

1994

Jerri K. Schwartz v. Randall I. Schwartz : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

940396

IN THE UTAH COURT OF APPEALS

JERRI K. SCHWARTZ,)
Plaintiff/Appellee,) APPELLANT'S BRIEF
vs.)
RANDALL I. SCHWARTZ,) Court of Appeal 940396 CA
Defendant/Appellant.)

APPEAL FROM

The Fourth District Court
In and For Utah County
Honorable Anthony Schofield

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ARGUMENT PRIORITY

Pursuant to Utah R. App. 26(b)((4), this appeal has a priority 4

FILED
Utah Court of Appeals

JAN 03

Marilyn M. Branch
Clerk of the Court

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JURISDICTION & NATURE OF PROCEEDINGS BELOW

The Court of Appeals has appellant jurisdiction in this matter pursuant to Utah Code §78-28-3(2)(a) since the order appealed from is a final order of the District Court.

STANDARD OF REVIEW

The standard of review for the trial court's findings of fact is the clearly erroneous standard. Walton v. Walton, 814 P.2d 619 (Utah App. 1991).

ISSUES PRESENTED FOR REVIEW

a. Did the District Court conclude that in order for Defendant to obtain custody, he had to prove that the Plaintiff (mother) was unfit and did the trial court presume that the mother should have custody when all other factors were equal?

b. Did the trial court abuse its discretion in disregarding the intent of the parents of Defendant when it awarded one half (1/2) of a home to Plaintiff as marital rather than separate property?

c. Did the trial court commit error in determining the amount of income for Defendant based on historical earnings when he was under court order to continue to operate a business at an income of \$1,000 a month?

d. Was there sufficient evidence to support a findings that Defendant had removed money from the children's trusts accounts to invest in a business?

e. Did the trial court commit error in deciding the distribution of a business without the joinder of all interested parties?

f. Did the trial court commit error in requiring Defendant to pay part of the cost of Plaintiff's witnesses?

STATUTES INVOLVED

The statutes and rules involved in this appeal are reproduced within the brief itself as permitted by Rule 24 (f) of the Rules of Appeal to the Utah Court of Appeal.

STATEMENT OF THE CASE

The parties were married September 26, 1980 and separated in early 1993. (Record 316, Finding 26). They have four (4) minor children, ages 12, 10, 6 and 3. (Record 160 and 316) The Court entered a bifurcated decree of divorce on September 14, 1993, because Plaintiff claimed that she had to have a divorce in order to obtain Pell Grants to attend college. (Record 142)

Plaintiff later admitted that she had falsely reported to the college that she was divorced and that the Pell Grant was already approved when she made her motion to bifurcate for a decree of divorce before trial. (Transcript of 1/20/94, page 135)

The parties were married in California and lived there for three (3) years before moving to Utah in 1984. (Record 316) The Defendant worked as a custodian for the L.D.S. Church and the Plaintiff as a manager of a Subway Store and as a dispatcher for

a small police department when they first arrived in Utah.
(Transcript of 3/1/94 at page 42)

Defendant's parents have been intricately involved in the lives of the parties and their children. Since the move to Utah, the parties have lived in a home purchased by Defendant's parents. The trial court found that without the aid of Defendant's parents, the parties "...would have faced financial ruin long ago.." (Finding 18 & 28, Record 316)

Defendant's parents advanced \$66,333 to start and maintain a feed business run by the parties since 1987. (Transcript of 3/1/94 at 162) When it was opened, Defendant continued his custodian employment at night and worked at the store during the day. Plaintiff quit her job to work at the store. (Transcript of 3/1/94 at page 65) Defendant's parents also worked in the business. (Transcript of 3/1/94, pages, 92, 159, and 166) When the divorce complaint was filed, Defendant took over the full time management of the business by agreement and court order. (Transcript of 3/1/94 at 159 and Record 92)

Defendant and his brother worked for their parents in the family mortuary business for years prior to this marriage. When the mortuary business was sold, the parents decided to give Defendant his share of the sale proceeds based on the work he had put into the mortuary business when he was younger. (Transcript of 3/1/94 at page 157)

Defendant's parents also purchased the home where the parties resided since 1984. The purchase price was \$45,000, but Defendant's parents also spent \$3,744 for repairs and in 1986, approximately \$79,500 to remodel and double the size of the home. (Transcript of 3/1/94, at pages 10, 12, 155, Record 316, Findings 27, 28, 29, & 30 and Record 316, Exhibit #6) The parties never paid any rent for the home, but did pay some taxes. (Record 361, Finding 29)

In 1989, Defendant's parents deeded one third (1/3) of the property to the parties as joint tenant. According to undisputed trial testimony, this was done to avoid marital difficulties between the parties. (Record 361, Finding 39 and Transcript of 3/1/94 at page 178 and 158)

Again in 1990, Defendant's parents deeded another one-third (1/3) of the property to the parties for the same reasons and made a final deed in 1991. Three (3) deeds were used for tax purposes. (Record 361, Finding 29) The court found the value of the home as \$125,000, however, Defendant's parents had spent \$128,244 on the home. (Record 361, Finding 47 and Exhibit 6)

Elizabeth Stewart, Ph.D., performed a custody evaluation at a cost of \$3100.00; each party was ordered and did paid one-half of this cost prior to trial. (Record 92) Plaintiff called Doctor Stewart to testify at trial. (Transcript of 1/20/94) She was of the opinion that Defendant must prove Plaintiff unfit in order to

obtain custody. (Record 189)

The custody and visitation issues were heard January 20, 1994 and the rest of the issues on March 1, 1994.

SUMMARY OF ARGUMENT

Defendant maintains that the trial court committed prejudicial error when it treated the assets of the parties as marital assets rather than separate assets and when it assumed that the mother should have custody of the children absence a finding of unfitness of the mother.

The trial court also committed prejudicial error when it required Defendant to pay for the cost of having the court appointed evaluator testify for Plaintiff, when the court imputed income to Defendant for support purposes, and when it accepted Plaintiff's word that \$7,000 was owed to the children's trust without requiring documentary evidence.

ARGUMENTS

CUSTODY & VISITATION

When the parties separate, the temporary order allowed Plaintiff to remain in the home with the children and granted the parties joint custody. (Record 92) Defendant moved only one (1) block with his parents. (Record 361, Finding 4) This order appears to have given Plaintiff an advantage over Defendant in the custody decision of the court.

The trial court found that joint custody was in the best

interest of the children, but awarded physical placement to the mother because she was in the home. (Record 361 Findings 25 & 48)

The trial court found that both parents were good parents, and left the children with Plaintiff because she was in the home and had been since the separation. (Record 361, Finding 48 & 49)

In fact, all of the testimony showed that Defendant was an exceptional father and involved in the lives of his children more than the "average" father. (Discussed hereafter.) Under the decision of the trial court, it would appear impossible for a father to ever obtain custody, absence a finding of unfitness of the mother.

Utah Code §30-3.10 (1) & (2) requires that the trial Court consider certain factors in determining custody. It states in pertinent part:

"... in determining custody, the court shall consider the best interest of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the child and take into consideration the child's desires regarding the future custody, but the express desires are not controlling and the court may determine the child's custody otherwise.

"In awarding custody, the court shall consider, among other factors the court finds relevant, which parents is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the non-custodial parent as the court finds appropriate."

The trial Court made findings regarding all of these elements and on each found that both parties were equal or that the weakness of one (1) was off set by other strengths. (Record

361 Findings 6 through 25) This leads to the conclusions that the trial court must have applied an assumption that custody should go to a mother over a father if all things are equal.

There is no statutory presumption in favor of a mother. Rice v. Rice, 564 P.2d 305 (Utah 1977) There was at one (1) time in Utah law, but this is an old rule that is now subordinate to the higher rule that custody should be based upon the best interest of the child. Brigham v. Brigham, 575 P.2d 703 (Utah 1978)

Utah statutes do not contemplate any discrimination or inequality based on sex. Martinett v. Martinett, 331 P.2d 779 (1961) Since no presumption exist in deciding custody, the trial court must make specific findings on the factors relied upon in awarding custody of a child to one (1) parent over another. Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1992)

One (1) important consideration ignored by the trial court in this case was pointed out in Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980) where the Utah Supreme Court held it is important in deciding custody to determine if one (1) parents has intentionally caused the children to be antagonistic toward the other parent.

