child care costs.**

(1) The need to include child care costs in the child support order is presumed if the custodial parent is working and actually incurring the child care costs.

(2) The need to include child care costs is not presumed, but may be awarded on a case by case basis if the costs are related to the career or occupational training of the custodial parent.

**History:** C. 1953, 78-45-7.17, enacted by L. 1989, ch. 214, § 19. came effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25  
**Effective Dates.** — Laws 1989, ch. 214 be-

**78-45-7.18. Limitation on amount of support ordered.**

(1) There is no maximum limit on the base child support award that may be ordered using the base combined child support obligation table or for the award of uninsured medical expenses except under Subsection (2).

(2) If the combination of the two amounts under Subsection (1) exceeds 50% of the obligor's adjusted gross income, or by adding the child care costs, the total child support award would exceed 50% of the obligor's adjusted gross income, the presumption under Section 78-45-7.17 is rebutted.

**History:** C. 1953, 78-45-7.18, enacted by L. 1989, ch. 214, § 20; 1990, ch. 100, § 13. section (1) and deleted "that" after "or" in Subsection (2).  
**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, deleted "extraordinary" before "medical expenses" in Sub-  
**Effective Dates.** — Laws 1989, ch. 214 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

**78-45-7.19. Determination of parental liability.**

(1) The district court may issue an order determining the amount of a parent's liability for uninsured medical, hospital, and dental expenses of a dependent child, when the parent:

- (a) is required by a prior court or administrative order to:
  - (i) share those expenses with the other parent of the dependent child; or
  - (ii) obtain medical, hospital, or dental care insurance but fails to do so; or
- (b) receives direct payment from an insurer under insurance coverage obtained after the prior court or administrative order was issued.

(2) If the prior court or administrative order does not specify what proportions of the expenses are to be shared, the district court may determine the amount of liability as may be reasonable and necessary.

(3) This section applies to an order without regard to when it was issued.

**History:** C. 1953, 78-45-7.19, enacted by L. 1990, ch. 166, § 4. came effective on April 23, 1990, pursuant to Utah Const., Art. VI, Sec. 25  
**Effective Dates.** — Laws 1990, ch. 166 be-



instructions. *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985).

**Written instructions.**

**—Failure to tender.**

**—Waiver.**

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

**Cited in** *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480

P.2d 462 (1971); *Flynn v. W.P. Harlin Constr. Co.*, 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 166 Utah Adv. Rep. 26 (Ct. App. 1991).

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 75A Am. Jur. 2d Trial § 1077 et seq.

**C.J.S.** — 88 C.J.S. Trial §§ 266 to 448.

**A.L.R.** — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

**Key Numbers.** — Trial ⇌ 182 to 296.

## Rule 52. Findings by the court.

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

considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

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

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

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is similar to Rule 52, F.R.C.P.

**Cross-References.** — Masters, Rule 53.

#### NOTES TO DECISIONS

##### ANALYSIS

Adoption.  
 —Abandonment of contract.  
 —Advisory verdict.  
 —Breach of contract.  
 —Child custody.  
 —Contempt.  
 —Credibility of witnesses.  
 —Denial of motion.  
 —Divorce decree modifications.  
 —Easement.  
 —Evidentiary disputes.  
 —Juvenile action.  
 —Material issues.  
 —Harmless error.  
 —Submission by prevailing party.  
 —Court's discretion.  
 —Water dispute.  
 —Findings of state engineer.  
 Amendment.  
 —Motion.  
 —Conformance with original findings.  
 —New trial.  
 —Notice of appeal.

—Time.  
 —Tolling of appeal period.  
 —When made.  
 —Overruling or vacation.  
 —Another district judge.  
 —Lack of notice.  
 Child custody awards.  
 Criminal cases.  
 Criminal contempt.  
 Effect.  
 —Preclusion of summary judgment.  
 —Relation to pleadings.  
 Failure to object to findings.  
 How findings entered.  
 Judicial review.  
 —Equity cases.  
 —Standard of review.  
 —Conclusions of law.  
 —Criminal cases.  
 —Criminal trials.  
 —Findings of facts by jury.  
 —Intent.  
 Juvenile proceedings.  
 Purpose of rule.  
 Stipulations.

