

1992

Kathleen R. Barnes v. Steven Lyn Barnes : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

KATHLEEN R. BARNES,
Plaintiff/Appellee,

vs.

STEVEN LYN BARNES,
Defendant/Appellant.

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APPEALS NUMBER 920608-CA

Case Number 924900082 DA

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court

Salt Lake County, State of Utah

Judge J. Dennis Frederick

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Appeal Classification 4

UTAH COURT OF APPEALS
BRIEF

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APPEALS NUMBER 920608-CA

Case Number 92-4900082 DA

STATEMENT OF JURISDICTION

The Utah Court of Appeals is granted jurisdiction of this matter pursuant to Rules 3(a) and 4 of the Utah Rules of Appellate Procedure and Section 78-2a-3 of the Utah Code Annotated 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from the Third Judicial District Court's award, after trial of the matter, of custody to the Plaintiff/Appellee, of alimony to the Plaintiff/Appellee and of the division of the Defendant/Appellant's retirement monies. The Honorable J. Dennis Frederick presided at the divorce trial held January 30, 1992 and January 31, 1992.

STATEMENT OF THE ISSUES

1. The trial court awarded permanent custody of the parties' three (3) minor children to the Plaintiff/Appellee. The Defendant/Appellant contends the award of custody was not based upon the evidence presented at trial, is contrary to the best interests of the minor children, and is not supported by adequate findings of fact. The standard of review to be followed by the

Court of Appeals is a determination that the best interests of the child will be met by the custody award and a determination that the award of custody is not a clear abuse of discretion. Section 30-3-10 of the Utah Code Annotated 1953, as amended, Paryzek v. Paryzek, 776 P.2d 78 (Utah App. 1989) and Cummings v. Cummings, 175 Utah Adv. Rep. 23 (Utah 1991) discuss the standard of review in custody matters.

2. The trial court awarded the Plaintiff/Appellee permanent alimony in the amount of five hundred dollars (\$500.00) per month. The Defendant/Appellant contends the award of alimony to the Plaintiff/Appellant is erroneous as the Plaintiff/Appellee did not demonstrate any genuine need for alimony. Moreover, the award of alimony to the Plaintiff/Appellee made it impossible for the Defendant/Appellant to meet basic living expenses for himself. As confirmed in Chambers v. Chambers, 198 Utah Adv. Rep. (Utah October 21, 1992) and Crockett v. Crockett, 836 P.2d. 818 (Utah App. 1992) the appellate standard of review of alimony determinations is whether or not the award constituted a clear and prejudicial abuse of discretion.

3. The trial court, without justification, essentially reversed its division of the Defendant/Appellant's retirement monies after ruling on post-divorce motions. The division of the retirement monies failed to take into account the allowable expenditures from retirement monies and erroneously calculated the amount of monies in existence on the date of the divorce trial. The appellate court reviews the trial Court's property division to

determine whether there was substantial and prejudicial error, whether the evidence clearly preponderates against the findings or if there was a clear abuse of discretion. Watson v. Watson, 194 Utah Adv. Rep. 42 (Utah App., August 24, 1992), Howell v. Howell, 806 P.2d 1209 (Utah App. 1991) and Haumont v. Haumont, 793 P.2d 421 (Utah App. 1990).

4. The trial court refused to allow the children and several witnesses called by the Defendant/Appellant to testify regarding the children's preference for permanent custody. The Court impermissibly excluded evidence impacting on the children's best interests. Identification of a child's preference for custody and the consequences for not doing so which constitute a clear abuse of discretion are identified in Section 30-3-10 of the Utah Code Annotated 1953, as amended, Paryzek v. Paryzek, supra, and Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982).

5. The trial court's findings of fact and conclusions of law were insufficient to support its resolution of custody, alimony, and the division of the Defendant/Appellant's retirement monies. If the findings of fact and conclusions of law are clearly erroneous they can not support a challenge upon appeal. Roberts v. Roberts, 835 P.2d 193 (Utah App. 1992), Woodward v. Fazio, 175 Utah Adv. Rep. (Utah App. Dec. 1991) and Rule 52(a) of the Utah Rules of Civil Procedure.

6. The trial court refused to grant the Defendant/Appellant a new trial and refused to grant a hearing to resolve issues which were not raised at trial. The rulings of the Court were arbitrary,

prejudicial and partially necessitated this appeal. The failure to grant the Defendant/Appellant's post-divorce motions including the Motion for New Trial were a clear abuse of discretion. Rule 59(6) of the Utah Rules of Civil Procedure and Watson v. Watson, supra.

STATEMENT OF THE CASE

This appeal is from a final Order of the Third Judicial District Court resolving issues of custody, alimony, and the division of retirement monies. The Defendant/Appellant filed post-trial motions for a new trial to stay the trial Court's decision pending completion of the appellate process, and to reconsider stated matters. Appeal is taken from the Court's denial of all the Defendant/Appellant's post-trial motions.

1. The parties were married on September 16, 1972.

2. Three (3) children, Jamie Nicole, whose date of birth is July 26, 1976, Adam Matthew, whose date of birth is March 29, 1979, and Jennifer Morgan, whose date of birth is November 20, 1982 were born of this marriage.

3. The parties reconciled after an eighteen month separation which terminated approximately two years prior to the final separation, which culminated in the dissolution of this marriage. During the initial separation, the Defendant/Appellant was the primary caretaker for the parties' minor children.

4. Commissioner Peuler interviewed Jamie and Jennifer after the hearing on the Plaintiff/Appellee's Order to Show Cause. Commissioner Peuler's Minute Entry, dated January 22, 1991, awarded the Defendant/Appellant temporary custody of the parties' minor

children because he had been their primary caretaker during the parties' previous extended separation.

5. The Defendant/Appellant remained in the marital home and provided the primary care for the minor children for over a year until the Court awarded custody of the children to the Plaintiff/Appellee and ordered him to vacate the marital home. The Plaintiff/Appellee provided limited supervision and care for the minor children before school and after school.

6. The Court selected Dr. Donald Strassberg to perform a custody evaluation. Dr. Strassberg determined that both parties would be fine custodians for the minor children but that custody should be awarded to the Plaintiff/Appellee.

7. The Court initially, in the oral ruling, rendered at the conclusion of the trial, ordered the parties divide the retirement monies the Defendant/Appellant had at the time of the separation after making deductions for expenditures made by the Defendant/Appellant during the parties' separation for marital obligations.

8. The Court awarded the Plaintiff/Appellee permanent alimony in the amount of five hundred dollars (\$500.00) per month.

9. The Defendant/Appellant filed a Motion for New Trial on February 13, 1992. The rationale for the Motion for New Trial was the Defendant/Appellant's belief the Court's decision on the issues of custody and alimony were legally deficient and not supported by the evidence presented at the trial. The Court issued a Minute Entry on February 20, 1992 denying the Defendant/Appellant's Motion

for New Trial.

10. The parties could not agree upon the dollar amount of the retirement monies to be divided between the parties. Consequently, the Defendant/Appellant filed a Motion for Reconsideration of Unresolved Issues on February 24, 1992. On March 3, 1992, the Court issued a Minute Entry denying the Defendant/Appellant's Motion for Reconsideration of Unresolved Issues.

SUMMARY OF THE ARGUMENTS

Each parent acknowledge the Defendant/Appellant was the primary caretaker of the parties' three (3) children during each of the parties' protracted separations. The children thrived in the Defendant/Appellant's care.

The Plaintiff/Appellee provided driving service back and forth from school during the parties' second separation. She even testified at trial that she did fewer labors to benefit and assist the minor children during the second separation than during the time of the first separation, and that she was in the martial home more during the first separation than during the second separation. (T.31)

The Plaintiff/Appellee did very little to exercise her full visitation rights. She testified that she generally only elected to see the children for a few hours one day each weekend and that she had the children spend the entire weekend with her only once during the entire second separation. (T.30,T.31, T.59)

The trial Court ignored the evidence at trial regarding the

parenting capabilities of both parents, and without compelling reasons to do so changed the stable, competent custodial situation of the children.

The Amended Findings of Fact and Conclusions of Law neither accurately reflect the testimony given at trial nor give more than conclusionary rationale, most of which are not supported by the evidence for the Court's rulings on the issues of custody, alimony and the division of the Defendant/Appellant's retirement monies. The Amended Findings of Fact and Conclusions of Law are legally deficient.

The Plaintiff/Appellee worked part-time during the majority of the second separation. There was absolutely no dispute that she could have worked full time for her employer. (T.6, T.49) The Defendant/Appellant worked full time with little opportunity for overtime. The trial Court awarded permanent alimony to the Plaintiff/Appellee without requiring her to maximize her own earning potential and in complete disregard of the financial consequences to the Defendant/Appellant. The Defendant/Appellant is left without sufficient monies to meet basic living expenses after payment of his child support and alimony obligations.