In Smith v. Smith, 793 P.2d 407 (Utah App. 1990) Justice Greenwood pointed out the importance of considering such factors:

"The best interests of a minor child are promoted by having the child respect and love both parents. 'Fostering a child's relationship with the noncustodial parent has an important bearing on the child's best interest

Visitation by the noncustodial parent helps to develop this bonding of respect and love. Interference by the custodial parent with a noncustodial parent's visitation rights as ordered by the court may clearly be contrary to the child's best interest.

"We are persuaded....that interference with visitation may be a factor relevant to the issues of the child's best interest."

Plaintiff admitted her negative actions toward Defendant in front of the children. She admitted that she had removed Defendant's photograph from family pictures, she admitted to calling Defendant names to the children, she admitted that she called Defendant a liar to the children, and she admitted that she had been obstructive in allowing the children to see Defendant. She also assaulted Defendant in front of the children. (Transcript of 1/20/94 at pages 124, 125, 128, 139 and 157)

The trial court ignored the close involvement of the Defendant's parents in the lives of the children. The grandfather testified that he spent about 10 hours a week with the children while the grandmother testified to extensive time and involvement with the children each day, including providing day care. (Transcript of 1/20/94 at pages 171 and 174)

It appears that the trial court accepted Dr. Stewart's conclusion that Plaintiff should have custody because Defendant had not proven her unfit. (Record 189) This is not proper. The trial court must make its own determination as to custody and can not simply adopt the decision of a custody evaluator.

Robinson v. Myers, 599 P.2d 513 (Utah 1979)

Elizabeth Stewart's custody evaluation was not helpful to the Court. She made a lot of mistakes. For example, she did no psychological tests; her recommendations were based solely on interviews with the parties and the children; she made little, if any, collateral contacts, she did not visit the homes of the parties, and she made no effort to confirm any of the information given by the parties. (Transcript of 1/20/94 at page 37)

Doctor Stewart admitted that Defendant is much more involved in and concerned about his children than the "average" father.

Doctor Stewart testified:

"In the recent year, prior to that time, Mr. Schwartz was certainly around, as I mentioned in the report, he did a good deal of the domestic work and for that reason he was around home much more than most fathers were. From the point of the physical care and time in the home and ability to maintain a domestic schedule, he can do that. ...certainly Mr. Schwartz had a lot of time in the home, much more so than most fathers do and he had much more actual what I call "domestic experience" taking care of both the home and the children.

(Transcript of 1/20/84 at pages 53-54)

Defendant had Doctor Stewart's report reviewed by another psychologist. Dr. Gale Stringham testified that Doctor Stewart's recommendations were inconsistent with her own report;

(Transcript of 1/20/94 at page 90) Also that:

1. She (Doctor Stringham) had worked in the mental health field for the past 17 years and had performed more than 100 custody evaluation for the Third and Fourth District Courts.
2. She had not met with Mrs. Schwartz nor the children,

but that she had reviewed the report of Doctor Stewart and meet with Mr. Schwartz for two (2) hours.

3. The criteria used by psychologist to do custodial evaluations included those in the Utah Code as well as standard psychological testing, to include standardized test in intelligence measure, standardized testing for personality and pathology measures, clinical interviews, and observation of each parent with the children to determine how the children react and respond to the parent.

4. Custody evaluations should also include collateral sources contacts to add information to the clinical impressions that are achieved through the testing and the clinical interviews. (Transcript of 1/20/94 from 67 to 90)

Regarding Doctor Stewart's report, Doctor Stringham testified that the Steward report did not meet the standards expected in a custodial evaluation because Doctor Stewart had done little or no psychological testing, she make little or no collateral source contacts, and that Doctor Stewart had not followed the standard protocol for custody evaluations.

Doctor Stringham was also concerned about Plaintiff's negative conduct about Defendant in front of the children.

MR. COLLINS: And if there was a situation where one of the parents was providing negative information, in this case I think you read the report where the mother admits saying negative things about the father, what type of affect would that have on the testing procedure? In other words, would there be indicated additional follow up under those circumstances?

DR. STRINGHAM: If I had an evaluation such as this where the one party acknowledged that they had said negative things regarding the other party around the children or where the children could overhear, I would be particularly concerned about how that was affecting the child. (Transcript of 1/20/94 from 69 to 90)

When Doctor Stewart's lack of a proper protocol for a

custody evaluations is considered, it is obvious that the trial court must have accepted Doctor Stewart's premiss; i.e. that since Defendant had not proven Plaintiff unfit, he was not entitled to physical custody.

IMPUTED INCOME

Did the trial court improperly impute income to Defendant? Defendant terminated his custodian job in November 1992 as a joint decision of the parties and now manages the feed business full time. (Finding 69, Record 361) The parties agreed at the original temporary hearing that the business could only support paying Defendant \$1,000 a month. (Record 92)

The trial court disregarded this admission by Plaintiff and found that Defendant had taken \$9,000 from the business as unexplained "draws". (Finding 70, Record 361) The trial court also found that Defendant's parents had given an additional \$21,333.30 to Defendant for the business since separation of the parties in February 1993. (Finding 54. Record 361).

For some reason, the court then took the \$9,000 which was obviously from the \$21,333.30 loan money and called that Defendant's extra income and used it to calculate child support. (Finding 76, Record 361) Plaintiff's CPA testified that this \$9,000 was taken by Defendant against capital and was not income and was explained by Defendant. (Transcript of 3/1/95 at page 30)

Since Plaintiff ran the business before the temporary order,

it must be presumed that she had knowledge what could be paid from the business for management. (Record 92)

The trial court imputed income to Defendant (Record 361, Finding 76) at his pre-separation earnings rate. The trial court did so by including the \$9,000 loan money. (Record, Findings 69 & 76) The reasoning of the trial court was that the children deserved such a finding. (Record 361, Finding 76)

The trial court did not make the findings required by Utah Code §78-45-7.5(7)(a). A trial court may impute income so long as it follows the requirements of the code 7 which states:

"Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed."

In order for a court to impute income for the purpose of increasing child support, the trial court must first find that at the time of trial the spouse is intentionally unemployed or underemployed. Hill v. Hill, 841 P.2d 722 (Utah App. 1992). Failure make such a finding is an abuse of discretion. There was not such finding in this case. The trial court simply found that Defendant voluntarily terminated his employment prior to separation. (Record 361, Finding 71)

The evidence supports the fact that Defendant was not unemployed nor voluntarily underemployed. The parties and Defendant's parents had a substantial investment in the feed business and the court found that Defendant was protecting this

investment and that it was proper to do so. (Record 361, Findings 51 through 56, 71 & 66) The trial court's findings contradict each other.

PROPERTY DISTRIBUTION

Utah Code §30-3-5 is brief in dealing with the division of property within a divorce. It states:

"When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts, or obligations, and parties..."

The general rules related to the awarding of property is that in making "equitable" property distributions, the court should generally award property acquired by one spouse by gift and inheritance during the marriage to that spouse, together with any appreciation or enhancement of its value. Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988)

In making a determination as to whether a piece of property is marital or separate, the court must look to the contributions of each party to the acquisition of the property and must make adequate findings to support its determination. Muns v. Muns, 790 P.2d 116 (Utah App. 1990)

The trial court concluded that the issuance of the deeds to the parties by the parents evidenced an intent to give a gift to both of the parties. (Record 361 Finding 39) The status of title to property is not the sole determining factor in its characterization. Workman v. Workman, 652 P.2d 931 (Utah 1982)

The trial court ignored the fact that all checks for the home were written either to the Defendant or to the construction workers and none of the checks were ever written to Plaintiff. (Record 351, Exhibit 6)

The way checks are written is important in deciding the intent of a gift in such situations. See Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah App. 1990) where the husband's parents gave both parties substantial cash payments during the marriage, but the checks were payable to both parties.

Defendant's parents were very careful to insure that each check was made out to Defendant and not to both of the parties. (Record 361, Exhibit 6) This is clear evidence of their intent was to give these funds to Defendant and not as a joint gift.

Defendant's parents never requested a return of the funds for the home as they did the funds use to start the feed business. (Record 361, Finding 67)

A trial court can distribute separate property to the other spouse regardless of how title is held, but must set forth its reasons clearly in its findings. Huck v. Huck, 734 P.2d 417 (Utah 1986 and Burke v. Burke, 733 P.2d 133 (Utah 1987).