The requirement that an olographic will be written by the hand of the testator is spelled out in Article 1588 of the Louisiana Civil Code which reads as follows:

The olographic testament is that which is written by the testator himself.

In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the State.

Article 2903 of the Louisiana Code of Civil Procedure places the burden of proving that an olographic testament was "entirely written, dated and signed by the hand of the testator" on the proponent of the purported will. Article 2903 states:

At the contradictory trial to probate a testament, its proponent bears the burden of proving the authenticity of the testament, and its compliance with all of the formal requirements of law.

[2] The requisites of meeting this burden are spelled out in Article 2883 of the Code of Civil Procedure which states:

The olographic testament must be proved by the testimony of two credible witnesses that the testament was entirely written, dated, and signed in the testator's handwriting. The court must satisfy itself, through interrogation or from the depositions of the witnesses, that the handwriting and signature are those of the testator, and must mention these facts in its proces verbal.

In the present case, therefore, the burden of proving that the purported will was entirely written by the hand of the testator rested with Louise King Posey. In order to prove this, she would have needed to have produced two witnesses to testify as to the genuineness of the writing and the signature in the document purported to be the will of Harold Rudolph Posey. However, Ms. Posey herself was the only witness to testify that the printing and the signature in the purported will was that of the decedent. Thus, since proponent failed to meet the requirement of producing two witnesses found in Article 2883, she did not carry her burden of proving the validity of the purported will. See *Succession of Sullivan*, 178

La. 230, 151 So. 190 (1933) and *Succession of Lewis* 174 La. 901, 142 So. 121 (1932).

For the reasons assigned, the judgment of the District Court is affirmed. All costs of this appeal are to be borne by appellant.

AFFIRMED.



**Carole Calvert CREECH,**  
Plaintiff-Appellant,

v.

**Bob Newton CREECH,**  
Defendant-Appellee.

No. 6792.

Court of Appeal of Louisiana,  
Third Circuit.

Feb. 5, 1979.

Divorced father proceeded by rule for extended visitation rights, and divorced mother reconvened for additional child support. The 7th Judicial District Court, Parish of Concordia, Richard P. Boyd, Jr., J., extended visitation privileges and increased child support, and divorced mother appealed. The Court of Appeal, Domengeaux, J., held that: (1) increase of child support obligation from \$300 per month to \$325 per month did not constitute abuse of discretion, where divorced father's annual salary was \$28,000, with housing provided by employer, divorced mother, who was unemployed at time of original child support decree, had take-home pay of approximately \$350 per month, and father had certain obligations which he did not have when support was initially awarded, and (2) where divorced father, under original visitation decree, had visitation rights of one weekend per month, the last week in December, and two weeks in the summer, but, because of expense and difficulty involved in traveling to United States from Mexico

where he worked, divorced father was virtually unable to visit his children one weekend each month, increase in divorced father's summer visitation period from two weeks to five weeks was not abuse of discretion and did not amount to split or divided custody.

Affirmed.

### 1. Divorce ⇐ 309.4

Increase of child support obligation from \$300 per month to \$325 per month did not constitute abuse of discretion, where divorced father's annual salary was \$28,000, with housing provided by employer, divorced mother, who was unemployed at time of original child support decree, had take-home pay of approximately \$350 per month, and father had certain obligations which he did not have when support was initially awarded.

### 2. Infants ⇐ 19.3(4)

Minors: Test of whether award of visitation rights is excessive is whether the frequency or length of visitation will be detrimental to the welfare of the child.

### 3. Divorce ⇐ 303(4)

Where divorced father, under original visitation decree, had visitation rights of one weekend per month, the last week in December, and two weeks in the summer, but, because of expense and difficulty involved in traveling to United States from Mexico where he worked, divorced father was virtually unable to visit his children one weekend each month, increase in divorced father's summer visitation period from two weeks to five weeks was not abuse of discretion and did not amount to split or divided custody.

Patrick McDonough, III, Vidalia, for plaintiff-appellant.