The parties' two oldest children had clear preferences regarding their permanent custody. The trial Court refused to hear any testimony from any witness or from the children themselves regarding their preferences for custody. These children, 16 years and 13 years, respectively are capable of voicing a thoughtful and wise choice of custodial parent, and believed that they had

sufficient reasons to prefer the custody of the Defendant/Appellant. The two older children hoped they would be able to speak to Judge Frederick about their choice of custody outside the presence of their parents. When talking with the children, Judge Frederick refused to ask either of the older children if they had any opinion or preference regarding custody. Apparently, he also did not introduce any general topic which would allow the older children to take the initiative to articulate their preferences. (T.192, T.193)

The failure of the trial Court to ascertain, much less place any reliance upon the older children's considered position regarding custody, was contrary to a full examination of the children's best interests. The exclusion of competent testimony clearly precluded a determination of custody designed to satisfy the needs of the children.

The Defendant/Appellant received the monies in his retirement account when there was a buy out of his employer. The parties made expenditures of these marital monies during the period of their reconciliation. There was essentially no dispute about the amount of monies in existence at the time of the parties' separation. (T.18, T.140) The Defendant/Appellant further expended retirement funds for marital and non-marital obligations during the parties' separation. The trial Court ordered the parties' to divide equally the retirement funds in existence at the time of the parties' separation after making deductions for the expenditures to pay the marital obligations. (T.200, T.201)

Counsel for the Plaintiff/Appellee drafted proposed Findings of Fact and Conclusions of Law which indicated an amount the Defendant/Appellant considered inaccurate. The trial Court denied the objection to the erroneous provisions, and improperly modified and upwardly adjusted the amount of retirement monies to be divided between the parties. On February 19, 1992, the Defendant/Appellant filed his Motion for Reconsideration of Unresolved Issues. The trial Court issued a Minute Entry dated March 3, 1992, which denied the Defendant/Appellant's Motion for Reconsideration of Unresolved Issues.

The trial Court ordered the division of the larger, initial amount of retirement funds received by the Defendant/Appellant rather than the funds existing at the time of the parties' separation minus allowable deductions for the payment of marital expenditures at the date of trial. The Court executed Amended Findings of Fact and Conclusions of Law addressing this issue which are not supported by the evidence. The improper division of the total amount of monies received initially by the Defendant/Appellant is contrary to the evidence presented at trial and is tantamount to an unjust enrichment to the Plaintiff/Appellee.

DETAIL OF THE ARGUMENT

- I. THE TRIAL COURT ERRED IN AWARDING CUSTODY OF THE PARTIES' MINOR CHILDREN TO PLAINTIFF/APPELLEE
 - A. THE TRIAL COURT FAILED TO CONSIDER THE PLAINTIFF/APPELLEE'S MORALS

Section 30-3-10 of the Utah Code annotated 1953, as amended, clearly mandates the trial Court evaluate each parent's morals as

a significant factor in considering an award of permanent custody.

The Plaintiff/Appellee testified at trial that she had intimate affairs with men during each of the parties' separation. (T.54, T.57, T.60, T.69, T.70, T.72) The termination of one, probably two, of these relationships caused the Plaintiff/Appellee to contemplate suicide. (T.56, T.57, T.70, T.155, T.156, Ex 5)

The Defendant/Appellant testified that he believed it was categorically wrong for a party to be intimate with another before one's divorce was final. (T.122) He testified that he believed the Plaintiff/Appellee's morals would preclude her from teaching good morals to their children, and setting a good example for the children. He believed her extramarital relationships often caused her to make poor decisions, such as introducing the children of the parties to her male friends, leaving the children with her boyfriends or neglecting them to spend weekends with her boyfriend. (T.60, T.122, T.123, T.126, T.129, T.160)

The Utah Court of Appeals has determined that a parents' extramarital affairs do have a bearing upon that parent's fitness to be awarded custody. In Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990) at page 1177 the Appellate Court stated:

"Nor do we find that the trial Court abused its discretion in considering Rachelle's sexual conduct in making its custody decision. Utah Code Ann. § 30-3-10(1) (1989) provides that in custody determinations pursuant to divorce, the trial Court "shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties." The statute has been construed to mean that parental moral character is but one of numerous factors that the trial Court may consider in determining the child's best interest. See Santerson v. Tryon, 739 P.2d 623, 627 (Utah 1987.)"

The Utah Courts do not appear to be willing to deviate from consideration of a party's extramarital affairs when deliberating the issue of permanent custody. In Cummings v. Cummings, 175 Utah Adv. Rep. 23, 26 (Utah Nov. 1991), the Appellate Court upheld the lower court's award of custody to the father partially because of emotional harm her children suffered because of her relationships with men.

There was never any indication from any source that the Defendant/Appellant had a single extramarital affair. There was never any suggestion that the loss of a lover would cause the Defendant/Appellant to contemplate suicide and desert his children. There was never any testimony to indicate the Defendant/Appellant needed to validate himself by engaging in extramarital affairs or that he had ever made his children secondary to an extramarital partner. Not only did the Plaintiff/Appellee choose to spend weekends with her boyfriend over the time she was scheduled to spend the time with her children, but as she reported to Dr. Strassberg she discussed her extramarital affairs with her oldest child, Jamie Nicole. She believed the sharing of personal, intimate matters enabled her to be more "like friends" with Jamie than mother/daughter. (Custody Evaluation of Dr. Strassberg)

The trial Court, in an absolute disregard of its discretion, failed to consider the Plaintiff/Appellee's extramarital affairs over parenting responsibilities, her abdication of traditional mother/daughter interaction in order to be a friend rather than parent to her oldest daughter, and the very definite negative

impact of her extramarital affairs upon her children. Clearly, there was a noted and substantial difference between the morals of these parents. It is inconceivable that the trial Court believed the parent with less exemplary morals, which she allowed to impact in decisions regarding her children should be awarded custody of the minor children. The trial Court's award of custody to the Plaintiff/Appellee should be reversed.

Dr. Strassberg testified that the Defendant/Appellant was concerned about the Plaintiff/Appellee's relationship with her biological father. (T.96) The evaluation also testified that the Plaintiff/Appellee eventually terminated all contact with her natural father when he indicated he wanted more intimacy with her. (T.91, T.92)

Although there is no proof that the Plaintiff/Appellee ever engaged in an incestuous relationship with her biological father, there is every indication from parties who knew the Plaintiff/Appellee and her father very well and even from the Plaintiff/Appellee herself that their relationship was not typical of other father/daughter relationships and had some sexual components. She maintained this relationship as an adult by her voluntary election. The Plaintiff/Appellee is, in the pictures introduced into evidence and in the descriptions given by others, seen to be willingly engaging in questionable physical contact with her father.

It is hard to fathom that the Plaintiff/Appellee's judgment would be deemed appropriate, wise, prudent or insightful in light

of her relationships with boyfriends during her marriage to Defendant/Appellant or her father. Antithetically, the Defendant/Appellant's morals and ability to form healthy relationships was never questioned or challenged. It was clearly an abuse of discretion for the trial Court to deprive the parent who could provide mature, appropriate, morally defensible guidance in the formation of future relationships of custody. The award of custody to the Plaintiff/Appellee should be reversed.

The Plaintiff/Appellee demonstrated that she would use deceit to ensure her own happiness even if it meant detrimental consequences to her children. The Plaintiff/Appellee removed checks remitted by the Defendant/Appellant's insurance carrier, which were made payable to the Defendant/Appellant, from the marital home. Although these checks were issued as payments to Jamie's health insurance providers, the Plaintiff/Appellee forged the Defendant/Appellant's names to the checks and utilized the funds for her own personal needs. (T.51, T.138, T.139) The Plaintiff/Appellee apparently believed it was acceptable and appropriate for her to convert monies that were not her own to her own wants rather than to work to pay her own bills.

The Plaintiff/Appellee went to the marital home when the Defendant/Appellant was not home and removed the parties' camper trailer. She subsequently sold the camper trailer and kept the sales proceeds for her own use. (T.135, T.136) The sale of the camper trailer eliminated the pleasure the children experienced in their family camping trips. (T.136) Again, the Plaintiff/Appellee

apparently believed it was appropriate and acceptable for her to dispose of an asset enjoyed by the entire family and retain the monies than to work to pay her own bills.