The thrust of the trial court's decision is based on the status of the title to the home and the method of deeding the property for tax benefits. (Record 361, Finding 39 & 40)

Defendant's parents did not understand the methods used to

convey the home. They hired a lawyer and followed his direction.
(Transcript of 3/1/94 at 158 and Record 361, Finding 36.)

Equity demand that the trial court considered the contributions which Defendant's parents made to the purchase and improvement of the home and their intent and desire in making these very large gifts, be properly considered by the court. A just and practical allocation of the property and finances of the parties can not be made without such consideration. Izatt v. Izatt, 627 P.2d 49 (Utah 1981)

The deed were given to the parties as tenants in common with no rights of survivorship. (Record 361, Finding 38) A conveyance as tenants in common where the writing does not specify the interests of the parties raises a presumption that the parties have an equal interest, however, that presumption may be rebutted by evidence of the amount contributed to the property by each party. Cummings v. Anderson 22 Wa. App. 634, 590 P.2d 1297 (1979)

The trial court did not properly look at the intent of Defendant's parents. Both of Defendant's parents testified that they intended the home to be their son's inheritance and that this was always clear. (Transcript of 3/1/94 at page 162)

The trial court incorrectly found that "... father never told mother that the home was his property or that she did not have an ownership interest until after she filed for this divorce. (Record 361, Finding 37). Plaintiff (mother/wife)

testified to the contrary:

MR. COLLINS: How about your ex-husband. For example, did you and he ever talk about it being his inheritance?

MRS. J. SCHWARTZ: He talked about it was a gift from his parents and they wanted him to have it now.

MR. COLLINS: Did he talk about it being his inheritance?

MRS. J. SCHWARTZ: I believe at one time he stated it as such.

MR. COLLINS: And this was prior to your filing for divorce?

MRS. J. SCHWARTZ: Oh, yes. A couple of years.

(Transcript of 3/1/94 at page 103)

The Defendant had discussions with the Plaintiff about the inheritance and the property on many occasions. She was slow to admit it at trial, but it is clear from her testimony that she knew the home was intended as Defendant's inheritance and that she knew that the intent of Defendant's parents was that he receive the home as his inheritance. Defendant's testimony was also contrary to the finding of the trial court. He testified:

MR. R. SCHWARTZ: We, no, because we knew it was my inheritance. I mean, that is why they purchased it for us.

MR. COLLINS: How did you both know, that is my question.

MR. R. SCHWARTZ: Well, because she knew that I grew up in the family business and when they sold the mortuary I had my inheritance, I decided to take it then to purchase the home. It was a home that we both decided we wanted to live in.

MR. COLLINS: Did you discuss this information?

MR. R. SCHWARTZ: We had discussed. She knew I had an inheritance coming from the mortuary, working there when I was growing up and so, I mean, she always knew that it was

my inheritance.

MR. COLLINS: So as early as 1984, when you moved in there was no question between you and she that the home represented your inheritance?

MR. R. SCHWARTZ: Most definitely.

(Transcript of 3/1/94 at page 191-194)

BUSINESS

There is some question about the court's jurisdiction to award the business. Where a trial court does not have complete jurisdiction over interested parties to litigation, the trial court cannot make a complete decision as to the distribution of property. Dority v. Dority, 645 P.2d 56 (Utah 1982)

Rule 19 of the Utah Rules of Civil Procedure provides that a person or persons shall be joined in litigation where possible if relief cannot otherwise be completely granted so long as there joinder is possible. The parents of Defendant have a substantial interest in the feed business. (Record 361, Findings 54, 55, & 56) This issue may be raised for the first time on appeal.

Seftel v. Capital City Bank, 767 P.2d 941 (Utah App. 1989)

A necessary party is one that is required for a full and fair determination of the rights of all interested parties. Cowen & Co. v. Atlas Stock Transf. Co., 695 P.2d 109 (Utah 1984) The purpose of this rule is to protect the rights of third persons. Cowen, supra. The court cannot determine what percentage of ownership should be divided between the parties, if any, unless

all parties are before it.

TRUST ACCOUNT REPAYMENT

Plaintiff testified that the parties had borrowed some money from the trusts accounts of the children in October or November 1989. These accounts which were solely under Plaintiff's control and Defendant had not control over them. (Transcript of 3/1/94 at page 152) Defendant had no knowledge of this. (Record 361, Findings 63)

There was no further evidence tendered by Plaintiff; no bank records even though they existed, no canceled checks and no records in the business. (Transcript of 3/1/94 at 148 to 152 and Record 361, Exhibit 16)

All of the trust accounts and records were kept by Plaintiff at the time of the alleged loan. There was not sufficient evidence to support a findings that Defendant had removed \$7,000 from these trusts accounts to place in the business.

Notwithstanding this lack of evidence, the trial court used this claim in off setting Defendant's interest in the property distribution. There was no further proof on this issue. These claims were not even alleged until trial. (Transcript of 3/1/94 at page 152)

PAYMENT OF WITNESS FEES

The trial court found that neither party could afford to contribute to the fees of the other party and that Defendant did

not have the ability to pay alimony. The trial court also found that Plaintiff had not demonstrated a need for alimony. (Record 361, Findings 89 through 94)

The trial court ordered that each party pay one-half (1/2) of the custody evaluation. (Record 361, Finding 95) The trial court did not order Defendant to pay for Plaintiff's use of Doctor Stewart at trial, but Plaintiff included this in the decree. Defendant's objection to this inclusion was simply ignored. (Record 327) There was no basis in the findings to require Defendant to pay for Plaintiff's witnesses.

SUMMARY

This court should determine that the home was the sole and separate property of Defendant and remand the case for a determination as to any interest which Plaintiff may have as a result of marital efforts.

This court should set aside any rulings related to the feed business and direct the trial court to bring Defendant's parents before the court prior to a determination of the interests of the parties in the feed business.

This court should set aside any imputed income figures for Defendant or require specific findings as required by statute before allowing imputed figures to be used for support purposes.

This court should vacate any orders related to the trust accounts of the children for lack of proof and require the trial

court to reconsider distribution without consideration of the alleged loan.

This court should remand the issue of custody for more specific findings as to the court's reasons for awarding custody to the mother and should direct the trial court to give the Defendant an equal opportunity at custody without consideration of sex.

Finally, the Court should award an off set in the property division once properly decided by the trial court for Defendant's cost and attorney's fees on appeal.

Respectfully Submitted

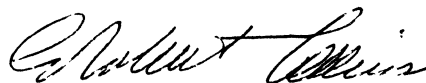


C. ROBERT COLLINS
Attorney for Defendant

CERTIFICATE OF DELIVERY

This is to certify that on the 3rd day of January, 1995, four true and correct copies of the foregoing were delivered to counsel for Plaintiff at his offices at:

Don R. Peterson
Attorney at Law
120 East 300 North
P.O. Box 778
Provo, UT 84603



C. ROBERT COLLINS

APPENDIX

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COPY

IN THE FOURTH JUDICIAL DI

JERRI K. SCHWARTZ,

Plaintiff & Appellee,

vs.

RANDALL I. SCHWARTZ,

Defendant & Appellant.

Case No. 934400154

NOTICE OF APPEAL

Judge Anthony W. Schofield

NOTICE is hereby given that Defendant and Appellant, RANDALL I. SCHWARTZ, appeals to the Utah Court of Appeals the final judgment of the Honorable Judge Anthony W. Schofield, entered in this matter on June 1, 1994. The appeal is taken from those parts of the decision that deal with child custody, income, business property, the home and other financial matters to be hereafter set forth in the brief.

Dated this 22nd day of June, 1994.