Philip Letard, Vidalia, for defendant-appellee.

Before DOMENGEAUX, FORET and STOKER, JJ.

DOMENGEAUX, Judge.

Carole Calvert Creech was granted a legal separation and, ultimately, a divorce from Bob Newton Creech. She received the permanent custody of the couple's two minor children, and Mr. Creech was allowed specific visitation privileges. Additionally, the mother was awarded \$300.00 per month for child support.

Subsequently, Mr. Creech proceeded by rule for extended visitation rights, and Mrs. Creech reconvened for additional child support.

At hearing, the father's visitation privileges were extended and child support was increased. Mrs. Creech now appeals contending that the increase in child support was inadequate and that the modified visitation privileges, if allowed to stand, would perpetuate "split or divided" custody.

### CHILD SUPPORT

[1] The child support was increased from \$300.00 to \$325.00 per month, and, additionally, Mr. Creech was ordered to maintain dental and medical insurance for the children. Although the father's annual salary was found to be \$28,000.00, with housing provided by his employer, we cannot say that the trial judge abused his discretion in view of the limited factual information before us. We also note that, at the time of the original child support decree, the mother was unemployed. She is now employed, having take home pay of approximately \$350.00 per month. The obligation to support, maintain, and educate the children extends to the mother. La.C.C. Art. 227.

Additionally, the district judge noted that Mr. Creech now has certain obligations which he did not have when support was initially awarded. Appellant does not contend that the written narrative entitled "Statement of Facts" has inaccurately portrayed that fact.<sup>1</sup> Without the benefit of a transcript of the parties' testimony, we

1. The statement of facts was prepared and signed by the trial judge at appellant's request, pursuant to La.C.C.P. Art. 2131.

must accept this finding made by the trial court. *McDonald v. McDonald*, 357 So.2d 1293 (La.App. 3rd Cir. 1978). The \$25.00 per month increase was an attempt by the trial court to, as he said: "balance present needs against present ability to pay." On the basis of the record before us, we find the increase in the support award within the bounds of the trial judge's discretion.

#### VISITATION PRIVILEGES

[2] In the recent case of *McDonald v. McDonald*, *supra*, we held that an award of visitation rights totaling 81 days annually was not excessive. The true test is whether the frequency or length of visitation will be detrimental to the welfare of the child.

Mr. Creech is now working in Vera Cruz, Mexico. Because of the expense and difficulty involved in traveling to the States, he was virtually unable to visit his children one weekend each month, as was originally provided for in the judgment of divorce. The trial judge concluded: "Therefore, the Court felt that the best interest of the children would be served and fairness would prevail upon the part of all parties if a summer visitation period was increased from two weeks to five weeks . . . ." By enabling meaningful visitation with their father, this arrangement could be more beneficial to the children.

[3] Under the original visitation decree, the defendant had visitation rights of one weekend per month, the last week in December, and two weeks in the summer. The essence of the judge's present ruling was to grant three additional weeks of summer visitation in lieu of weekend visitation. As stated above, in the *McDonald* case, we let stand a visitation grant giving the father four weeks during the summer, five days at Christmas, and weekend visitation, which resulted in a total of 81 days. Under the circumstances presented in this case, the visitation award gives Mr. Creech approximately six weeks (45 days) with his children and does not amount to "split or divided" custody. Further, there has been no showing that the period allowed is of such duration as to cause confusion among the children as to parental authority. *Poole*

*v. Poole*, 270 So.2d 215 (La.App. 1st Cir. 1972).

Mrs. Creech indicated concern over the possibility that Mr. Creech might not return the children once they were removed from the United States. Recognizing this potential problem, the district court mandated that Mr. Creech post a \$5,000.00 bond before taking the children to Mexico. We appreciate the worries of the appellant, however, under the original visitation grant, Mr. Creech had the children for the last week of December and two weeks in the summer. This time would have been sufficient to remove the children to Mexico if appellee had intended to do so. Under the present decree, appellant is given more protection with the posting of a bond, which would be forfeited if the children are not returned timely.

