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IN THE SUPREME COURT OF THE

STATE OF UTAH

MELODY LEETHAM, :

Plaintiff-Respondent, :

v. : No. 19250

RICHARD D. LEETHAM, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from a Final Order and Decree of Divorce entered in the Third Judicial District Court, Tooele County, State of Utah, Honorable Scott Daniels, Judge.

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FILED

JAN ~ - 1984

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE

STATE OF UTAH

MELODY LEETHAM,	:	
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v.	:	No. 19250
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IN THE SUPREME COURT OF THE

STATE OF UTAH

MELODY LEETHAM,	:	
Plaintiff-Respondent,	:	
v.	:	No. 19250
RICHARD D. LEETHAM,	:	
Defendant-Appellant.	:	

NATURE OF THE CASE

This appeal concerns that portion of the trial court's Decree of Divorce which grants custody of the parties' minor daughter to the Respondent.

DISPOSITION IN THE LOWER COURT

Respondent filed an action for divorce on or about May 10, 1982. Following trial of the matter on April 14, 1983, the Honorable Scott Daniels awarded respondent the permanent care, custody and control of the parties' two-year-old daughter.

RELIEF SOUGHT ON APPEAL

Respondent seeks an Order affirming the trial court's award of permanent custody to Respondent.

STATEMENT OF FACTS

Respondent and Appellant were married to one another on October 1, 1979. There was one child born as issue of the marriage, Kacie Lynn Leetham, born May 24, 1980. Respondent had a son, Chris Worthington, by a former marriage; Chris was about two and one-half when Kacie was born. (Tr.4)

Respondent filed for divorce from Appellant for the second time in May 1982 and was awarded temporary custody of Kacie. (Eval.) Respondent had had temporary custody of Kacie for almost one year at the time of trial on April 14, 1983. (Eval., Tr. 5 and 26) Respondent had taken a voluntary lay off from her job as a laborer at Amax Specialty Metals in October 1982 to spend more time with her two children and because she expected to be rehired within ninety days when business improved. (Eval., Tr. 22-23) Respondent had been unemployed and at home with her two children six months at the time of trial. (Tr. 66) Appellant had been paying Respondent $75.00 per month as temporary child support for Kacie. (Tr. 5)

Appellant had a history of psychiatric problems related to drug abuse. Appellant had been seeing a psychiatrist while dating Respondent. Appellant was hospitalized on the psychiatric ward at St. Mark's Hospital when Respondent was preg-

many with Kacie. Appellant blamed Respondent for his problems. (Eval.) The evaluator observed that it seemed to be an effort for Appellant to keep his voice and emotions under control. (Eval.) Appellant testified at trial that he had been involved with drugs, but not within the past year. (Tr. 49) Appellant admitted at trial that he had understated his monthly income by 50% in the financial declaration he submitted to the trial court. (Tr. 32-36) The testimony Appellant's mother gave regarding Appellant's board, room and incidental expenses varied from the figures Appellant had claimed in his financial declaration. (Tr. 52-53)

When Kacie was about six weeks old, Appellant beat Chris for wetting the bed. Respondent protested; Appellant struck Respondent; Appellant took the tiny baby and left. Respondent reconciled with Appellant at that time only because she couldn't bear to be separated from her six-week-old baby daughter. Appellant continued to threaten he would take Kacie away from Respondent. (Eval.)

Counsel for the parties stipulated to the admission of the child custody evaluation performed by Joyce Higashi. The trial court noted that it had had a chance to read the evaluation quite thoroughly before the hearing. (Tr. 65) The evaluator observed in the report that perhaps Respondent was overly alert to her

children's behavior. The evaluator also observed that Respondent had a close, affectionate relationship with her children and recommended that Respondent be awarded permanent custody of Kacie. The evaluator noted that if further psychological evaluation of Respondent appeared warranted, the trial court could order such evaluation. The trial court did not order that Respondent be evaluated further.