C. ROBERT COLLINS
Attorney for Defendant

listened to arguments of counsel, and having heretofore entered its Findings of Fact and Conclusions of Law, the Court now makes and enters the following:

AMENDED DECREE OF DIVORCE

1. Mother and Father are awarded joint legal custody of the four minor children, to-wit: Cari Jo Schwartz, age 12; Kelli Schwartz, age 10; Derek Schwartz, age 6; and Tyler Schwartz, age 3.
2. Mother is awarded primary physical custody of the minor children.
3. Father is awarded liberal visitation with the minor children, to include statutory visitation.
4. Father is awarded five weeks of summertime visitation with the minor children, which visitation shall be divided into a two-week period and a three-week period. Plaintiff shall have a two-week period between the two visitation periods with Father. Mid-week visitation will end at 8:00 p.m. on school nights and 9:00 p.m. on non-school nights. Christmas holiday will alternate every year with one party having the children from the beginning of the school Christmas recess until December 26, and the other party having the children from December 26 until the end of the school recess. The party having visitation starting after Christmas Day will get Thanksgiving visitation during that year. Father will pick up the children for visitation and Mother will pick up the children at the conclusion of visitation. Given the extent of mid-week visitation, no special visitation for children's birthdays will be provided.

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Our File No. 22,056

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JERRI K. SCHWARTZ, Plaintiff, vs. RANDALL I. SCHWARTZ, Defendant.	AMENDED DECREE OF DIVORCE Case No. 934400154 Hon. Anthony W. Schofield
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The above-entitled matter came on regularly for trial on December 20, 1993, with respect to the issues of custody and visitation. The Court took the matter under advisement and entered its Memorandum Decision on January 19, 1994. Disposition of the home, business and personal property and issues of support were reserved for subsequent trial, held March 1, 1994. The Court issued its Ruling dated March 30, 1994.

Don R. Petersen represented plaintiff ("Mother"), and C. Robert Collins represented defendant ("Father"). Having heard the testimony of witnesses, received documentary evidence

9. It is hereby ordered that the evening-out of the various liabilities of the parties will occur by adjustment to the home equity owed by Mother to Father.

Mother owes Father:

	\$62,500	Home equity
less	14,174	Business equity he owes her
less	7,000	Mortgage debt she will pay
plus	<u>1,500</u>	Excess of value of personal property
Total:	\$42,826	

This amount is due from Mother to Father at the appointed time. This is equitable, as Mother has a home to live in but he does not. It is appropriate he not pay her the equity from the business until she pays him the equity from the home. This allows him maximum funds for the present time from which he can finance his own housing and living expenses.

10. It is hereby ordered that Father is to replace into the children's trust accounts the sum of \$7,000.00. To ensure the funds are available for the children, both parties are to be signatories on the children's trust accounts; withdrawals only can occur upon the child reaching 18 or upon further order of the Court. These funds are to be replaced within one year of entry of the decree.

11. It is hereby ordered that both parties are to share equally in the cost of the custodial evaluation. To the extent one party has borne a greater share of the cost than the other, that party is entitled to reimbursement from the other so that each pays an equal amount.

5. The Court hereby adopts the parenting plan, Exhibit 17 and as amended by Exhibit 19. The parties may agree upon such additions or changes to the plan as they think appropriate, but are directed to execute the plan as amended hereby, unless they otherwise agree in writing on a different plan.

6. The plaintiff mother, Jerri K. Schwartz, is awarded all right, title and interest in and to the home, which property is more specifically described as follows:

Beginning at a point 1211.32 feet North and 230 feet West of the Southeast corner of the Southeast one-quarter of Section 34, Township 5 South, Range 2 East, Salt Lake Base and Meridian; thence West 100 feet; thence North 209.17 feet; thence South 88°15' East 100.05 feet; thence South 206.11 feet to beginning.

7. The plaintiff mother is hereby awarded the horses, saddles and personal property as described in the Findings of Fact herein, but is liable for the mortgage, the difference in value of the personal property, and is hereby ordered to pay to Father his one-half equity in the home upon her remarriage, death, refinancing the home, or further encumbering it, cohabiting with another male, or the youngest child reaching age 18.

8. The defendant father, Randall I. Schwartz, is awarded the business, the camper and personal property as described in the Findings of Fact, but is liable for repaying the children's trust accounts the amount which the business borrowed, and to pay Mother one-half of the value of the business.

16. The Court finds that neither party has the ability to pay the other's attorney fees. Therefore, no attorney fees are awarded.

17. In the custody decision, the Court directed the parties to agree on a parenting plan. They came close but did not complete the negotiation process. The Court therefore will direct appropriate adjustments to the draft parenting plan received as Exhibit 17 and the offsetting comments received as Exhibit 19 be made.

18. Visitation, though liberal, only includes five weeks of summertime visitation with Father, whose visitation will be divided into a two-week period and a three-week period. Mother shall have a two-week period between the two visitation periods with Father. Mid-week visitation will end at 8:00 p.m. on school nights and 9:00 p.m. on non-school nights. The Christmas holiday will alternate every year, with one party having the children from the beginning of the school Christmas recess until December 26, and the other party having the children from December 26 until the end of the school recess. The party having visitation starting after Christmas Day will get Thanksgiving visitation during that year. Father will pick up the children for visitation, and Mother will pick up the children at the conclusion of visitation. Given the extent of mid-week visitation, no special visitation for the children's birthdays will be provided. Other than these modifications, the parenting plan, Exhibit 17, is adopted. The parties may agree upon such additions or changes to the plan as they think

12. The Court orders that there is an additional sum of \$731.98 due and owing to Elizabeth B. Stewart, who performed the custodial evaluation.

13. Pursuant to the guidelines, Father is ordered to pay to Mother child support in the sum of \$495.00 per month. As Father has always paid child support and as he is an owner of the business rather than an employee, a withhold and deliver is not required unless subsequent evidence is provided which demonstrates a failure to pay on a timely basis.

14. Mother is not awarded alimony. She is quite able to provide for her own care, particularly when the amount of child support is added in, as well as she has use of a home without rent or significant mortgage debt. While she claims need, it is not really demonstrated. She has income and support of around \$1,500.00 per month. Her expenses are listed as \$1,737.00 per month. Mother has control over the amount of riding lessons she teaches. As such, it appears she has capacity to earn the shortfall which exists between her income and her listed expenses. Mother anticipates completing schooling in amount 5 to 6 years; then, she anticipates sufficient income to meet her needs.

15. The Court finds that Father does not have the ability to pay alimony. To a great extent, this family has lived on the generosity of Father's parents. While he has a legal obligation to his divorcing wife, his parents do not. The Court imputes income to him for purposes of protecting the children but will not do so where, with a modest stretch, Mother can provide for her own needs without receipt of alimony.

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Our File No. 22,056

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JERRI K. SCHWARTZ, Plaintiff, vs. RANDALL I. SCHWARTZ, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 934400154 Hon. Anthony W. Schofield
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The above-entitled matter came on regularly for trial on December 20, 1993, with respect to the issues of custody and visitation. The Court took the matter under advisement and entered its Memorandum Decision on January 19, 1994. Disposition of the home, business and personal property and issues of support were reserved for subsequent trial, held March 1, 1994. The Court issued its Ruling dated March 30, 1994.

Don R. Petersen represented plaintiff ("Mother"), and C. Robert Collins represented defendant ("Father"). Having heard the testimony of witnesses, received documentary evidence and listened to arguments of counsel, the Court now makes and enters the following:

appropriate, but are directed to execute the plan, as amended hereby, unless they otherwise agree in writing on a different plan.

DATED this 7 day of ~~May~~ ^{June}, 1994.

BY THE COURT

15/
ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 16th day of May, 1994.

C. Robert Collins, Esq.
P. O. Box 243
405 East State Road
American Fork, UT 84003

Linda Osborne
SECRETARY

10. Each of the parents desires custody of the children.
11. Each of the parents desires that the children be kept together.
12. Cari Jo, the oldest child, is a very sensitive young woman, demonstrably affected by the divorce proceedings. She has responded by becoming protective and caring for the younger children. She has been a source of genuine stability for the other children, shouldering a burden that a 12-year-old should not have to bear. In a sense, she is a surrogate parent for the younger children.
13. Kelli is ten and is bright and able. She is a happy child that is resilient and less troubled by circumstances than Cari Jo. She has a warm, loving relationship with both parents.
14. Each of the two boys is active, inquisitive and warmhearted. Each is relatively unaware of all that the divorce implies, and each has a strong bond with both parents.
15. Given the observed interaction of the children, they each would be best served by being kept together. It would be destructive to Cari Jo, who has a strong, protective nature for her siblings, to be separated from them. Equally, it would be damaging to Derek and Tyler, who rely to a large extent on their older sisters, to be separated from them. For the present, the children must be kept together.
16. Cari Jo has a more strained relationship with Father than with Mother. He has not understood her as well and does not relate as well with her as does Mother.