Evidence at trial, even from the Plaintiff/Appellee, illustrated the questionable integrity of the Plaintiff/Appellee. There is no plausible argument which could refute the contention that a person's integrity is a component of their moral fitness. Although Judge Frederick did not condone the Plaintiff/Appellee's taking and utilization of assets for her personal needs, he did not make any correlation between the Plaintiff/Appellee's lack of integrity, her willingness to put her needs before the needs of her children, and the statutory requirements of § 30-3-10(1) of the Utah Code Annotated, 1953, as amended. The Court's failure to consider the integrity of the Plaintiff/Appellee was clearly violation of the mandates of the applicable statutes and controlling case law such as Merriam, supra.

B. THE TRIAL COURT IMPROPERLY IGNORED THE EXCELLENT TEMPORARY CUSTODY AWARD.

The Defendant/Appellant was unarguably the primary caretaker for the parties' minor children nearly thirty months of the fifty-four months which preceded the trial of this matter. He was the custodial parent and primary caretaker during the eighteen months of the parties' first separation and the twelve months of the parties' final separation. (T.30, T.54, T.117, T.118, T.123) Dr. Strassberg did not identify any harm or ill effects to the children during the extensive times spent in the custody of their father. Rather, the home maintained by the Defendant/Appellant and the

environment therein seemed to be stable and structured to successfully meet the needs of all the children.

The stability of a temporary custody arrangement is one which should not be changed except for compelling reasons. In Paryzek v. Paryzek, 776 P.2d 78 (Utah App. 1989) at pages 81 and 82, the Court stated:

"The overriding consideration in child custody determinations is the child's best interests. Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982). There are several factors to be considered by the trial court in awarding custody, some of which concern the child's specific needs and others which relate to the parents' characteristics. Id. at 41. However, providing a stable home for a child and avoiding "ping pong" custody awards are critical factors in custody disputes. Hogge v. Hogge, 649 P.2d 51, 53-54 (Utah 1982). There is a "general interest in continuing previously determined custody arrangements where the child is happy and well adjusted." Hutchinson, 649 P.2d at 41. This interest in stability has been the basis for requiring a substantial change of circumstances as a precondition for reexamining permanent custody awards. Id.; Kramer v. Kramer, 738 P.2d 624, 626 (Utah 1987); Fullmer v. Fullmer, 761 P.2d 942, 946 (Utah Ct. App. 1988). Recently, however, in Elmer v. Elmer, 776 P.2d 599, (1989), the Utah Supreme Court held that the strict change of circumstances requirements would not always apply in custody modification proceedings. Nonetheless, the court emphasized the importance of relative permanence in custody orders:

[I]f an existing custody arrangement is not inimical to the child, the continuity and stability of the arrangement are factors to be weighted in determining a child's best interests. What particular weight to be accorded those factors in a given case must depend on the duration of the initial custody arrangement, the age of the child, the nature of the relationship that has developed between the child and the custodial and noncustodial parents, and how well the child is thriving physically, mentally, and emotionally. A very short custody arrangement of a few months, even if nurturing to some extent, is not entitled to as much weight as a similar arrangement of substantial duration.

Id. at 604. See also Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989). Notably, Elmer did not identify the temporary versus permanent nature of the "initial custody award" as one of the factors to be considered in deciding how much weight to give "continuity and stability." The Elmer decision emphasized that the paramount consideration must be promoting the child's best interests, and it is irrelevant from the child's perspective, how, as a legal matter, the existing arrangement came about.

Other Utah Supreme Court cases have similarly held that stability is a fundamental consideration in original custody awards as well as in subsequent modifications. In Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986), the court stated that decisive factors in child custody determinations should be function-related, and include the "identity of [the] primary caretaker during the marriage." However, Pusey also states that another factor is considered in the "identity of the parent with whom the child has spent most of his or her time pending custody determination if that period is lengthy." Id. in Davis v. Davis, 749 P.2d 647 (Utah 1988), the father had custody of the child for over a year prior to trial on the issue of a permanent custody award. The trial court considered various factors, including that the father had provided a stable environment and had been the primary caretaker during the interim period. The Utah Supreme Court affirmed the custody award to the father, and stated that "[i]n considering competing claims to custody between fit parents under the 'best interests of the child' standard, considerable weight should be given to which parent has been the child's primary caretaker" prior to the divorce. Davis, 749 P.2d at 648 (emphasis added).

The Defendant/Appellant demonstrated not only the desire but the actual ability to place his children's needs before his, to make sacrifices of time and assets for his children and to provide a stable, secure environment and home for his children during the disruptions and separations caused by their parents' marital discord. (T.151, T.152)

After Paryzek, supra, there have been a plethora of cases which have affirmed the desire to maintain temporary custody

arrangements if they have been functional, have met the needs of the children and will continue to meet the best interests of the children. Moon v. Moon, 790 P.2d 52 (Utah App. 1990), Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991), Cummings v. Cummings, 175 Utah Adv. Rep. 23 (Utah Nov. 1991). The Utah Court of Appeals has even stated that as a matter of law permanent custody must be awarded to the party who was the primary caretaker during the pendency of the action. In Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990) at pages 1177 and 1178 the Court stated:

"In Paryzek v. Paryzek, 776 P.2d 78 (1989), this court held that in custody decisions, a trial court must, because of the child's need for stability, consider the nature and duration of pre-existing custody arrangements. Id. at 82. We also indicated that when the call is otherwise close, this consideration may warrant awarding permanent custody, as a matter of law, to the party who was primary caretaker during the pendency of the divorce. Id. at 83-84. In Davis v. Davis, 749 P.2d 647 (Utah 1988), the Utah Supreme Court stated that in a custody dispute between fit parents, "considerable weight" should be given to the identity of the primary caretaker. Id. at 648. See also Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986) (identity of parent with whom child has spent most time pending divorce is fact to consider in custody decision."

There is no dispute that the Defendant/Appellant nurtured the children and met their emotional and physical needs during each of the parties' separations.

Dr. Strassberg testified that the Defendant/Appellant was a good parent who was not deficient in any way. (T.102) He also testified that the children would not be harmed in any way if the Defendant/Appellant were awarded physical custody of the children. (T.103) Lastly, the evaluator testified that his recommendation awarding permanent custody to the Plaintiff/Appellee was "a very

close judgment call." (T.103) In refusing to award permanent custody of the children to the Defendant/Appellant, the trial Court clearly failed to follow the mandates of Paryzek. Supra, and Merriam. Supra.

There was no compelling reason to change the temporary custody situation. However, as noted by the Defendant/Appellant in his post-trial Motion for New Trial and Motion to Stay Proceedings, it was imperative that the children not suffer another disruption in their lives. The trial Court erred in its award of permanent custody to the Plaintiff/Appellee. There was neither sufficient evidence to support the trial Court's decision nor a convincing consideration of the requirement to maintain a stable custodial arrangement if possible. The trial Court's decision resolving custody is an illogical, specious abuse of discretion. This Court should reverse the order granting the Plaintiff/Appellee permanent custody.

C. THE TRIAL COURT FAILED TO AWARD CUSTODY TO THE CHILDREN'S PRIMARY CARETAKER.

A multitude of cases have determined that a trial Court, when articulating what type of custodial arrangement will satisfy the child's best interest, must closely examine "function-related factors." As stated in Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989) at page 87:

"To determine the best interests of the child, the trial court must consider "function-related" factors, which include:

the preference of the child; keeping siblings together; the relative strength of the child's bond

with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted. Other factors related primarily to the primary custodian's character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition. Id. at 973 (quoting Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982)). This court has recognized that some of the more significant factors, although not dispositive, include the identity of the primary caretaker during the marriage, the parent who has the greatest flexibility to provide personal care for the child, and the relative stability of the environment each parent is capable of providing. Id. at 56."

Subsequent cases such as Moon v. Moon, 790 P.2d 52 (Utah App. 1990), Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1991) and Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991) have all mandated identification of the primary caretaker utilizing function related criteria to formulate a legally cognizable award of custody.

There is no dispute that the Defendant/Appellant provided the greater amount of day-to-day care for the children during the parties' initial separation. The Plaintiff/Appellee would assist in transporting the children to school and back and would assist in doing some housework and laundry. (T.30, T.31, T.598, T.60, T.183) Her primary, almost sole function, during the final separation was to shuttle the children back and forth to school and to make

certain that they had eaten something for breakfast. The Plaintiff/Appellee testified that during the most recent separation she did not cook, clean or do the laundry except infrequently. (T.31) As she stated this time she was helping out her husband but not caring for him. (T.32) It is tragic that in attempting to place the responsibility for the more tedious but critical element of caring for the children onto her estranged husband she fails to realize that doing household labors for her children is of significant benefit to the children and a large part of daily parenting.