There has been no showing of error or abuse of discretion on the part of the trial judge.

For the above reasons, the judgment is affirmed at appellant's costs.

AFFIRMED.



Robert PELOQUIN, Individ., etc.,  
Plaintiffs-Appellants,

v.

CALCASIEU PARISH POLICE JURY et  
al., Defendants-Appellees.

No. 6793.

Court of Appeal of Louisiana,  
Third Circuit.

Feb. 5, 1979.

Plaintiffs sued defendants for damages for conversion of their pet cat, for value of cat, and for mental anguish, inconvenience, and humiliation suffered due to defendants

statute if its meaning is clear from the language employed. *Id.* In the same light, we will look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *Shidler v. All American Life & Financial*, 298 N.W.2d 318, 321 (Iowa 1980).

[2] The appellee/mother urges the language of section 600A.3 clearly leads to a conclusion it is the exclusive remedy in termination cases. There is no reported decision on point, however, a 1987 Iowa Supreme Court decision aids us in our analysis. In its decision addressing the admissibility of hearsay evidence in termination proceedings, the court began its analysis by following the provisions of chapter 600A until it reached section 600A.5. Here the court noted the statutes bisected forming separate procedural paths for the resolution of disputed termination proceedings. *In Interest of E.J.R.*, 400 N.W.2d 531, 533 (Iowa 1987). Important here is the court acknowledged section 600A.3 (which provides termination "shall be accomplished only according to the provisions of this chapter") as its starting point, indicating its belief that 600A.3 is where the legislature has given exclusive authority to terminate parental rights. *E.J.R.*, 400 N.W.2d at 531. We agree with this analysis.

Chapter 600A was adopted prior to 1966 when the juvenile justice act was enacted (now chapter 232) and the legislature has never acted to amend or repeal section 600A.3. The legislature therefore intended to provide in chapter 232 a second procedure for instituting termination proceedings, but not for the actual termination itself. Thus, we determine section 600A.9 is applicable to all termination proceedings.

Finally, we note the golden thread running through both chapter 600A and chapter 232 is the best interests of the child. We do not believe the liberal intent of the legislature to assure the best interests of the child can be accomplished by a construction which would tie the hands of ju-

venile courts in these matters. These provisions should be construed broadly to ensure the court has the ability to achieve its statutorily mandated goal of protecting and providing for the best interests of the children involved. To decide this case differently, would work against the legislature's stated intent.

AFFIRMED.



**In re MARRIAGE OF Susan  
HATZIEVGENAKIS and  
Vassilis Hatzievgenakis,**

**Upon the Petition of Susan Hatzievgenakis, Petitioner-Appellee,**

**And Concerning Vassilis Hatzievgenakis,  
Respondent-Appellant.**

**No. 88-388.**

**Court of Appeals of Iowa.**

**Nov. 29, 1988.**

The District Court, Marion County, James Brown and Jerrold Jordan, JJ., entered decree dissolving marriage, and husband appealed. The Court of Appeals, Sackett, J., held that: (1) refusal to grant continuance to husband whose employment as cruise ship captain required him to be out of the country at time of dissolution trial was not abuse of discretion; (2) restrictions placed on out-of-country visitation between son and husband, who was Greek citizen, were unreasonable; (3) property division would be modified; and (4) child support would be reduced from \$500 to \$400 per month.

**Affirmed as modified.**

**1. Appeal and Error** ⇨966(1)**Pretrial Procedure** ⇨713

Granting of motion to continue trial is at discretion of trial court and will be overturned on appeal only where there is clear abuse of discretion.

**2. Appeal and Error** ⇨1043(7)

Prejudice must be shown to require reversal of judgment for denial of motion to continue trial.

**3. Divorce** ⇨145

Refusal to grant continuance to cruise ship captain who was scheduled to be on duty on date of dissolution trial was not abuse of discretion, even though captain had not requested any previous continuances and had filed pleadings and other court papers in timely manner, where captain did not request continuance until 11 days before trial, despite receiving notice of date four months previously.