All

FINDINGS OF FACT

The Court finds the following facts have been proven by a preponderance of the evidence:

1. The parties were married in 1980 and are the parents of four children, to-wit: Cari Jo Schwartz, age 12; Kelli Schwartz, age 10; Derek Schwartz, age 6; and Tyler Schwartz, age 3.

2. Each of the children is well-adjusted and each has significant interaction with both Father and Mother.

3. Father's parents live near the marital home and have provided extensive child care over the years for each of the children.

4. Under a temporary order, Mother has lived in the marital home.

5. Under the temporary order, Mother has temporary custody of the children.

6. By agreement between the parties, the children have visited with Father every other weekend and have had two mid-week visits with Father each week.

7. The effect of the visitation schedule is that the children have retained a strong bond with both parents. Each has been able to spend considerable time with the children.

8. The parties have been reasonably cooperative with each other to ensure the children have ready access to both parents.

9. Mother has been particularly sensitive to have the children spend time with Father.

(A10)

Father has been able to provide meaningful care to the children while they have been in his care for visitation.

23. Tyler goes to Kinder Care day care. He also receives day care from his grandparents. This should be allowed to continue as he has a bond with his grandparents.

24. Joint legal custody as defined in Utah Code Ann. § 30-3-10.1 would be in the best interests of the children.

a. Both parents appear capable of implementing joint legal custody as each has cooperated to a large extent in ensuring that the children have access to both parents.

b. As the four children each have a significant bond with each parent, that bond would be fostered by a determination of joint legal custody.

c. Each of the children has been well cared for physically, psychologically and emotionally. During the temporary period, the parents have been able to meet the needs of the children without undue difficulty. The children would continue to be cared for physically, psychologically and emotionally if an award of joint legal custody is entered.

d. The parents have demonstrated an ability to give first priority to the welfare of their children and have been able so far to reach shared decisions in the best interests of the children.

e. Each parent so far has been and is capable of encouraging positive relationships between the children and the other parent. The Court is impressed with the

17. Each of the parents is morally responsible. Each has a commitment to teach values appropriate for our society and community. Each has similar religious values. Either would do well in exemplifying values for the children.

18. Each of the parents is similarly situated with respect to financial understanding and money management. The family has received considerable financial support from grandparents of the children and neither parent has demonstrated a better ability to manage the family's financial resources than the other. Without the consistent support of grandparents, the family would have faced financial ruin long ago.

19. Neither parent has personality quirks or particularly unrealistic expectations that would render that parent less fit to serve as custodial parent.

20. Father is more rigid and somewhat less flexible than Mother.

21. Mother is significantly involved in improving her lot through additional education. She tends to over-extend herself some as she works, goes to school, and has a major commitment to horse care and riding, which is both a hobby and an outlet for stress and frustration.

22. While each parent has been a significant caregiver for the children, Mother has provided a greater portion of the parental care as between the parents, although Father's parents (the children's paternal grandparents) have provided considerable care for the children both in the form of day care as well as care in the marital home. Directly and through his parents,

system. During that same time, the parties performed general maintenance and upkeep, and they paid for these smaller improvements.

31. In 1991, Father's parents deeded the home to the parties as tenants in common.

32. After 1991, there were minor improvements to the property, including construction of a hay barn and installation of a secondary irrigation water line. Monies for the hay barn came from the family budget.

33. In August, 1992, the home was used as collateral to borrow \$15,000.00, which was used to buy a 1986 Suburban and also horse trailers for business inventory. Mother has been paying interest only on that loan in the amount of \$50.00 per month.

34. Father asserts his parents told him the home was to be a gift to him, a part of his inheritance, and they wanted him to have it now so it could mutually benefit everybody, including the children. There was no similar discussion between the parents and Mother regarding it being Father's inheritance.

35. As part of parents' estate planning, an attorney assisted parents with conveying the property. For tax purposes, the property was gifted to the parties over a period of three years.

36. Parents executed the deed to the home at their attorney's office; neither of the parties were present nor had input into the form of the deed.

37. Father never told Mother that the home was his property or that she did not have an ownership interest until after she filed for this divorce.

maturity of the parents and the willingness they demonstrated to work cooperatively together in the best interests of the children.

f. At present, the parents live just a few blocks apart. The children are able to walk between residences and to receive support from each parent.

25. Based upon these findings, joint legal custody has a significant likelihood of working in this case, and each of the parents has demonstrated the ability to work cooperatively for the benefit of the children.

26. The parties were married in 1980 and separated in early 1993. For more than three months preceding this action, the parties resided in Utah County. During the course of the marriage, irreconcilable differences arose between the parties making the continuation of the marriage impossible. Grounds and jurisdiction exist.

27. Since 1984, the parties have lived in a home in Lindon, Utah, which was purchased by Father's parents.

28. In 1986, a major addition of about 1000 square feet was added to the home. The addition was paid for by Father's parents.

29. The parties never paid any rent for their occupancy of the house. For the years 1987-1991, they did pay the property taxes on the house.

30. Prior to 1991, the parties participated with Father's parents in improving the home by building a barn and installing a sprinkling system. The parents paid for the sprinkling

46. The video tapes received in evidence depict the condition of the home shortly after the separation as well as its current condition. While very cluttered during the recent inspection and video (Exhibit 21), there has been some damage, not extensive damage. There were, for example, some new holes in the sheet rock walls and pencil and crayon scribbles on the walls. As the damage was not extensive, it does not appear significantly to decrease the value of the home.

47. In other contexts, this Court has received evidence of a ten percent increase over that time period. While it cannot rely on that extrinsic evidence, the home does have a value greater than the 1992 appraisal. Given the appraiser's report and Mother's testimony that it could be sold for more than the 1992 appraisal, the home is valued at \$125,000.00.

48. Mother desires to live in the home. She has custody of the children and they have lived in the home since 1984. It is in the best interest of the children and Mother that they be permitted to reside in the home during the children's growing years.

49. Mother is awarded the home.

50. Father has an equity in the home of one-half of its value, or \$62,500.00.

51. In 1987, the parties started a business, a feed store in Lindon, Utah.

52. To start the business, they borrowed \$20,000.00 from Father's parents. Before separation, they borrowed an additional \$25,000.00 from Father's parents.

53. Neither of these loans was evidenced by a promissory note, nor were any terms of repayment or interest established for the loans.

A-17

38. Mother asserts the home was deeded as tenants in common for the protection of the children and because she was more financially responsible than Father.

39. Father's parents assert they deeded the home as tenants in common in order to keep peace in the family and because they thought the parties would be together forever. This explanation is somewhat lame as they would not have qualified for the tax treatment they sought if they had not deeded the home jointly; they would have had a gift tax obligation. Thus, the principal purpose for deed of the home in tenancy in common was for tax purposes. Clearly, the parents intended a gift both to their son as well as to his wife so they could avoid gift tax liability on the transfer.

40. The home is a marital asset.

41. In 1992, the home was appraised at \$114,000.00.

42. Jud Harward, an MAI appraiser, did a letter report as to the value of the home on February 25, 1994, of \$125,000.00.

43. Mother places a value on the home of \$130,000.00 to \$135,000.00.

44. Father believes the home is worth less now than in 1992 because he asserts there has been fairly extensive damage to the home since the separation.

45. Given the significant real property appreciation in this county during the year and a half since the valuation of the home, it undoubtedly has increased in value, unless it has suffered unusual depreciation or wear and tear.

59. In support of Mother's claim, however, the truck which Father drives is owned by the business and not included in the value of fixed assets, though the debt against the truck was included in the liabilities. That truck has a value of \$13,500.00.

60. Ron King, the evaluator, noted that the depreciated value of business assets almost always is less than true market value.

61. In light of all of the assets given or loaned to the business by Father's parents, together with reasonable depreciation, the value of the fixed assets seems somewhat low; however, other than the value of the truck, no clear evidence of value was provided. The fixed assets are valued at \$11,000.00, plus \$13,500.00, the value of the truck, a total of \$24,500.00.

62. Since the date of this account, Father's parents advanced additional funds, making total notes payable of \$66,333.30. Since that date, the FSB loan was reduced to \$7,000.00.

63. The parties borrowed \$7,000.00 from the children's trust accounts which the children received from Mother's family. These monies were used to pay bills for the business. Mother testified the parties intended to repay these loans with interest. Father testified he was not aware the money was borrowed.