The Defendant/Appellant testified that having the Plaintiff/Appellee in the home often meant more work for him as he would have to clean meals she left behind. (T.123, T.124) The Plaintiff/Appellee admits receiving letters complaining of the condition in which she would leave the house after her daily departures. (T.59)

The Defendant/Appellant has demonstrated an ability to supervise and guide his children. The children have curfews. They must have his permission to be away from home and they must inform their father of their whereabouts. (T.129, T.130, T.145) If the children do not keep their curfews or inform their father of where they will be, he grounds them. (T.130) Neighbors, including a witness called by the Plaintiff/Appellee, indicated the children are well-supervised and cared for by a father who is at home as much as possible. (T.11, T.12, T.178)

The Defendant/Appellant testified he makes as much effort as

possible to be with his children and assist them in all their endeavors. He has coached their teams, played sports with them, and attended their games. (T.114, T.116, T.161, T.162, T.186) He has attended parent-teacher conferences and had additional meetings with Adam's teachers because he was concerned about Adam's recent academic performance. (T.118, T.119, T.147, T.189, T.190) Both parties testified that the Defendant/Appellant assisted the children with their homework. (T.60, T.119) The Plaintiff/Appellee indicated at trial that the children were not doing as well in school as they had been prior to the separation. However, she made no attempts to arrange tutoring for the children. (T.49) Mr. Paul Brennan, Adam's social studies teacher, testified that he had only seen the Defendant/Appellant at parent-teacher conferences. (T.189) He perceived the Defendant/Appellant to be a very concerned parent. His assessment of Adam was ". . . he seems very stable, happy. His scholastic work is exceptional." (T.190)

The Defendant/Appellant has stated concerns that the Plaintiff/Appellee does not adequately supervise the children. The Plaintiff/Appellee did not know where Adam was when Commissioner Peuler wished to speak to the children. (T.29) The Defendant/Appellant testified that he knew of times when the children were left alone unsupervised in the home overnight by the Plaintiff/Appellee. (T.122) Mr. Tenneson, a neighbor, recalled seeing the Defendant/Appellant watching over his children from the street at about 3 o'clock A.M. because the Plaintiff/Appellee was not home. (T.176, T.177)

The Defendant/Appellant demonstrated a willingness and ability to spend as much time as possible with his children. The Plaintiff/Appellee did not place as much significance on maximizing the time she spent with the children. She admitted she spent a considerable amount of time during the weekends in Park City with her boyfriend. (T.60) During the time the Defendant/Appellant had custody of the children during the final separation the Plaintiff/Appellee exercised visitation only one or two full weekends. (T.126, T.127, T.128) She did not even request to have the children with her during Thanksgiving 1991. (161) The Plaintiff/Appellee chose to attend a concert at Park City rather than attend a softball game on Jamie's birthday. (T.79) Any bond between the children and their mother could not have been fostered by her elective absences or her failure to spend as much time as possible with the children. The apparent increased focus on her personal pursuits rather than spending time with the children were noted both by the Defendant/Appellant and Mrs. Elma Barnes, the children's paternal grandmother. (T.81, T.84, T.85) As the Defendant/Appellant stated "She spent more time with them the first time and she seemed a little closer to them." (T.126)

The Defendant/Appellant has demonstrated an ability to discuss issues dealing with maturation, responsibility and ethics with his children. (T.123, T.125, T.130, T.131) He is a caring, patient, competent parent. In contrast the testimony at trial indicated the Plaintiff/Appellee was less patient with the children and that she was also more likely to articulate comments which would cause pain

to the children and harm their self-esteem, such as calling them names, indicating they were couch potatoes and lazy . (T.81, T.84, T.125)

There is not a single function, chore or undertaking the Defendant/Appellant did not or would not undertake to meet the needs of his children. He clothed, fed, educated and loved them during each of the parties' separations. No one has alleged the Plaintiff/Appellee does not love her children. However, her functioning as a parent has been much less active and significant than that of the Defendant/Appellant. No one even suggested the children did not thrive while in the care of the Defendant/Appellant. No one ever suggested that the children were not happy and well-adjusted while residing with the Defendant/Appellant.

The trial Court completely ignored the parenting, function-related tasks performed by the Defendant/Appellant when issuing its oral decision awarding custody to the Plaintiff/Appellee. Judge Frederick stated, "The Plaintiff's level of commitment to her children during the course of this separation has exceeded that of the Defendant and that's been established by their actions during the course of the separation." The failure of the Court to properly identify the primary caretaker, to acknowledge the Defendant/Appellant's care of the children, and to declare the Plaintiff/Appellee to have had a higher level of commitment to the children was contrary to the holdings of cases designed to further the best interests of children and was contrary to the evidence

presented at trial. As a clear abuse of the discretion given a trial Court, the trial Court's custody decision should be reversed.

D. THE TRIAL COURT IMPROPERLY ADOPTED THE DECISION OF THE CUSTODY EVALUATOR WITHOUT PROPER CONSIDERATION OF THE FACTS EVIDENCED AT TRIAL.

Dr. Strassberg failed to make adequate inquiry into past and current realities when he performed his custodial evaluation. Dr. Strassberg was informed by the Defendant/Appellant of two separate occasions when the Plaintiff/Appellee had suicidal ideations due to the termination of extramarital affairs. (T.148, T.149) However, in his evaluation, Dr. Strassberg discusses only one instance when the Plaintiff/Appellee had contemplated suicide. (T.95)

The Defendant/Appellant testified he informed Dr. Strassberg that he believed the Plaintiff/Appellee's interest and ability to parent their children had been adversely impacted by her extramarital relationships. (T.150) He also indicated that he believed the children were upset when they met their mother's boyfriends. (T.150) Despite these articulated concerns, Dr. Strassberg was unconcerned about the Plaintiff/Appellee's extramarital affairs. (T.96, T.97, T.98) This apparent lack of concern is antithetical to the statutory mandates of § 30-3-10(1) of the Utah Code Annotated 1953, as amended and precedential case law which states that a parent's morals are factors which the trial Courts must consider in making an award of custody. The custodial evaluator was also "unconcerned" that the children would meet the man or men with whom their mother was having an affair. (T.97,

T.98) It is incredulous that introducing minor, impressionable children to their parent's lovers can be cavalierly dismissed as having no relevance to the straying parent's ability to assess a child's needs and to protect the child from additional anguish and trauma or that these introductions will not traumatize children.

Dr. Strassberg's testimony at trial and his evaluation report are inconsistent. He based his recommendation that the Plaintiff/Appellee be awarded custody because of the impressive level of involvement with the children during the separation. (T.103, Custody Evaluation) However, at trial he identified the Plaintiff/Appellee's involvement with her children to be ". . . getting there early and getting the kids ready for school and was often there when the kids got home from school until Steve returned from work." (T.99) Later he minimized the efforts expended by the Plaintiff/Appellee to parent the children. He stated there was very little involved in preparing breakfast for the children. (T.99) He was also aware that the Plaintiff/Appellee would "often" have the children one day on the weekend. (T.100) The Plaintiff/Appellee's concern and love for her children may have been genuine but the efforts she expended to parent and have contact with her children was minimal. The illusion was a caring, committed active parent. The reality was parenting with the least possible amount of effort only when it did not involve sublimating or delaying the pursuit of her pleasures or inconveniencing the Plaintiff/Appellee. It should also be remembered that the Plaintiff/Appellee utilized her access to the marital home to

remove property which did not belong to her, to go through the personal property of the Defendant/Appellant, and to leave dirty dishes and messes for the Defendant/Appellant to clean. (T.50, T.51, T.59, T.124, T.165) The fatal inconsistencies between the conclusion by the evaluator, the evaluator's testimony and the facts created and fostered by the Plaintiff/Appellant during the separation should have negated any great reliance being placed upon the custody report and evaluation.

The evaluator made no efforts to interview or speak with anyone related to the Defendant/Appellant. Several members of the Plaintiff/Appellee's family were contacted. (T.93, T.94) Dr. Strassberg made no effort to ascertain how much substantive real parenting was done by the Plaintiff/Appellee. He made no effort to determine why the Plaintiff/Appellee did not exercise more frequent or more extended visitation. (T.99, T.100, T.101) The evaluation process was flawed. It is only logical that the evaluator's recommendation then is also fatally flawed.

The trial Court is granted a great deal of latitude to determine custody. Paryzek v. Paryzek, 776 P.2d 78 (Utah App. 1989). However, it is not the prerogative of the trial Court to automatically adopt the recommendation of the custody evaluator. The facts which could have been ascertained by Dr. Strassberg and which should have been incorporated in his custody evaluation should have properly considered the non-illusionary facts of the temporary custody situation and the parenting activities of the parties. The failure to do so tainted the evaluation process. It

was a clear abuse of the trial Court's broad discretion to adopt the recommendations of Dr. Strassberg when the same were not substantiated by any credible evidence. It is not within the prerogative of the trial Court to adopt flawed analysis or untenable, unconscionable recommendations while ignoring compelling, often undisputed facts, which affected and defined the best interests of these children. The adoption of Dr. Strassberg's recommendation and the award of custody to the Plaintiff/Appellee should be reversed.