**4. Divorce** ⇨301

Unreasonable restrictions on out-of-country visitation by Greek citizen with his son were not justified where mother's fears that her son would not be returned from Greece were not supported by any evidence.

**5. Divorce** ⇨300

Restriction imposed on out-of-country visitation by Greek father with his son, that father have at least two visitations with son prior to any trip to Greece, was unreasonable where father's work schedule as captain of cruise vessel, geography and expense made required visits impossible.

**6. Divorce** ⇨261

Provisions making out-of-country visitation by Greek father with son contingent on payment of child support and property settlement were not in accord with state law and would be stricken.

**7. Divorce** ⇨252.3(1), 252.4

Appropriate property division for parties who had net worth of approximately \$12,000 plus household goods and vehicles was to award wife all household goods and furnishings in her possession, vehicle, and her checking and savings accounts, and to

award husband lot in foreign country, his vehicle and foreign bank accounts and to require him to pay \$3,000 to wife in addition to satisfying \$2,120 worth of her credit card debt.

**8. Divorce** ⇨308

Award of \$500 per month for support of one child would be modified to \$400 per month where father grossed \$2,293 monthly and netted \$1,985.

Steven W. Guiter, of Johnston, Hicks & Guiter, Knoxville, for respondent-appellant.

Garold F. Heslinga, of Heslinga, Heslinga, Dixon & Grotewold, Oskaloosa, for petitioner-appellee.

Considered by OXBERGER, C.J., and DONIELSON and SACKETT, JJ.

SACKETT, Judge.

Respondent-appellant Vassilis Hatzievgenakis appeals the decree dissolving his marriage to petitioner-appellee Susan Hatzievgenakis. He contends the trial court (1) should have granted his motion for continuance, (2) should not have placed unreasonable restrictions on allowing him to take his son outside the United States for visitation, and (3) made an inequitable property and child support award. We affirm as modified.

The parties were married in 1980. Susan, a resident of Marion County, Iowa, is a travel agent. Vassilis, a Greek national, is a ship captain. They have a child who was born in Iowa in 1982. The child is a United States and Greek citizen. Susan maintains a residence in Marion County; Vassilis maintains a residence in Greece.

On April 27, 1987, Susan filed in Marion County for a dissolution of their marriage. Vassilis was personally served in New Orleans on May 21, 1987, and on June 9, 1987, Vassilis answered the petition and in doing so submitted to the jurisdiction of the Iowa court on all issues. He requested joint custody of the child. On October 7, 1987, Vassilis filed a financial statement and on November 7, 1987, Susan filed a financial statement. Interrogatories were pro-

pounded to Vassilis which were answered October 7, 1987.

Neither party filed a trial certificate. See Iowa Rule of Civil Procedure 181. However, on August 21, 1987, the court on its own motion in an attempt to comply with case disposition time standards established by the Iowa Supreme Court, ordered a scheduling conference. An order was issued September 11, 1987 closing discovery on December 10, 1987; closing pleadings on December 17, 1987 and setting the trial for January 28, 1988. A copy of the order was mailed to Vassilis' attorney on September 14, 1987. On January 11, 1988, Vassilis filed a motion to continue claiming his tour of duty as a Staff Captain for a Greek cruise ship sailing in the Cape Horn area of South America made it impossible to attend the January trial. He asked for a continuance until late June or July 1988. Susan resisted. The trial court overruled the motion.

#### I.

[1-3] Vassilis contends the trial court erred in not granting a continuance. The granting or denial of a motion for continuance is in the discretion of the trial court and will be interfered with on appeal only where there is a clear abuse of discretion. *Department of Gen. Servs., State of Iowa v. R.M. Boggs Co., Inc.*, 336 N.W.2d 408, 410 (Iowa 1983); *Estate of Lovell*, 344 N.W.2d 576, 578 (Iowa App.1983). Prejudice must be shown to require a reversal for denial for such a motion. *Cavanagh v. O'Connor*, 194 Iowa 670, 186 N.W. 907 (1922). It must be shown an injustice has been done. *In re Tomin's Estate*, 260 Iowa 1129, 152 N.W.2d 286 (1967). Ordinarily an abuse is found to exist only where there is not support in the record for the trial court's action. *Rath v. Sholty*, 199 N.W.2d 333, 336 (Iowa 1972).