64. The amount of these loans from the children's trust accounts should be included as liabilities in the valuation of the business.

65. If the balance sheet of the business is adjusted for fixed assets of \$24,500.00, notes payable of \$66,333.30, FSB bank loan of \$7,000.00, and loan from children of \$7,000.00,

- A 119

54. Since the separation in 1993, parents have loaned an additional \$21,333.30 to Father for the business. For these loans to the business, parents are owed \$66,333.30 by these parties, plus interest.

55. While the company tax returns show Father as the owner of the business, the business was originally started for Mother to operate while Father maintained full-time employment elsewhere.

56. These parties each are owners of the business. It was built from loans from Father's parents, but as both parties are liable for repayment of the loans, the business is a marital asset.

57. As of 12/31/93, the business had the following assets and liabilities:

<u>Assets</u>		<u>Liabilities</u>	
Inventory	\$103,000	Accounts payable	\$ 23,800
Fixed assets	11,000	Taxes payable	8,120
Cash	9,600	Notes payable	55,957
Accounts receivable	<u>3,500</u>	FSB bank loan	<u>12,815</u>
Total:	\$127,100		\$102,872
Net Worth:	\$22,228		

58. Mother believes the amount of the fixed assets is understated by about \$24,000.00; however, the description of fixed assets includes a fiberglass horse, a tractor, a heater and a Ford truck, which were purchased by Father's parents and loaned to the business.

A-18

77. The total income of the parties is \$2,758.00. Father receives 63% of the income. Based upon those amounts, for four children, total child support is \$787.00, of which Father's share is \$495.00.

78. Six horses are being kept at the home of Mother. Of the six, Ariel belongs to Mother's mother. The remaining five belong to the parties and their children. Billy and Musket were brought to the marriage by Mother. She should have them. Cody should be awarded to Father and Tangent to Mother. The remaining pony belongs to the children and should be kept by them.

79. The parties have seven saddles, one of which Mother brought to the marriage and one of which replaces a second saddle Mother brought to the marriage. Three saddles are for the children and are awarded to them. The remaining saddles, an English saddle, a western saddle, a dressage saddle and a Wintex saddle are divided the English, dressage and Wintex to Mother, and the western saddle to Father.

80. Father brought History of the Church, Journal of Discourses, dictionary, pictures of Europe and much of the stereo system to the marriage. He should receive them.

81. Mother brought the pony cart into the marriage, which she should receive.

82. Father should receive the chairs from his family and the rocker which was a gift from his parents.

83. Father should receive the following items from the marital estate: bed, electric piano, tools, clothes, stereo system, one-half of CD's and records and tapes, CD player,

73. Mother is attending UVSC three-quarter time getting a degree in general education, and also works 24 to 34 hours per week. She intends to become a math teacher. She anticipates she will not graduate for at least five years. She has applied for a Pell grant which only covers books and tuition. She has not attempted to obtain student loans.

74. Mother now earns about \$896.00 per month from her employment. She also earns, after expenses, at least an average of \$112.00 per month from horse training and horse riding lessons, making total income to her of \$1,008.00 per month. It appeared that she actually earns more than this from her riding lessons and training, but the amount was unclear.

75. Mother has been receiving child support in the amount of \$304.00 per month.

76. Father had income of \$1,000.00 per month, but he also took the additional \$9,000.00 draw in 1993, a total of \$21,000.00. He thus had income in 1993 of \$1,750.00 per month. It is appropriate that income be imputed to him in that amount as he has control over the store; its debts, other than debts to parents, have been reduced; he is able-bodied; and while working for the Church, he made even more. He now works in the store primarily to rescue his parents' investment. The children suffer from less support than they deserve if he is able to base his support on the monthly draws which he takes from the store, rather than on all of the income he took from the store last year, an amount more nearly like what he earned before working in the store. For purposes of calculating child support, Father's income is imputed at \$1,750.00 per month.

(A-200)

Thus, in arriving at a disposition of the assets and debts of the parties, she must receive credit for this debt, a business debt for which she will be responsible.

89. Mother seeks alimony.

90. Given the amount of his reasonable living expenses and child support, when contrasted with his income from the store, Father does not have the capacity to pay alimony. Even at \$21,000.00, the amount of his income in 1993, he does not have the capacity to provide for his own needs, to pay child support and still pay alimony. Thus, although Mother seeks alimony, Father does not have capacity to pay.

91. Nor does Mother demonstrate significant need. She receives income of \$1,000.00 and she has support of \$495.00. She asserts expenses of \$1,737.00. Because she has control over the amount of riding lessons which she gives, she has control over her ability to pay her own way.

92. Father's attorney fees are in the sum of \$8,020.00, which appears necessarily incurred and reasonable in amount.

93. Mother's attorney fees are in the sum of \$5,125.00, which appears necessarily incurred and reasonable in amount.

94. Neither party has the capacity to pay the other's fees.

95. The cost of the custodial evaluation should be borne equally by the parties. To the extent not already done, each should pay one-half of the evaluation.

computer, weight set, one-half kitchen appliances, one-half linens, one-half family pictures, one-half games, one bookcase, TV and VCR, one-half of silverware and cookware, one set of clippers, hide-a-bed, green couch, stove, one-half of tack other than saddles, camper, one-half of videos.

84. Mother should receive the following items from the marital estate: encyclopedias, piano, couch, TV and VCR, beds, dressers, refrigerator, one-half kitchen appliances, one-half linens, one-half family pictures, one-half games, children's encyclopedias, pipe corral, hot walker, one-half of silverware and cookware, horse clippers, wheelbarrow, one-half of videos, one-half of CD's and records and tapes, one-half of tack other than saddles.

85. The foregoing disposition of property is not fully inclusive of all items. The parties are to divide any unlisted items evenly between them.

86. Given the values attributed to the items awarded to each from the marital estate, because Mother receives more horses and saddles, as well as the pipe corral and the hot walker while Father receives the camper, Father will receive less in value than Mother receives. The estimated difference in value is approximately \$1,500.00. Father is entitled to receive that sum from Mother.

87. The truck which Father drives is owned by the business. As he will keep the business, he gets the truck. Its value is included in the business valuation, as is its debt.

88. The remaining balance of the First Security Bank home equity loan, a loan to the business, is secured by a mortgage on the home. Mother has agreed to pay this mortgage.

A-2.2

2. While the Court orders joint legal custody, it concludes that primary physical custody should rest with Mother. Given the ages of the girls, Cari Jo's much closer bonding with her mother, and the express conclusion of all, including the Court, that the children be kept together, the Court concludes Mother is best suited to serve as the primary custodial parent.

3. Liberal visitation is awarded to Father, to include the statutory visitation, augmented by allowing Father, so long as he lives close and it is convenient, to have the children visit more regularly after school in his parents' home and by allowing Father to provide day care for Tyler personally or through Tyler's grandparents.

4. The Court hereby approves the parenting plan drafted by the defendant and amended by the plaintiff.

Disposition of Property.

5. Mother is awarded the home, horses and saddles and personal property as described, but is liable for the mortgage, the difference in value of personal property, and must pay Father for his one-half equity in the home upon her remarriage, death, refinancing the home or further encumbering it, cohabiting with another male, or the youngest child reaching age 18. Mother, Jerri K. Schwartz, is awarded all right, title and interest in and to the home, which property is more specifically described as follows:

Beginning at a point 1211.32 feet North and 230 feet West of the Southeast corner of the Southeast one-quarter of Section 34, Township 5 South, Range 2 East, Salt Lake Base and Meridian; thence West 100 feet; thence North 209.17 feet;

A-25

96. A legal description of the home belonging to the parties, which was purchased by Father's parents and awarded to the plaintiff mother is more particularly described as follows:

Beginning at a point 1211.32 feet North and 230 feet West of the Southeast corner of the Southeast one-quarter of Section 34, Township 5 South, Range 2 East, Salt Lake Base and Meridian; thence West 100 feet; thence North 209.17 feet; thence South 88°15' East 100.05 feet; thence South 206.11 feet to beginning.