E. THE AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE LEGALLY INSUFFICIENT.

Paragraphs 7, 8, 9, 10 and 14 of the Amended Findings of Fact and paragraphs 4 and 5 of the Amended Conclusions of the Law are conclusionary, erroneous statements designed only to support the trial Court's award of custody to the Plaintiff/Appellee. They lack substantiation in the trial transcript.

The evaluator determined that the Plaintiff/Appellee had the emotional stability to be the custodial parent based upon the MMPI scores. (T.90) This conclusion is erroneous as the evaluator impermissibly disregarded her extramarital relationships, her willingness to discuss these relationships with her children, and the simple parenting she did in the minimal amount of time she elected to give to the children. (T.97, T.99, T.100) The evidence by the parties and the witnesses cast unrefuted qualms about the Plaintiff/Appellee's fitness, character and emotional stability to be the custodial parent.

Contrary to the assertion in paragraph 8 of the Amended

Findings, the Court did not consider the "relative ability of parents to provide care, supervision and suitable environment for children. . . ." Had the Court done so it would not have modified the existing lengthy, healthy temporary custody award. This allegation is conclusionary and contrary to the preponderance of the evidence introduced at trial.

Roberts v. Roberts, 835 P.2d 193 (Utah App. 1992) sets for a very explicit standard for that the trial Court must adhere to in issuing legally sufficient Findings of Fact and Conclusions of Law:

"Our threshold consideration on review is whether the court's findings and conclusions are adequate. 'In cases tried to the bench, the court is required to 'find the facts specially' and thus ground its decision on findings of fact which resolved the material factual uncertainties and are expressed in enough detail to enable a reviewing court to determine whether they are clearly erroneous.' Erwin v. Erwin, 773 P.2d 847, 848-49 (Utah App. 1989) (quoting Utah R. Civ. P.52(a)). '[T]o ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions.' Painter v. Painter, 752 P.2d 907, 909 (Utah App. 1988) (citations omitted); accord Linam v. King, 804 P.2d 1235, 1237 (Utah App. 1991). These findings must be adequate to ensure on appeal 'that the trial court's discretionary determination was rationally based.' Painter, 752 P.2d at 909 (quoting Martinez v. Martinez, 728 P.2d 994 (Utah 1986)). Specifically of findings is particularly important in custody determinations. This is so because the issues involved are highly fact sensitive.

We will not disturb a trial court's custody determination if it is consistent with the standards set by appellate courts and supported by adequate findings of fact and conclusions of law. Paryzek v. Paryzek, 776 P.2d 78, 83 (Utah App. 1989). The legal standards applied by the appellate courts are based on Utah Code Ann. § 30-3-10(1) (1989), which requires the trial court to consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.' The appellate courts have emphasized a number of 'function related' factors that are criteria for the trial court to consider in determining which custody arrangement will meet the minor child's best interests.

Unlike support and alimony determinations, which can be made by relatively simple quantitative analysis, there is no checklist of custody factors, since '[t]hese factors are highly personal and individual, and do not lend themselves to the means of generation employed in other areas of the law.' Moon v. Moon, 790, P.2d 52, 54 (Utah App. 1990). Consequently, when custody is contested and evidence presents several possible interpretations, a bare conclusory recitation of factors and statutory terms will not suffice. We must have the necessary supporting factual findings linking those factors to the children's best interests and each parent's abilities to meet the children's needs. See Painter, 752 P.2d at 909.

[I]f our review of custody determinations is to be anything more than a superficial exercise of judicial power, the record on review must contain written findings of fact and conclusions of law by the trial judge which specifically set forth the reasons, based on those numerous factors which must be weighted in determining the 'best interests of the child,' and which support the custody decision. Smith v. Smith 726 P.2d 423, 425 (Utah 1986); cf. Ebbert v. Ebbert, 744 P.2d 1019, 1021 (Utah App. 1987) (specific findings not required when custody is not contested), cet. denied, 765 P.2d 1278 (Utah 1988).

In the instant case, the trial court made two conclusions of law referring to its findings, and summarized its findings on the custody issue as follows:

- a. That both parties are capable of providing care of the minor children.
- b. That both parties have participated in acts that bear on their moral character, to-wit: [Wife] with the ZCMI incident and [Husband] with the incident at the bar. Further, the court finds that the incident at the bar did in fact take place and that [Husband] was less than candid in his testimony given to the court regarding the same.
- c. That [Husband] has physically abused [Wife] during the marriage.
- d. That although [Husband] has had custody of the minor children since 1990; since that period of time is not substantial the court has not given it a great deal of weight.
- e. That both parties have a desire for custody and a bonding with the children.
- f. That [Wife] was primary caretaker of the minor children during the marriage and prior to the separation in January, 1990.
- g. That [Wife] is far more amenable to giving liberal visitation to [Husband] than [Husband] would be to [Wife].
- h. That [Wife] has better parental skills than

[Husband] based upon her being the primary caretaker.

i. That it is in the best interests of the children that [Wife] be awarded the sole care, custody and control of the two (2) minor children of the parties.

These findings are inadequate to guide us in assessing the correctness of the court's custody determination. The last finding on the children's best interests is merely a conclusion of law. From the remaining findings, it is impossible to divine how the court reached its final legal conclusion. In their evidentiary presentations, the parties made much of moral character. 'Moral standards' are a statutory consideration, Utah Code Ann. § 20-2-10 (1989), and may be relevant to a custody determination to the extent they affect the children's best interests. See Sanderson v. Tryson, 739 P.2d 623, 627 (Utah 1987). However, the concept of fault, unrelated to the children's best interests, is irrelevant to the custody decision. See Marchant v. Marchant, 743 P.2d 199, 203 (Utah App. 1987). The court's finding on moral character in this case states that 'both parties have participated in acts that bear on their moral character,' and then proceeds to cite specific examples. This statement gives no guidance regarding how those acts bear on the parties' parenting abilities or affect the children's best interests. Nor does it indicate the relative morality of the parties' acts, if the specified acts do bear on the parties' parenting abilities. The court may be implying that Wife's extramarital sexual act in the public parking terrace is of equal gravity to Husband's request for women's phone numbers at a bar, six months following the parties' separation and divorce filing. If so, it fails to say so. The court's statement that Husband 'was less than candid' renders the finding more problematic. Does the lack of candor somehow affect Husband's moral character or was the trial court making a credibility finding.' If the court was concerned about credibility, does this mean that the court did not believe Husband's testimony regarding the bar incident or did not believe any of his testimony for lack of candor?

The court may have considered other factors as bearing on moral character. If so, it failed to enumerate what those other facts were. We believe that Husband's abusive conduct toward Wife could be relevant to moral character. See Marchant, 743 P.2d at 2093-04 & n.3 ('neither this court nor any other court can excuse or justify or approve intrafamily violence or spouse abuse'). However, the court's sole and conclusory finding on abuse, '[Husband] has physically abused [Wife] during the marriage,' is not included in the court's

finding on moral character. If the court considered abuse or any other factor in its calculation of moral character, it should have clearly so indicated. Alternatively, the court could have tied its finding of abuse directly to the children's best interests by, for example, finding a pattern of abuse beyond the one culminating incident to which Husband admitted. Absent specific subsidiary findings addressing these concerns we have no way of knowing on appeal how the court's finding on moral character weighs in relation to its scanty findings favoring its outcome. Absent factual findings specifically setting forth the basis for the court's custody determination, we are at a loss to determine whether the court abused its discretion in the custody award. See Smith, 726 P.2d at 426 ('Proper findings of fact ensure that the ultimate custody award follows logically from, and is supported by, the evidence and the controlling legal principles.'). Thus, we remand for more detailed findings. Having made this determination, we do not reach Husband's further contention that the evidence was insufficient to support the findings and that the court abused its discretion in its final determination awarding custody to Wife."

The dicta in Roberts, supra, is unfortunately applicable in this matter. The Amended Findings of Fact and Conclusions of Law do not refer to any evidence or testimony from this trial which was fact specific to this case or which clearly sets forth supportable rationale for the trial Court's custody decision. The Amended Findings of Fact are also violative of Rule 52(a) of the Utah Rules of Civil Procedure. No facts incidental to this particular action are cited in the Amended Findings of Fact. However, it is not necessary for this matter to be remanded for additional proceedings as there is sufficient credible and compelling evidence to reverse the trial Court's award of custody to the Plaintiff/Appellee.