Vassilis signs on a ship for an extended period of time. His employment may be jeopardized if he leaves the ship during his tour of service. This was the first time the case was set for trial. Vassilis has not requested any other continuances and appears to have filed pleadings and financial

information in a timely manner. He did not request a continuance until eleven days before trial despite the fact the case had been set since September 1987.

Vassilis has failed to show the trial court abused its discretion in not granting him a continuance.

#### II.

[4] Vassilis contends the trial court unduly restricted his out of country visitation. The decree provided Vassilis have reasonable visitation with the child in the continental United States and he have the right commencing in the summer of 1989 to take the child to Greece or outside the United States, but before he could exercise out-of-country visitation with his son he be required to first meet the following conditions:

- (1) That he have at least two significant visitations with the child within the six months prior to the visit;
- (2) He post a bond with the Marion County Clerk of Court in the amount of \$20,000 cash or surety;
- (3) All child support payments then be current;
- (4) His property settlement payments ordered previously be paid by the Respondent.
- (5) He pay the travel expenses.

Vassilis contends the first four restrictions should be removed or modified. Vassilis was named a joint custodian. He has met the joint custody test. See *In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). The trial court has determined the child can go to Greece. Susan has not cross-appealed on either issue.

The only thing we must determine is whether the trial court imposed too many restrictions. There is no evidence Vassilis has ever threatened or indicated he would keep the child in Greece. Susan's request for the restrictions was based on the following evidence. She was concerned about the child going to Greece because she lived in Greece. She feels there is no separation of church and state in Greece. Greece is a male oriented society and in a dissolution



the father gets custody. Susan read an article and saw a television show that convinced her she would have problems returning the child from Greece. The child does not speak Greek.

We recognize there are sometimes problems securing the return from a foreign country of a child to a custodial parent in the United States, particularly where the noncustodial parent is a citizen of the other country and once out of the United States the child no longer has the rights and liberties of the United States Constitution.

The Iowa court recently was confronted with the problem of a father who while his marriage dissolution was pending in Iowa sent his child to his home country of Jordan. He remained in Iowa. Nearly two years later the child had not been returned to Iowa despite numerous orders directing the father to return the child to Iowa. See *Amro v. Iowa Dist. Ct. for Story County*, 429 N.W.2d 135 (Iowa 1988).

We find after reviewing Vassilis' financial statement the restrictions imposed will effectively preclude Vassilis from having his child visit with him in Greece. We have long subscribed to a philosophy children of broken homes should have substantial contacts with both parents. See *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa App.1985). The world does not end at the borders of Iowa. These parties lived with the child in both Greece and the United States. Susan is a travel agent. Vassilis is a Greek ship captain. Both are sophisticated and knowledgeable about international travel. They come from diverse cultures and backgrounds. The child is a citizen of two countries and has a right to be introduced and exposed to both. The child has a grandmother, an aunt and uncle and cousins he will not know unless he travels to Greece.

We examine provisions for authorizing out of the country visitation by noncustodial parents in other jurisdictions. In California the court allowed visitation in South Africa, determining the children would benefit from visiting with this father in his home community and the children would be well cared for by the father. See *Milne v.*

*Goldstein*, 202 Cal.App.2d 582, 20 Cal.Rptr. 903 (1962). In Louisiana the court allowed the father to exercise visitation in Mexico finding it would be impossible for the children to spend time with him unless they went to Mexico where he worked. See *Creech v. Creech*, 367 So.2d 1244 (La.Ct. App.1979). In Oregon the court did not prohibit visitation where the mother had a fear but no facts indicating the children would not be returned. See *In re Marriage of Ross*, 45 Or.App. 565, 608 P.2d 1214 (1980).

There is nothing in this record and Susan has presented no evidence other than her fears to support her position. Vassilis has appeared and consented to the jurisdiction of the Iowa courts on all issues. There is no evidence he has thwarted Susan's custody in any way. He has the right to assume we will offer him the same justice we offer Susan. While she expresses fears the child will not be allowed to leave Greece, she asks our courts to prevent the child from leaving the United States.