97. The additional cost of the custodial evaluation not already paid for is the sum of \$731.98.

ANALYSIS AND CONCLUSION

From the foregoing facts, the Court makes the following conclusions:

1. Based upon the foregoing findings, the Court concludes that it is in the best interest of the children that an order of joint legal custody be entered. The Court commends both parents for their demonstrated ability to work cooperatively together for the benefit of he children. The separation of divorce and temporary decisions as to custody and visitation place great emotional strains upon parents who share a mutual love for their children. In this case, these parents have been able to work together in spite of that emotional strain. The Court finds that there is significant potential for success in a joint legal custody arrangement and orders joint legal custody.

A-24

9. Both parties are to share equally in the cost of the custodial evaluation. To the extent one party has borne a greater share of the cost than the other, that party is entitled to reimbursement from the other so that each pays an equal amount.

Child Support.

10. Pursuant to the guidelines, child support is fixed at \$495.00 per month. As Father has always paid child support and as he is an owner of the business rather than an employee, a withhold and deliver is not required unless subsequent evidence is provided which demonstrates a failure to pay on a timely basis. Father is hereby ordered to pay child support to Mother in the sum of \$495.00 per month.

Alimony.

11. Mother would like alimony while she goes to school. Yet, she is quite able to provide for her own care, particularly when the amount of child support is added in. As well, he has use of a home without rent or significant mortgage debt. While she claims need, it was not really demonstrated. She has income and support of around \$1,500.00 per month. Her expenses are listed as \$1,737.00. Mother has control over the amount of riding lessons she teaches. As such, it appears she has capacity to earn the shortfall which exists between her income and her listed expenses. Mother anticipates completing schooling in about 5 to 6 years. Then she anticipates sufficient income to meet her needs.

12. Nor does Father have the ability to pay alimony. To a great extent, this family has lived on the generosity of Father's parents. While he has a legal obligation to his divorcing

thence South 88°15' East 100.05 feet; thence South 206.11 feet to beginning.

6. Father is awarded the business, the camper and personal property as described, but is liable for repaying the children's trust accounts the amount which the business borrowed, and to pay Mother one-half of the value of the business.

7. The evening-out of the various liabilities of the parties to each other will occur by adjustment to the home equity owed by Mother to Father.

Mother owes Father:

	\$62,500	Home equity
less	14,174	Business equity he owes her
less	7,000	Mortgage debt she will pay
plus	<u>1,500</u>	Excess of value of personal property
Total:	\$42,826	


This amount is due from Mother to Father at the appointed time. This is equitable, as Mother has a home to live in but he does not. It is appropriate he not pay her the equity from the business until she pays him the equity from the home. This allows him maximum funds for the present from which he can finance his own housing and living expenses.

8. Father is obligated to replace into the children's trust accounts the sum of \$7,000.00. To ensure the funds are available for the children, both parties are to be signatories on the children's trust accounts; withdrawals only can occur upon the child reaching 18 or upon further order of the Court. These funds are to be replaced within one year of entry of the decree.

visitation. Given the extent of mid-week visitation, no special visitation for the children's birthdays will be provided. Other than these modifications, the parenting plan, Exhibit 17, is adopted. The parties may agree upon such additions or changes to the plan as they think appropriate, but are directed to execute the plan, as amended hereby, unless they otherwise agree in writing on a different plan.

DATED this 1st day of ~~May~~ ^{June}, 1994.

BY THE COURT

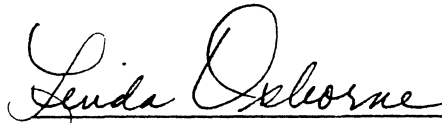


ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 16th day of May, 1994.

C. Robert Collins, Esq.
P. O. Box 243
405 East State Road
American Fork, UT 84003



SECRETARY

wife, his parents do not. The Court imputes income to him for purposes of protecting the children but will not do so where, with a modest stretch, Mother can provide for her own needs without receipt of alimony.

Attorney Fees.

13. Neither party has the ability to pay the other's attorney fees. None are awarded.

Parenting Plan.

14. In the custody decision, the Court directed the parties to agree on a parenting plan. They came close but did not complete the negotiation process. The Court therefore will direct appropriate adjustments to the draft parenting plan received as Exhibit 17 and the offsetting comments received as Exhibit 19.

15. Visitation, though liberal, only includes five weeks of summertime visitation with Father, whose visitation will be divided into a two-week period and a three-week period. Mother shall have a two-week period between the two visitation periods with Father. Mid-week visitation will end at 8:00 p.m. on school nights and 9:00 p.m. on non-school nights. The Christmas holiday will alternate every year, with one party having the children from the beginning of the school Christmas recess until December 26, and the other party having the children from December 26 until the end of the school recess. The party having visitation starting after Christmas Day will get Thanksgiving visitation during that year. Father will pick up the children for visitation, and Mother will pick up the children at the conclusion of

more than three months preceding this action the parties resided in Utah County.

During the course of the marriage irreconcilable differences arose between the parties making the continuation of the marriage impossible. Grounds and jurisdiction exist.

2. Since 1984 the parties have lived in a home in Lindon, Utah which was purchased by Father's parents.

3. In 1986 a major addition of about 1000 square feet was added to the home. The addition was paid for by Father's parents.

4. The parties never paid any rent for their occupancy of the house. For the years 1987-1991, they did pay the property taxes on the house.

5. Prior to 1991 the parties participated with Father's parents in improving the home by building a barn and installing a sprinkling system. The parents paid for the sprinkling system. During that same time the parties performed general maintenance and up-keep and they paid for these smaller improvements.

6. In 1991 Father's parents deeded the home to the parties as tenants in common.

7. After 1991 there were minor improvements to the property including construction of a hay barn and installation of a secondary irrigation water line. Monies for the hay barn came from the family budget.

8. In August 1992 the home was used as collateral to borrow \$15,000 which was used to buy a 1986 Suburban and also horse trailers for business inventory. Mother has been paying interest only on that loan in the amount of \$50 per month.

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**IN THE FOURTH DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

JERRI K. SCHWARTZ, Plaintiff, vs. RANDALL I. SCHWARTZ, Defendant.	CASE NUMBER: 934400154 DATE: MARCH 30, 1994 RULING ANTHONY W. SCHOFIELD, JUDGE
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Trial on the issues of custody and visitation was held December 20, 1993. The Court issued it's written decision on January 19, 1994. Disposition of the home, business and personal property and issues of support were reserved for subsequent trial, held March 1, 1994.

Don R. Petersen represented plaintiff ("Mother") and C. Robert Collins represented defendant ("Father"). Having heard the testimony of witnesses, received documentary evidence and listened to arguments of counsel, the Court now makes its ruling.

FINDINGS OF FACT

The Court finds that the following facts have been proven by a preponderance of the evidence.

1. The parties were married in 1980 and separated in early 1993. For

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16. In 1992 the home was appraised at \$114,000.
17. Jud Harward, an MAI appraiser, did a letter report as to the value of the home on February 25, 1994 of \$125,000.
18. Mother places a value on the home of \$130 - \$135,000.
19. Father believes the home is worth less now than in 1992 because he asserts there has been fairly extensive damage to the home since the separation.
20. Given the significant real property appreciation in this county during the year and a half since the valuation of the home, it undoubtedly has increased in value unless it has suffered unusual depreciation or wear and tear.
21. The video tapes received in evidence depict the condition of the home shortly after the separation as well as its current condition. While very cluttered during the recent inspection and video (Exhibit 21), there has been some damage but not extensive damage. There were, for example, some new holes in the sheet rock walls and pencil and crayon scribbles on the walls. As the damage was not extensive, it does not appear significantly to decrease the value of the home.
22. In other contexts this Court has received evidence of a ten percent increase over that time period. While it cannot rely on that extrinsic evidence, the home does have a value greater than the 1992 appraisal. Given the appraiser's report and Mother's testimony that it could be sold for more than the 1992 appraisal, the home is valued at \$125,000.
23. Mother desires to live in the home. She has custody of the children and they have lived in the home since 1984. It is in the best interest of the children

A-33

9. Father asserts his parents told him the home was to be a gift to him, a part of his inheritance, and they wanted him to have it now so it could mutually benefit everybody including the children. There was no similar discussion between the parents and Mother regarding it being Father's inheritance.

10. As part of parents' estate planning, an attorney assisted parents with conveying the property. For tax purposes the property was gifted to the parties over a period of three years.

11. Parents executed the deed to the home at their attorney's office; neither of the parties were present nor had input into the form of the deed.