II. THE COURT ERRED IN AWARDING ALIMONY TO THE PLAINTIFF/APPELLEE.

It has been long established that the trial Court must find sufficient legal reasons to order alimony. In 1985 the Utah

Supreme Court reaffirmed the controlling criteria which must be satisfied before there can be a proper award of alimony. In Jones v. Jones, 700 P.2d 1072 (Utah 1985) at 1075. The Court stated:

"This Court has described the purpose of alimony: '[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge.' English v. English 565 P.2d at 411. With this purpose in mind, the Court in English articulated three factors that must be considered in fixing a reasonable alimony award:

- (1) the financial conditions and needs of the wife;
- (2) the ability of the wife to produce a sufficient income for herself; and
- (3) the ability of the husband to provide support."

A multitude of cases decided after Jones, supra, have held that a trial Court's failure to consider these three factors is reversible error. In Chambers v. Chambers, 198 Utah Adv. Rep 49 (Utah App. October 21, 1992) Judge Russon for the Court of Appeals stated:

"The trial court is given considerable discretion to provide for spousal support, and such an award will not be overturned on appeal unless there has been a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 96, 100 *Utah 1986); accord Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah App. 1988).

In Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989), we outlined the facts to be considered by a trial court in determining alimony: '(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support.' Id. at 90 (citations omitted). 'If these three factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion.' Id. (citations omitted). Moreover, 'in considering these factors, the trial court is required to make adequate factual findings on all material issues, unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.' ' Haumont v.

Haumont, 793 P.2d 421, 424 (Utah App. 1990) quoting Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988), quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)."

The trial Court in this instance failed to consider any of the factors enumerated in Jones, supra or Chambers, infra. The Plaintiff/Appellee worked a flexible schedule for her employer. According to her testimony, she worked between twenty and twenty-five hours per week. (T.14, T.45) However, both the Plaintiff/Appellee and a co-worker who testified on her behalf admitted that the option to work full time was available. In fact when the Plaintiff/Appellee needed some money to pay attorney fees she did work full time. (T.6, T.8, T.48, T.49)

The Plaintiff/Appellee did not testify regarding her hourly rate of pay at the time of trial. Nor did she provide any current information which would verify her present earnings or her total year-to-date income. The trial Court utilized the income shown by the Plaintiff/Appellee on the Financial Declaration Sheet that she had submitted to the Court several months earlier for the calculation of child support. (T.133, T.135) There is absolutely no indication of what evidence the trial Court utilized to assess the Plaintiff/Appellee's income for the purpose of establishing her alleged need for alimony other than her testimony that she would guess her monthly earnings were "right around" Nine Hundred Dollars (\$900.00) per month.

Absent any credible evidence of the Plaintiff/Appellee's actual income, the Court had no plausible means of determining what the Plaintiff/Appellee's needs were. All the trial Court could

possibly have known for certain was that the Plaintiff/Appellee believed the mortgage on the parties' marital home required an expenditure of more than half of her gross check. (T.16)

The Plaintiff/Appellee stated she needed alimony to help with the house payment, food and to take care of the children. (T.16) The Plaintiff/Appellee did not have a significant amount of marital debts to pay as a result of the parties' division of marital debts. Unlike the situation in many divorces, these parties were relatively debt free. The only numerical calculation that could have been made of the Plaintiff/Appellee's monthly expenses was an inflated, speculation of what her monthly expenses might be if she were to regain custody which she delineated on her Financial Declaration Sheet. There was absolutely no evidence or credible testimony as to the Plaintiff/Appellee's realistic monthly expenses. It is sheer folly to determine that Plaintiff/Appellee needed alimony without any credible evidence of what were her actual needs.

The trial Court did nothing to assess what the Plaintiff/Appellee could earn if she were required to work full time. The trial Court also failed to determine what the Plaintiff/Appellee would earn if income that could be earned by working full time were imputed to her even if she were to elect to work part time. However, utilizing what the Plaintiff/Appellee reported as her hourly rate of pay was, it can be calculated that her gross monthly income, computed in the same manner as gross monthly income for child support purposes, would be One Thousand

Six Hundred Forty-Two Dollars and Sixty Cents (\$1,462.60). The higher figure should have been utilized in calculating the Plaintiff/Appellee's gross monthly income as it is not unreasonable to expect the Plaintiff/Appellee to have first maximized her earning potential before determining there was a need for alimony.

The trial court did not, as is required, make any determination which is supported by the record on appeal, that the Plaintiff/Appellee did not have the ability to produce a sufficient income for herself. Rather, the trial court accepted at face value the absurd position of the Plaintiff/Appellee that she needed to work part time in order to be able to supervise her children.

(T.16) It had already been demonstrated that the Plaintiff/Appellee lacked the ability to adequately supervise her children when she was the custodial parent and working part time.

(T.29, T.121, T.122, T.179) Additionally, all the parties' children were in school full time. The amount of time they "needed" supervision was minimal. The "need" to work part time in order to supervise children, who were not rowdy or troublemakers, also ignores the reality of the Defendant/Appellant's ability to more than adequately supervise his children while working full time. It is likely that most custodial parents of school age children work full time. It is not unreasonable to expect healthy able-bodied individuals, such as the Plaintiff/Appellee, to work full time to support themselves even though for whatever reason they would, if they could, choose to work part time. The trial Court effectively awarded the Plaintiff/Appellee for expressing her

desire to work part time while being punitive to the Defendant/Appellant because he, who had no genuine alternative, worked full time. The refusal to insist the Plaintiff/Appellee accept full-time employment and the refusal to base any initial determination of her need for alimony after assessing her ability to be self-sufficient as if she had wisely become employed full time, whether or not she continued to insist upon the right to be underemployed, is clearly violative of controlling case law. The Plaintiff/Appellee should have been expected to work full time. Her ability to produce sufficient income for herself should have been viewed as if she accepted the option available from her employer to work full time.

The trial Court absolutely failed to consider the ability of the Defendant/Appellant to pay alimony. Clearly, the Plaintiff/Appellee's choice to work only part time was a luxury these parties could not afford. The Defendant/Appellant testified at trial that he worked forty hours per week. He was paid Thirteen Dollars and Ninety-Five Cents (\$13.95/hr.) per hour. (T.131, T.132) His 1991 W-2 form was also introduced into evidence (Ex. 1, Ex.2) Computation of the Defendant/Appellant's gross monthly income, pursuant to the means utilized for calculating gross monthly income for child support purposes, unarguably established the Defendant/Appellant's gross monthly income to Two Thousand Three Hundred Ninety-Nine Dollars (\$2,399.00). Had the trial Court even calculated the Defendant/Appellant's gross monthly income after the deduction of her child support obligation and compared it to the

Plaintiff/Appellee's gross monthly income, based upon full-time employment, it would have been clear there was no genuine or overwhelming disparity in incomes. The Defendant/Appellant's gross monthly income after deduction of child support only is One Thousand Eight Hundred Thirty-Five Dollars (\$1,835.00). The Plaintiff/Appellee's earnings if employed would be One Thousand Six Hundred Forty-Two Dollars (\$1,642.00). Not only does this proper calculation show near parity between the parties' realistic gross monthly income, it obliviates any claim that the Defendant/Appellant had the ability to pay alimony and the claim that the Plaintiff/Appellee had the need for alimony. Now while the Plaintiff/Appellee is able to meet her needs, the Defendant/Appellant cannot meet his living expenses. The refusal of the trial Court to accurately examine the Plaintiff/Appellee's need for alimony pursuant to the formula adopted in Jones, supra, and ratified in Chambers, supra, was clearly violated. The trial Court ignored established, controlling precedent and abused its discretion. The award of alimony by the trial Court should be reversed. Bell v. Bell, 810 P.2d 489 (Utah App. 1991).

Neither the Amended Findings of Fact nor the Amended Conclusions of Law make any reference to the Defendant/Appellant's ability to pay alimony. There is absolutely no mention of the Plaintiff/Appellee's ability to provide a sufficient income for herself. There is only one conclusionary statement in paragraph 19 of the Amended Findings of Fact that mentions the need of the Plaintiff/Appellee for alimony. Even the oral decision rendered by

the trial Court failed to address any facts which would support a legally cognizable award of alimony to the Plaintiff/Appellee. (T.200). The Amended Findings of Fact and Conclusions of Law are woefully insufficient. Chambers v. Chambers, 198 Utah Adv. Rep. 49 (Utah October 21, 1992), at page 49, articulated what must be contained in final divorce documents to be legally sufficient:

"This finding is insufficient. See Morgan v. Morgan, 795 P.2d 684, 689 (Utah App. 1990); Johnson v. Johnson, 771 P.2d 696, 699 (Utah App. 1989); Marchant v. Marchant, 743 P.2d 199, 207 (Utah App. 1987). Contrary to the second prong of Schindler, the trial court's findings do not address Mrs. Chambers's level of education, health, and other matters concerning her immediate or eventual employability. Moreover, without further explanation, the court's blanket reference to 'substantial income from assets that have been awarded to her' is inadequate to justify the court's reduction of alimony. Without more, we cannot determine whether such reduction constituted an abuse of discretion. Lastly, as to the third prong of Schindler, the court must do more than simply state that 'the defendant has the ability to pay.' Given the amount of conflicting evidence on these facts, the trial court's award of alimony must be reversed and remanded for further findings."