Appellant had been employed at Utah Marblehead Lime since September 1977. Appellant was the union president at Utah Marblehead Lime and attended Trade Tech College two times a week. (Eval., Tr. 41) Appellant intended to continue to reside with his parents and siblings, although he testified it was a possibility he might remarry and move out. (Tr.37) Appellant's father and mother were employed. (Eval., Tr. 27 and 50)

Respondent testified that the relationship between Chris and Kacie was very close. (Tr. 63-65) Appellant testified that Kacie and Chris "do all right together" and that he didn't "think it's right that they be split up unless the circumstances called for." (Tr. 38 and 40) Appellant at one point referred to Chris and Kacie as "our children." (Tr. 45) Appellant had not adopted Chris because he felt it was a ploy to get support payments. Appellant felt he had been "initially too hard on Chris" and "hurt his personality"

and regretted that. (Eval.)

Appellant testified, however, that he felt it would not be in the best interest of Kacie to live with Chris, "because of Melody's background and the way Melody has turned out, being around that environment . . . It's not right to have a child around that kind of environment, in my eyes." (Tr. 48-49) On cross examination, Appellant then testified to having been involved with drugs during the time he lived with Kacie, Melody and Chris as a family. (Tr. 49)

Appellant called two witnesses to testify to the "circumstances" and "environment" to which he generally referred. Charles Johnson testified to having seen Respondent in a bar with Kacie. (Tr. 54-55) Respondent testifed that on one occasion she had taken Kacie with her to return some milk bottles to a woman who worked in a bar, rather than leave Kacie alone in the car. (Tr. 61, 20-21)

John Chidester, Sr., testified that he thought a Rex Stromberg spent the night with Respondent, but he "wouldn't go so far as to say he had moved anything in." (Tr. 60) Respondent testified that Stromberg had not moved in, but sometimes spent the night there. Respondent testified that her bedroom was at one end of the mobile home and the chil-

dren's bedrooms were at the other end. Respondent testified that at no instance did either child observe she and Stromberg in the bedroom. (Tr. 62-63) Respondent testified that she understood that in the event the trial court granted her custody, the overnight behavior was going to have to cease and desist. (Tr. 21-22)

The trial court struggled with the custody issue:

> THE COURT: Well, this is not an easy case on custody, I think.
> The question of the best interest of this child and whether--
> On the one hand, you have the very important relationship between the little girl and her brother--which I think is very important and shouldn't be--the two shouldn't be separated, except for very compelling reasons.
> On the other hand, I don't think it's really going to do any good to enter some kind of an order that the plaintiff not take the child into bars or not have her boyfriend stay over, things like that. I think it's evident that if she wants to do those things, she's going to do them. If she's not going to refrain from doing them while the custody hearing is pending, certainly she's not going to afterwards. And it's evident that the court order is not going to keep her from doing those things.
> The question is: Which is really the most important and how do you weigh that. I'm not so sure I know the answer to it. (Tr.75-76)

The trial court found it in the best interests of the child, Kacie Lynn Leetham, to award custody to Respondent, subject to the reasonable visitation rights of the Appellant. (Tr. 76) The trial court admonished Respondent regarding her conduct:

> THE COURT: I want her to know that--although I'm not entering a specific order about that--that in the event that that kind of behavior is evident, that will be taken into consideration by the court at any subsequent petition for a modification, that the plaintiff can--or the defendant can petition for a modification in the decree if it appears that the child's best interests are not being served and if the environment in which she's being raised is not appropriate.
>
> I think she probably understands that and I'm sure her attorney will advise her of that. That doesn't need to be part of the order but goes without saying. (Tr. 79)

Respondent has had custody of Kacie from that time forward.

ARGUMENT

POINT I: WHERE THE EVIDENCE DID NOT SUPPORT A FINDING THAT RESPONDENT'S HETEROSEXUAL RELATIONS WITHOUT MARRIAGE HAD AN ADVERSE EFFECT UPON THE PARTIES' TWO-YEAR-OLD DAUGHTER, THE TRIAL COURT PROPERLY AWARDED RESPONDENT PERMANENT CUSTODY OF THE CHILD.

§30-3-10, U.C.A. 1953, as amended 1977, reads:

> In any case of separation of husband and wife having minor children, or wherever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.