Our hope for justice for our citizens in foreign courts can best be forwarded by our efforts to offer fair and equitable treatment to foreign nationals in our jurisdiction. We cannot assume Vassilis will not honor our decree.

[5] We examine the restrictions imposed by the trial court. Vassilis contends the requirement for him to have two visitations prior to the trip should be removed. He contends his work schedule, geography and expense makes the required visits impossible. While ideally we would like to see this child have frequent contacts with his father before spending a month with him, we find as Vassilis argues geography, work schedule and expense makes such a requirement prohibitive. We agree with Vassilis and strike that provision.

[6] Vassilis next contends the provisions making the visitation contingent on payment of child support and the property settlement are not in accord with the dictates of Iowa case law. We agree. The Iowa court has said the opportunity for association with one's noncustodial parent

should not be denied because there has not been compliance with the support-money provisions of a decree. See *Sweat v. Sweat*, 238 Iowa 999, 1009-10, 29 N.W.2d 180, 185 (1947) (the court modified a decree to strike provisions making visitation contingent on the payment of child support) and *Fitch v. Fitch*, 207 Iowa 1193, 1196, 224 N.W. 503 (1929) (where the court modified the decree to strike a provision visitation was contingent on the payment of alimony).

Following the dictates of *Sweat* and *Fitch* we strike from the visitation requirement the provision that all property settlement and alimony be paid before out-of-country visitation is authorized. In doing so, however, we find it incumbent to remind Vassilis that courts of this state expects him to comply with the terms of the decree. We consider his obligation to support his child to be a most serious one and his failure to pay could subject him, among other things, to the contempt power of the Iowa courts.

Vassilis contends the bond requirement should be reduced. He offered to post a bond and does not disagree with a bond requirement; rather he contends his financial condition prevents him from posting a \$20,000 bond. We find the bond should be reduced to \$10,000.

### III.

[7] Vassilis contends the property division is not equitable. The trial court ordered Vassilis to pay Susan \$11,500 as a property settlement, \$1,500 toward her credit card indebtedness and \$600 toward attorney fees. He contends the award is not equitable. Vassilis claims the parties have assets of \$10,000. Susan contends they have net assets of about \$100,000, including a condominium in Greece she claims has a value of \$85,000 and is not encumbered. Vassilis denies owning the condominium. The only evidence of condominium ownership is Susan's testimony that Vassilis told her once they owned the condominium and another time they did not. Susan also contends \$8,300 was transferred to Greece in 1983 for the condominium.

Vassilis agrees the \$8,300 was transferred to an account in Greece. However, he contends and bank records filed in response to a request for production show \$11,200 was transferred from Greece to the Interstate Bank of Urbandale in September 1986. Susan makes no explanation for this transfer.

We determine the parties have a combined net worth of approximately \$12,000, less household goods and furnishings which Susan has in her possession. Susan also apparently has a 1982 Oldsmobile, jointly owned, which she values at \$4,000. The trial court made no disposition of the parties' assets, other than to provide for Vassilis' payment of \$11,500 as a property settlement and a \$1,200 payment toward debt.

We modify the property award made by the trial court to strike the provision for Vassilis to pay a \$11,500 property settlement and \$1,200 toward debt. We award Susan all household goods and furnishings in her possession and the 1982 Oldsmobile, as well as her checking and savings account in Iowa. The lot in Greece, Japanese car and Greek bank accounts shall go to Vassilis except he shall pay Susan \$3,000. He shall also pay the Visa, Discover and Master Card debts of \$2,120. Susan shall be responsible for the Younkers and Seiferts bills of \$1,146. We find such an award to be equitable. See *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa App. 1984).

### IV.

[8] Vassilis contends \$500 a month child support is inequitable. We agree. Vassilis grossed \$2,293.93 monthly and netted \$1,985.25. We modify to \$400 per month.

Each party shall pay his or her own attorney fees on appeal. Court costs are taxed one-half to each party.

AFFIRMED AS MODIFIED.