Watson v. Watson, 190 Utah Adv. Rep. 42 (Utah July 2, 1992). The trial Court's award of alimony to the Plaintiff/Appellee must be reversed as there is absolutely nothing in the record which supports the same.

III. THE TRIAL COURT IMPROPERLY DETERMINED THE AMOUNT OF THE DEFENDANT'S RETIREMENT MONIES

At trial there was virtually no disagreement between the parties as to the amount of retirement monies in existence at the time of their separation. They each agreed that the Defendant/Appellant had received retirement monies approximately a year or more prior to the separation. (T.18, T.140) Each testified

that some of the money received had been expended for marital purposes prior to the separation. (T.18, T.19, T.140) The Defendant/Appellant testified there was approximately Ten Thousand Dollars (\$10,000.00) of retirement monies when the parties separated. (T.140) The Plaintiff/Appellee testified she believed there was Ten Thousand Dollars (\$10,000.00) of retirement monies when the parties' separated. (T.19) The testimony of each party indicates no disagreement about the amount of the Defendant/Appellant's remaining money when the parties separated. Additionally, the Defendant/Appellant testified he made expenditures from this retirement monies during the pendency of the action. (T.140)

The Defendant/Appellant testified that he had no objection to dividing the retirement monies that were in existence with the Plaintiff/Appellee. (T.140) His agreement to divide the monies existing at the date of trial is in full accord with controlling case law. In Howell v. Howell, 806 P.2d 1209 (Utah App. 1991) at page 1211 the Appellate Court stated:

"The value of marital property is determined as of the time of the divorce decree or trial. Fletcher v. Fletcher, 615 P.2d 1218, 1222-23 (Utah 1980). See also Berger v. Berger, 713 P.2d 695, 697 (Utah 1985). The reason for the rule is that "[b]y the very nature of a property division, the marital estate is evaluated according to what property exists at the time the marriage is terminated." Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980). Courts can, however, in the exercise of their equitable powers, use a different date, such as the date of separation, if one party has "acted obstructively, . . ." Peck v. Peck, 738 P.2d 1050, 1052 (Utah Ct.App. 1987).

Judge Frederick ordered the parties to divide the

Defendant/Appellant savings accounts and I.R.A. Accounts. (T.196). While still presiding over the trial he further classified the division of the Defendant/Appellant's retirement monies to include the monies existing at the time of separation (T.200) minus expenditures made by the Defendant/Appellant during the pendency of the action. (T.201, T.202). The Defendant/Appellant has no quarrel with this division.

After trial the issue of the division of the Defendant/Appellant's retirement account again became an issue. The Plaintiff/Appellee would not accept the accounting made of the retirement monies subsequent to the date of their final separation. Counsel for the Plaintiff/Appellee prepared proposed final divorce documents which purported to give the Plaintiff/Appellee more of the retirement monies than were actually due her. The Defendant/Appellant filed an objection to the proposed Findings of Fact and Conclusions of Law. The Court denied these objections.

On February 26, 1992, the Defendant/Appellant filed a Motion for Reconsideration of Unresolved Issues and a supporting Affidavit. He verified the retirement monies in existence at the date of the parties' separation and the amounts expended during the pendency of the action. By Minute Entry Order March 3, 1992, the trial Court denied the Motion for Reconsideration. As a result of this erroneous decision the trial Court granted permission to the Plaintiff/Appellee to have entered Findings of Fact, specifically paragraph 21, and Conclusions of Law, specifically paragraph 15, which were factually erroneous and not supported by evidence

elicited at trial. The Amended Findings of Fact and Conclusions of Law should be deemed legally insufficient and erroneous. The ordered division of the Fourteen Thousand Dollars (\$14,000.00), the amount originally in the Defendant/Appellant's retirement account, should be reversed.

The trial Court's division of the Defendant/Appellant's retirement monies as stated in the Amended Findings of Fact and Conclusions of Law and the Second Amended Decree of Divorce is a gross misapplication of the law which resulted in a clear abuse of the Court's discretion as well as creating a serious inequity. The presumption of the validity of the trial Court's decision as referred to in Watson v. Watson, 190 Utah Adv. Rep. 42, (Utah July 2, 1992) is not present in this situation. As noted in Watson, supra, reversal of the trial Court's decision is necessary when there is a misapplication of the law.

"'There is no fixed formula upon which to determine a division of properties in a divorce action[.]' Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah App. 1988) (citation omitted). We afford the trial court 'considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity.' Id. (citation omitted). Accordingly, changes will be made in a trial court's property division determination in a divorce action 'only if there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.' Id. (citations omitted)."

Watson, supra, page 44. The parties should be ordered to divide the Defendant/Appellant's retirement monies in accordance with the accounting he provided the Plaintiff/Appellee and the trial Court.

IV. THE TRIAL COURT ERRED IN EXECUTING LEGALLY INSUFFICIENT

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Considerable discussion has been previously undertaken to clearly identify the facts which do not support the rulings of the trial Court, and which do not substantiate the trial Court's resolution of custody, alimony and the division of the Defendant/Appellant's retirement monies. The ill founded, egregious decisions of the trial Court were further compounded by the execution and entry of legally insufficient Amended Findings of Fact and Conclusions of Law. Read alone without any access to the record of the trial proceedings the Amended Findings of Fact and Conclusions of Law give not one iota of fact or extrapolative rationale to allow any understanding of why the trial Court ruled in the manner it did. The Amended Findings of Fact and Conclusions of Law violate Rule 52(a) of the Utah Rules of Civil Procedure as the facts established at trial are not stated specially.

The Court of Appeals in Woodward v. Fazzio, 175 Utah Adv. Rep. 70 (Utah December 1991) at page 72 set forth what Findings of Fact and Conclusions of Law must do minimally to be legally sufficient:

"Although the trial court's findings of fact constitute a full three pages of text, they nonetheless provide an inadequate account of the actual facts supporting the court's ultimate decision. Most of the 'findings' are conclusory, and reflect an intention to merge the trial court's ultimate factual determinations with the requirements of the Wuffenstein test, and as such are more akin to conclusions of law. See Vigil, 164 Utah Adv. Rep. at 30. Finding of Fact #7, for instance, states that '[appellant's] contacts with the child have been inconsistent, sporadic and token,' that 'it is evident to the court that the natural Father has abdicated his responsibility as a parent,' and that 'the court is convinced that the father's conduct has let to the destruction of the parent/child relationship.' These conclusory statements provide no insight into the

evidentiary basis for the trial court's decision and render effective appellate review unfeasible. See Adams v. Board of Review, 173 Utah Adv. Rep. 18, (Utah Ct. App. Nov. 5, 1991). The issue before the court was whether Fazzio had abandoned R.A.F.; accordingly, the findings should have set forth specific facts--subsidiary facts--bearing on that issue. The conclusory statement in Findings of Fact #7, 8, 10, and 11 do not provide this information and are therefore inadequate.

Unless the record 'clearly and uncontrovertedly support[s]' the trial court's decision, the absence of adequate findings of fact ordinarily requires remand for more detailed findings by the trial court. Acton, 737 P.2d at 999. See also Lovegren, 798 P.2d at 770-71 (remand necessary when facts disputed). But see State v. Ramirez, 159 Utah Adv. Rep. 7, 15 & n.6 (Utah 1991) (suggesting same liberalization of Acton's requirement of express findings even absent uncontroverted evidence).

We have canvassed the record in the instant case and find disputed evidence, making affirmance as a matter of law impossible. Cf. Lovegren, 798 P.2d at 771 n.10 (absence of adequate findings is harmless when facts concerning an issue are undisputed). There was conflicting testimony about the frequency and duration of Fazzio's visits with the child, his treatment of the child during those visits, Woodward's attempts to prevent Fazzio from visiting with the child, Fazzio's payment of child support, and Fazzio's provision of gifts to the child--all facts crucial to the validity of the court's ultimate decision that Fazzio's conduct had destroyed the parent-child relationship. See Adams, slip op. at 8 ('When multiple conflicting versions of the facts create a matrix of possible factual findings, we are unable on appeal to assume that any given finding was in fact made.')