In Jorgensen v. Jorgensen, Utah, 599 P.2d 510 (1979), Chief Justice Hall noted:

> " . . . the trial court is given particularly broad discretion in the area of child custody incident to separation or divorce proceedings. (Footnote omitted.) A determination of the "best interests of the child" frequently turns

> on numerous factors which the trial court is best suited to assess, given its proximity to the parties and the circumstances. Only where the trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own discretion." 599 P.2d at 511-512.

In Jorgensen, this Court found no abuse of discretion on the part of the trial court.

Similarly, in Mitchell v. Mitchell, 668 P.2d 561 (1983), Justice Durham, writing for the Court, found no abuse of discretion on the part of the trial court faced with an extremely difficult decision regarding custody:

> " . . . The trial court was in an advantaged position in dealing with the witnesses and the parties and, "(o)nly where (the) trial court('s) action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment." Jorgensen v. Jorgensen, Utah 599 P.2d 510, 512 (1979) See also, e.g., Nilson v. Nilson, Utah 652 P.2d 1323 (1982). Such is not the case here."

In Hutchison v. Hutchison, Utah 649 P.2d 38 (1982), Justice Oaks, writing for a unanimous Court, listed some of the numerous factors which the trial court is best suited to assess.

> "Some factors the court may consider in determining the child's best interests relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody

arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition. (These factors are not necessarily listed in order of importance.)" 649 P.2d at 41.

Justice Oaks repeated this Court's deference to the trial court's unique opportunity to observe the parties and their witnesses:

> "Assessments of the applicability and relative weight of the various factors in a particular case lie within the discretion of the trial court. 'Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment.' Jorgensen v. Jorgensen, Utah, 599 P.2d 510, 512 (1979)." Ibid.

In Lembach v. Cox, Utah, 639 P.2d 197 (1981), Justice Howe reiterated the Court's recognition in Jorgensen, supra, of " 'the continued vitality of a judicial preference for the mother in child custody matters, all other things being equal' even though the statutory maternal presumption formerly contained in §30-3-10 was repealed in 1977." 639 P.2d at 200.

Similarly, in Boals v. Boals, Utah, 664

P.2d 1191 (1983), Chief Justice Hall recognized the prerogative of the trial judge to weigh "the best interests of the child, mindful of the usually unique role played by a mother in caring for a child of tender years. Cox v. Cox, Utah, 532 P.2d 994 (1975); Steiger v. Steiger, Utah, 4 U.2d 273, 293 P.2d 418 (1956)."

The very important relationship between the children in a divorced family received special comment by Chief Justice Crockett in Jorgensen, supra.

> "One of the principal factors to be given consideration is that there may be, and in most instances there are, greater values to be found in the children being together, and in their relationships with each other, that are to be found in their relationships with their divorced and contentious parents. . . " 599 P.2d at 512.

Numerous courts have considered the matter of custody where the custodial parent's heterosexual relations without marriage were continuing, or apparently continuing, at the date of a custody modification determination. 100 A.L.R.3d 625, Modification of Child Custody Order. The cases cited in the article clearly establish a modern trend, applicable to initial custody determinations as well, toward consideration of whether a meretricious relationship has a detrimental effect upon the child(ren).

In older cases mere evidence of a mother's

moral transgression was sufficient to deprive her of custody. *Wilbanks v. Wilbanks* (1965) 220 Ga. 665, 141 SE2d 161; *Harris v. Garmon* (1971) 228 Ga. 413, 185 SE2d 802; *Simpson v. Simpson* (1974) 233 Ga. 17, 209 SE2d 611; *Otani v. Otani* (1927) 29 Hawaii 866; *Vice v. Vice* (1939) 192 La. 1002, 190 So. 111; *Kleinpeter v. Kleinpeter* (1935) 182 La. 198, 161 So. 582; *Tulley v. Tulley* (1931, Mo.App.) 38 S.W.2d 291; *J. v. F.* (1969, Mo. App.) 446 SW2d 425; *Carey v. Carey* (1925) 4 NJMisc. 1, 131 A. 103; *Costello v. Costello* (1970) 185 Neb. 396, 176 NW2d 10; *Brim v. Brim* (1975, Okla. App.) 532 P2d 1403; *Sullivan v. Sullivan* (1963) 236 Or. 192, 387 P2d 571; *Eaton v. Eaton* (1961, Pa.) 3 Adams Co. Leg. J. 67; *Bliffert v. Bliffert* (1961) 14 Wis.2d 316, 111 NW2d 188; *Bell v. Bell* (1980) 154 Ga.App. 290, 267 SE2d 894; and *Shanklin v. Shanklin* (1979, La.App.) 376 So.2d 1036.