The trial court's findings of fact should resolve these conflicts unequivocally, by stating the specific subsidiary facts as the trial court found them. The findings should set forth, with as much precision as possible, the number of times Fazzio visited the child during particular periods; the length of each of the visits; the number of visits Woodward intentionally prevented; the sums Fazzio provided as child support, either personally or through his parents; the number and type of gifts Fazzio gave them; and the specific statements, acts, or omissions that demonstrate Fazzio's intent to either accept or disregard his obligations as a parent (e.g., instances of appellant performing child care functions like changing his diaper or feeding him, denying that the child was his responsibility, etc.).

Further, the findings should explicitly address the impact Woodward's frequent relocation had on Fazzio's

ability to maintain contact with the child, the effect Fazzio's living and working outside Utah had on his visitation, the manner and effect of any refusal on Fazzio's part to legally acknowledge his paternity, and any other factors bearing on whether Fazzio consciously disregarded the child to such an extent that the parent-child relationship was destroyed. The court's findings as to these issues should be set forth specifically and should correspond to the factual evidence upon which the court relied.

Once we possess this information, we can meaningfully evaluate whether the visits have been sporadic, the child support payments insufficient, Fazzio's conduct unacceptable, and, ultimately, whether Fazzio abandoned the child. Accordingly, we remand for more detailed findings by the trial court.

'We do not intend our remand to be merely an exercise in bolstering and supporting the conclusion already reached.' Allred v. Allred, 797 P.2d 1108, 1112 (Utah 1990)."

Utah's appellate Courts have not allowed insufficient and inadequate Findings of Fact and Conclusions of Law to resolve important, fact sensitive issues. This sound policy and precedence should not be ignored or abolished. The decision of the trial Court should be reversed.

V. THE COURT ERRED WHEN IT DENIED THE DEFENDANT/APPELLANT'S MOTION FOR RECONSIDERATION OF UNRESOLVED ISSUES AND MOTION FOR NEW TRIAL.

The trial Court in its ruling at trial ordered the deduction of expenditures for legitimate marital obligation from the Defendant/Appellant's retirement monies. Implicit in this Order was the requirement that the Defendant/Appellant make an accounting of the expenditures from these funds. He indeed did provide an accounting of the expenditures and validly made to satisfy joint marital obligations.

The Plaintiff/Appellee would not accept this accounting. The Defendant/Appellant then sought the assistance of the trial Court

to resolve this impasse. Rather than resolving the conflict and aiding the parties' to resolve their differences and ensure implementation of its ruling the trial Court shirked its duty and responsibility and denied the Motion for Reconsideration of Unresolved Issues. The Trial Court seriously abused its discretion when it denied the Motion for Reconsideration of Unresolved Issues.

The Defendant/Appellant brought a Motion for New Trial pursuant to Rule 59 of the Utah Rules of Civil Procedure. The rationale for the Motion, which sought a rehearing on the issues of custody, alimony and division of the Defendant/Appellant's retirement monies, was the insufficiency of the evidence to substantiate the trial Court's rulings. This Motion, too, was denied by the trial Court.

In yet one more instance the trial Court abused its discretion. As stated in Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989) at pages 84 and 85 the appellate Court discusses the necessity of trial Court's acting within its discretion and within the parameters of applicable rules and controlling case law:

"The decision to grant a new trial lies largely within the trial court's discretion. State v. Brown, 771 P.2d 1093, 1095 (Ct. App.1989). However, the trial court has no discretion to grant a new trial unless the moving party shows at least one of the circumstances specified in Rule 59(a) of the Utah Rules of Civil Procedure. Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc., 767 P.2d 125, 128 (Utah Ct.App.1988). These circumstances include, among others, '[a]ccident or surprise, which ordinary prudence could not have guarded against'; '[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial'; and 'insufficiency of the evidence to justify the verdict or other decision.' Utah R. Civ. P.59(a)(3), (4), and (6). So long as such a showing is not made, we

will not reverse the trial court's decision on a motion for a new trial absent a clear abuse of discretion. Brown, 771 P.2d at 1095; Moon Lake Electrical Ass'n, 767 P.2d at 128."

Ad nauseam recitation of the facts should not be necessary to remind this Court of the rulings of the trial Court which are not supported by the evidence or controlling case law. Dismantling a viable, stable temporary custody arrangement for no clearly articulated reason, requiring a party who could not afford to pay alimony to a party who declined to work full time, and declaring an excessive value of an asset to be divided are all legally indefensible and not even remotely justified by the evidence at trial. The refusal to grant a new trial was a clearly improper abuse of discretion. The Defendant/Appellant would prefer that there be no remand of this matter, but that this Court merely reverse the decision of the trial Court, as he believes the delay which would be unavoidable while awaiting a new trial could cause irreparable harm to his children and seriously jeopardize his ability to climb out of the abysmal financial situation in which he finds himself. Anton v. Thomas, 806 P.2d 744 (Utah App. 1991).

CONCLUSION

The Defendant/Appellant believes the trial Court repeatedly committed reversible error and imposed many manifest injustices upon him. He respectfully requests the trial Court's award of custody to the Plaintiff/Appellee, the award of alimony to the Plaintiff/Appellee and the ordered division of the wrong amounts of his retirement monies be reversed.

The trial Court abused its discretion when it summarily

adopted the fatally flawed recommendation of the custody evaluator. The trial Court failed to honor its obligation to be the trier of fact and consider all the evidence presented it when it adopted the recommendation of the evaluator without considering all the evidence presented and without making an award of custody premised upon the preponderance of credible facts introduced at trial. The trial Court, without justification, terminated a temporary custody award which provided the children a stable, functional custodial situation. There was a total failure on the part of the trial Court to identify the best interests of these children and to make an award of permanent custody which would meet the existing, ongoing and future best interests of the children. The Plaintiff/Appellee had in the past given de facto custody of the parties' minor children for eighteen months to the Defendant/Appellant without making any formal legal claim asserting her fitness to be the custodial parent. The Defendant/Appellant demonstrated his desire and ability to be the custodial parent during each of the parties' separations. The trial Court completely disregarded the Plaintiff/Appellee's unwillingness to be a dedicated parent who would exercise visitation at every opportunity, assist the children with their homework, attend parent teacher conferences, be present at their sporting events, birthdays and holidays. The Defendant/Appellant, unlike the Plaintiff/Appellee, was able to repeatedly translate his deep love and concern for his children into actions which demonstrated his love and caring, and which substantiated his ability to identify

and satisfy his children's best needs and interests. There is no evidence which supports the trial Court's custody award.

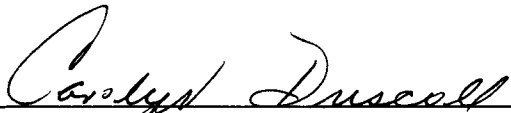
The Defendant/Appellant's net monthly income after the payment of his child support and alimony is insufficient to allow him to rent an apartment or meet other basic expenses. Yet he is expected to work full time to support his children and ex-wife. Unaccountably the Plaintiff/Appellee, who had an equal responsibility to help support her children and who can be expected to attempt to be self-supporting, was not required to work full time to meet her financial obligations. The trial Court's award of allimony is antithetical to prevailing case law. It is unconscionable and untenable.

The trial Court ordered the parties' to divide an asset which neither existed at the time of the parties' separation or at trial. The parties agreed that there was Ten Thousand Dollars (\$10,000.00) in retirement monies when they separated. However, the trial Court ordered them to divide Fourteen Thousand Dollars (\$14,000.00). The division of an asset which did not exist is not only irresponsible it is clearly erroneous. The trial Court was given evidence by the Defendant/Appellant, at trial and in his post-trial matters of the amount of retirement monies when the parties' separated, on the date of trial and of the expenditures for marital obligations and reimbursable expenditures therefrom. The disregard of the evidence was a prejudicial abuse of discretion.

The trial Court executed Amended Findings of Fact and Conclusions of Law which neither relied upon the evidence and

testimony introduced at trial nor explained the rationale for its decisions. It then compounded this abuse of discretion, to the detriment of the parties' children and the Defendant/Appellant, by its refusal to rectify its errors when it denied the Defendant/Appellant's Motion to Reconsider Unresolved Issues, his Motion to Stay Its Decision and his Motion for New Trial. The trial Court's rulings should neither be afforded the presumption of validity, nor the presumption of being well considered, legally cognizable or being supported by credible facts, testimony and evidence. A reversal and rejection of the trial Court's decision is mandated and fervently requested.

Respectfully submitted this 9th day of December 1992.


CAROLYN DRISCOLL
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that four copies of the Defendant/Appellant's brief and addendum were hand-delivered on the 9th day of December 1992, to Stuart Hinckley, the attorney for the Plaintiff/Appellee, 265 East 100 South, Suite 300, Salt Lake City, Utah 84111.