Recent cases contain language requiring a finding as to whether the welfare of the children was affected [*Hawkins v. Hawkins* (1977) 240 Ga. 30, 359 SE2d 358; *Schoonover v. Schoonover* (1975, Iowa) 228 NW2d 31; *In Re Marriage of Morton* (1976, Iowa) 244 NW2d 819; *Feldman v. Feldman* (1974, 2d Dept.) 45 App.Div.2d 320, 358 NYS2d 507; and *Re Marriage of Olson* (1981) 98 Ill.App.3d 316, 53 Ill.Dec. 751, 424 NE2d 386]; whether the children have been in-

jured by their mother's conduct or by the relationship [Marchand v. Marchand (1971, La.App.) 246 So.2d 216, cert.den. 258 La. 769, 247 So.2d 865; Beebe v. Beebe (1972, Colo.App.) 503 P2d 634; and Rupp v. Rupp (1979, Pa.Super.) 408 A2d 883]; whether there was a showing of resulting detriment to the children [In Re Marriage of Farris (1979) 69 Ill.App.3d 1042, 26 Ill.Dec. 608, 388 NE2d 232; Marriage of Neidert (1977) 28 Or.App. 309, 559 P2d 515; Soldner v. Soldner (1979) 69 Ill.App.3d 97, 25 Ill.Dec. 489, 386 NE2d 1153; Willcutts v. Willcutts (1980) 88 Ill. App.3d 813, 43 Ill.Dec. 924, 410 NE2d 1057; Cleeton v. Cleeton (1979, La.) 383 So.2d 1231; and Manley v. Manley (1980, La.) 389 So.2d 454]; and whether there was any effect on the care and treatment of the children [Steiner v. Steiner (1978) 257 Pa. Super. 457, 390 A2d 1326; and Morrissey v. Morrissey, (1962, Pa.) 9 Lebanon Co. Leg. J. 157].

This Court recently has considered the matter of custody where the custodial parent's heterosexual relations without marriage were continuing, or apparently continuing, at the date of a custody determination. Martinez v. Martinez, Utah, 652 P.2d 934 (1982) and Shioji v. Shioji, Utah, 671 P.2d 135 (1983).

In Martinez, Justice Howe affirmed the

trial court's change of custody from the mother to the father, where trial evidence established that the child had been adversely affected by highly detrimental circumstances in the mother's home. The mother had stated to one witness that her live-in boyfriend had a drug problem and that he was "lousing up" the child's life. Several other witnesses observed that the child was nervous, unsure of herself, unhappy and cried frequently. Frequent quarrels between the mother and her boyfriend caused the mother to move with the child to the home of the mother's sister. The welfare of the child had been affected, the child had been injured by the relationship, there was a showing of resulting detriment to the child and the evidence suggested that there may have been an effect on the care and treatment of the child. This Court found no abuse of discretion warranting reversal.

In Shioji, supra, the Court vacated the trial court's order changing custody of two daughters from their mother to their father on the sole ground of the overnight presence in the mother's home of her boyfriend. Justice Durham, concurring and dissenting, noted that there was no trial evidence whatsoever of any detrimental effect on the the appellant's parenting skills or on the children

themselves as a result of the occasional overnight visits.

Justice Durham wrote in Shioji:

> "The 'best interests of the child' standard is one which requires a thorough and careful exploration of many factors, including long-term relationships with a primary caretaker, stability in placement, parenting skills and styles, employment and child-care schedules, as well as the presence in the home of other persons (friends, step-parents or other relatives). I believe the trial court erred in basing its order changing custody on the sole factor of an inappropriate overnight visitation practice. While we do not condone such a practice, we have frequently noted such 'illicit' relationships must be shown to have a detrimental effect on the interests of the children before they can be the predicate for a deprivation of custody. See, e.g., Kallas v. Kallas, Utah, 614 P.2d 641 (1980). The language in Chief Justice Hall's dissent in Nielsen v. Nielsen, Utah, 620 P.2d 511 (1980), is entirely applicable to this case:
>
>> Although the record contains no formal findings of fact and conclusions of law, the evidence presented appears to support the trial judge's apparent conclusion that defendant's lifestyle, both economic and moral, is somewhat inferior to that of the plaintiff. However, the record is devoid of any evidence whatsoever to the effect, if any, of defendant's lifestyle upon the best interests of Jimmy. Thus, it becomes further apparent that the trial judge simply drew a broad inference, without any evidence in support thereof, that the defendant's lifestyle did, in fact, adversely affect the best interests of her son.
>>
>> In light of the highly equitable nature of custody proceedings, I deem it an injustice to base an order changing custody on such a broad inference

standing alone.

Id. at 513 (Hall, C.J., dissenting). Chief Justice Hall continued:

> In regard to the immoral conduct of the defendant, such behavior is not to be considered in a vacuum. Again, the focus must be upon the best interests of the child, and in the absence of a showing of an adverse effect upon those interests, a basis for a change of custody is not made out. As this Court stated the matter in Stuber v. Stuber, [121 Utah 632, 244 P.2d 650 (1952)]:
>
> > The fact that she lived with a man whom she expected to marry, although censurable, does not in and of itself make her an unfit and improper person to have the custody of her child.

Id. at 514 (Hall, C.J., dissenting). See also Robinson v. Robinson, 15 Utah 2d 193, 391 P.2d 434 (1964).

Section 30-3-10 requires the trial court to consider the best interests of the child, as well as the past conduct and demonstrated moral standards of the parties. Recent Utah case law has enumerated factors determinative of the best interests of the child and factors which contribute to an assessment of the past conduct and demonstrated moral standards of the parties. The burden falls on the trial court to assess and weigh both sets of factors brought into play by the evidence in the light of its observations of the parties and their witnesses. The law requires only that the evidence preponderate in favor of one

party in a custody determination. Only where the trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own discretion. Such is not the case here.

The Case at Bar

It cannot be said that the trial court abused its discretion in awarding permanent custody of the parties' two-year-old daughter to Respondent. The trial court was presented with favorable and unfavorable evidence regarding both Appellant and Respondent on the issues of the best interests of Kacie and on the issue of the past conduct and demonstrated moral standards of the parties.

With regard to the factors determinative of the best interests of the little girl, both parties testified to the close relationship that existed between Kacie and Chris. The trial court expressed its concern for the "very important relationship between the little girl and her brother--which I think is very important and shouldn't be--the two shouldn't be separated, except for very compelling reasons."

In her report, the evaluator observed that "(w)ith Kacie, Richard appeared very comfortable with physical contact and Kacie climbed into his lap and fell asleep during the interview." In her recommenda-

time, however, the evaluator apparently felt the strength of Kacie's bond with Respondent was the stronger. The evaluator wrote:

> "Melody Leetham does have a close, affectionate relationship with her children and it is recommended that she be awarded permanent custody of Kacie Leetham."

With regard to previously determined custody arrangements, Kacie had been with her mother, the Respondent, all of her life, except for the few days Appellant had taken six-week-old Kacie away from her mother. Respondent had had temporary custody of Kacie for almost one year at the time of the divorce trial, and had devoted herself almost exclusively to her children for six months when unemployed.

With respect to the past conduct and demonstrated moral standards of the parties, the evidence was somewhat less conclusive. Respondent had demonstrated the depth of her desire to have Kacie with her when she reconciled with Appellant rather than be separated from her six-week-old baby daughter. Respondent had taken a voluntary lay off from her job in part to spend more time with her children. Respondent had cared for her Kacie and Chris for all their lives.

Respondent was able to provide Kacie with

a great amount of personal rather than surrogate care. Appellant, on the other hand, was very busy with his job, his union presidency and his classes at Trade Tech. His mother would probably have been taking care of Kacie when she would not have been working. Other surrogate care arrangements would have to have been made when Appellant's mother would have been at work.

Financially, both parties appeared capable of providing for Kacie. Although unemployed at the time of trial, Respondent expected to be recalled to work at any time. When working, Respondent earned slightly more per hour than Appellant.

The evidence regarding Appellant's psychiatric history, his use of drugs in the past, the evaluator's observations that it seemed to be an effort for Appellant to keep his voice and emotions under control, and discrepancies regarding the financial declaration Appellant submitted to the trial court might have raised questions in the trial court's mind as to any impairment of Appellant's ability to function as a parent. Certainly, that evidence had a bearing on the trial court's assessment of Appellant's moral character and emotional stability.

The evidence regarding Respondent's relationship with Rex Stromberg was called to the trial court's

attention throughout the trial. No evidence was presented, however, as to any adverse effect of the relationship on Kacie or on Respondent's ability to function as a parent. Respondent's admission that she took Kacie into a bar on one occasion to return some milk bottles rather than leave her alone in the car was considered as well in its assessment of Respondent's moral character and any impairment of Respondent's ability to function as a parent. No evidence was presented reflecting adversely on Respondent's emotional stability.

The evidence clearly preponderates in favor of Respondent. Whether the trial court considered the judicial preference for the mother in regard to the custody of two-year-old Kacie is not apparent from the record. It cannot be said, in any event, that the trial court abused its discretion in awarding permanent custody of Kacie Lynn Leetham to her mother, Melody Leetham.

Appellant cites Utah cases where this Court has affirmed the trial court's award of custody to the father after weighing all evidence, including the mother's moral transgressions. Appellant can cite no Utah case, however, where this Court has found an abuse of discretion on the part of a trial court and has reversed the trial court's award of

custody.

The trial court here struggled with the custody decision and admitted, "Well, this is not an easy case on custody, I think." The trial court considered the factors bearing on the issue of the best interests of the child, Kacie Lynn Leetham, and the factors bearing on the issue of the past conduct and demonstrated moral standards of the parties. The trial court recognized its duty to assess the evidence and weigh the various factors. The trial court stated, "The question is: Which is really the most important and how do you weigh that. I'm not so sure I know the answer to it."

Based upon the evidence before it and with due consideration for the difficulty of the task at hand, the trial court nevertheless reached its decision. The trial court awarded permanent custody of Kacie Lynn Leetham to Respondent. The trial court recognized the necessity to admonish Respondent regarding her conduct. Tacitly, the trial court appeared to recognize that to deprive Respondent of custody would punish the child by denying her a mother's care and that would not serve the best interests of the child. This Court should affirm the trial court's award of permanent custody to Respondent.

CONCLUSION

Section 30-3-10 U.C.A. 1953, as amended 1977,

requires the trial court in a custody determination to consider the best interests of the children, as well as the past conduct and demonstrated moral standards of the parties. The trial court here considered the evidence relating to the factors determinative of the best interests of Kacie Lynn Leetham and the evidence bearing on the issue of the past conduct and demonstrated moral standards of the parties, including Appellant's psychiatric and drug abuse history and Respondent's meretricious relationship with another man. The trial court may have indulged a judicial preference for the mother in the matter of the custody of a child of tender years.

This Court has demonstrated its deference to the trial court unique opportunity to assess and weigh the evidence in a child custody matter in the light of the trial court's observations of the parties and their witnesses. This Court has not reversed a trial court's determination of custody on a finding of an abuse of discretion, even in difficult cases.

The modern trend in the case law of other states and the case law of Utah requires a finding as to whether the welfare of the children has been adversely affected, whether the children have been injured by their mother's conduct or by the relationship, whether there has been a showing of resulting

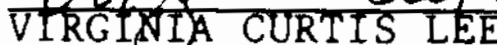
detriment to the children or whether there has been any adverse effect on the care and treatment of the children. No evidence was presented to the trial court which would support any such finding in the instant case.

This Court must affirm the determination made by the trial court after due deliberation and consideration of all the evidence that Respondent be awarded the permanent care, custody and control of the parties' minor daughter, Kacie Lynn Leetham.

DATED this 23rd day of January, 1984.

Respectfully Submitted,

JIMI MITSUNAGA



VIRGINIA CURTIS LEE

CERTIFICATE OF SERVICE

Mailed a true and correct copy of this BRIEF OF RESPONDENT to:

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postage prepaid this 23rd day of January, 1984.