12. Father never told Mother that the home was his property or that she did not have an ownership interest until after she filed for this divorce.

13. Mother asserts the home was deeded as tenants in common for the protection of the children and because she was more financially responsible than Father.

14. Father's parents assert they deeded the home as tenants in common in order to keep peace in the family and because they thought the parties would be together forever. This explanation is somewhat lame as they would not have qualified for the tax treatment they sought if they had not deeded the home jointly, they would have had a gift tax obligation. Thus, the principal purpose for deed of the home in tenancy in common was for tax purposes. Clearly the parents intended a gift both to their son as well as to his wife so they could avoid gift tax liability on the transfer.

15. The home is a marital asset.

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Accts. Receivable	<u>3,500</u>	FSB Bank Loan	<u>12,815</u>
TOTAL	\$127,100		\$102,872
Net Worth	\$24,228		

33. Mother believes the amount of the fixed assets is understated by about \$24,000. However, the description of fixed assets includes a fiberglass horse, a tractor, a heater and a Ford truck which were purchased by Father's parents and loaned to the business.

34. In support of Mother's claim, however, the truck which Father drives is owned by the business and not included in the value of fixed assets though the debt against the truck was included in the liabilities. That truck has a value of \$13,500.

35. Ron King, the evaluator, noted that the depreciated value of business assets almost always is less than true market value.

36. In light of all of the assets given or loaned to the business by Father's parents, together with reasonable depreciation, the value of the fixed assets seems somewhat low, however other than the value of the truck, no clear evidence of value was provided. The fixed assets are valued at \$11,000 plus \$13,500, the value of the truck, for a total of \$24,500.

37. Since the date of this account, Father's parents advanced additional funds, making total notes payable of \$66,333.30. Since that date the FSB loan was reduced to \$7,000.

38. The parties borrowed \$7,000 from the children's trust accounts which the children received from Mother's family. These monies were used to pay bills for

and Mother that they be permitted to reside in the home during the children's growing years.

24. Mother is awarded the home.

25. Father has an equity in the home of one half of its value, or \$62,500.

26. In 1987 the parties started a business, a feed store in Lindon, Utah.

27. To start the business they borrowed \$20,000 from Father's parents.

Before separation they borrowed an additional \$25,000 from Father's parents.

28. Neither of these loans was evidenced by a promissory note nor were any terms of repayment or interest established for the loans.

29. Since the separation in 1993, parents have loaned an additional \$21,333.30 to Father for the business. For these loans to the business, parents are owed \$66,333.30 by these parties, plus interest.

30. While the company tax returns show Father as the owner of the business, the business was originally started for Mother to operate while Father maintained full time employment elsewhere.

31. These parties each are owners of the business. It was built from loans from Father's parents, but as both parties are liable for repayment of the loans, the business is a marital asset.

32. As of 12-31-93, the business had the following assets and liabilities:

Assets		Liabilities	
Inventory	\$103,000	Accounts Payable	\$ 23,800
Fixed Assets	11,000	Taxes Payable	8,120
Cash	9,600	Notes Payable	55,957

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store. He draws \$1,000 per month from the business, although the accountant reviewing the books of the business testified that in 1993 Father also took a \$9,000 draw from the business which was not explained nor contradicted.

46. Father has not sought other employment. He is trying to protect his parent's investment.

47. Father is in good health.

48. Mother is attending UVSC three-quarter time getting a degree in general education, and also works 24 to 34 hours per week. She intends to become a math teacher. She anticipates she will not graduate for at least five years. She has applied for a Pell grant which only covers books and tuition. She has not attempted to obtain student loans.

49. Mother now earns about \$896 per month from her employment. She also earns, after expenses, at least an average of \$112 per month from horse training and horse riding lessons, making total income to her of \$1,008 per month. It appeared that she actually earns more than this from her riding lessons and training, but the amount was unclear.

50. Mother has been receiving child support in the amount of \$304 per month.

51. Father had income of \$1,000 per month but he also took the additional \$9,000 draw in 1993, a total of \$21,000. He thus had income in 1993 of \$1,750 per month. It is appropriate that income be imputed to him in that amount as he has control over the store; its debts, other than debts to parents, have been reduced; he is

the business. Mother testified the parties intended to repay these loans with interest.

Father testified he was not aware the money was borrowed.

39. The amount of these loans from the children's trust accounts should be included as liabilities in the valuation of the business.

40. If the balance sheet of the business is adjusted for fixed assets of \$24,500, notes payable of \$66,333, FSB bank loan of \$7,000 and loan from children of \$7,000, total assets are \$140,600, total liabilities are \$112,253, and the net value of the business is \$28,347. That is the value which the Court places upon the business. One half of that value is \$14,174.

41. Father desires to retain ownership of the business so that he can work to recover for his parents their investment. It is appropriate that he be awarded the business.

42. Post-separation Father's parents requested that the loans be reduced to written documentation and they requested repayment. While the Court will not so order, the parties do owe the parents the described sum and appropriate written evidence should be prepared.

43. Father is still residing with his parents and is paying Mother support for the children.

44. Prior to November 1992 Father worked for the L.D.S. Church as a custodian. Immediately before his voluntarily termination of employment with the church he was making \$10.61 an hour, or approximately \$1,800 per month.

45. Following termination with the church, Father went to work at the feed

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should receive them.

56. Mother brought the pony cart into the marriage, which she should receive.

57. Father should receive the chairs from his family and the rocker which was a gift from his parents.

58. Father should receive the following items from the marital estate: bed, electric piano, tools, clothes, stereo system, one half of CD's and records and tapes, CD player, computer, weight set, one half kitchen appliances, one half linens, one half family pictures, one half games, one bookcase, TV and VCR, one half of silver ware and cook ware, one set of clippers, hide-a-bed, green couch, stove, one half of tack other than saddles, camper, one half of video.

59. Mother should receive the following items from the marital estate: encyclopedias, piano, couch, TV and VCR, beds, dresser, refrigerator, one half kitchen appliances, one half linens, one half family pictures, one half games, children's encyclopedias, pipe corral, hot walker, one half of silver ware and cook ware, horse clippers, wheelbarrow, one half of videos, one half of CD's and records and tapes, one half of tack other than saddles.

60. The foregoing disposition of property is not fully inclusive of all items. The parties are to divide any unlisted items evenly between them.

61. Given the values attributed to the items awarded to each from the marital estate, because Mother receives more horses and saddles as well as the pipe corral and the hot walker while Father receives the camper, Father will receive less in

able-bodied; and while working for the church he made even more. He now works in the store primarily to rescue his parents' investment. The children suffer from less support than they deserve if he is able to base his support on the monthly draws which he takes from the store, rather than on all of the income he took from the store last year, an amount more nearly like what he earned before working in the store. For purposes of calculating child support Father's income is imputed at \$1,750 per month.

52. The total income of the parties is \$2,758. Father receives 63% of the income. Based upon those amounts, for four children total child support is \$787, of which Father's share is \$495.

53. Six horses are being kept at the home of Mother. Of the six, Ariel belongs to Mother's mother. The remaining five belong to the parties and their children. Billy and Musket were brought to the marriage by Mother. She should have them. Cody should be awarded to Father and Tangent to Mother. The remaining pony belongs to the children and should be kept by them.

54. The parties have seven saddles, one of which Mother brought to the marriage and one of which replaces a second saddle Mother brought to the marriage. Three saddles are for the children and are awarded to them. The remaining saddles, an English saddle, a western saddle, a dressage saddle and a Wintex saddle are divided the English, dressage and Wintex to Mother and the western saddle to Father.

55. Father brought History of the Church, Journal of Discourses, dictionary, pictures of Europe and much of the stereo system to the marriage. He

68. Mother's attorney's fees are in the sum of \$5,125, which appears necessarily incurred and reasonable in amount.

69. Neither party has the capacity to pay the others fees.

70. The cost of the custodial evaluation should be born equally by the parties. To the extent not already done, each should pay one half of the evaluation.

ANALYSIS AND CONCLUSION

From the foregoing facts the Court makes the following conclusions:

Disposition of property.

Mother is awarded the home, horses and saddles and personal property as described but is liable for the mortgage, the difference in value of personal property, and must pay Father for his one half equity in the home up on her remarriage, death, refinancing the home or further encumbering it, cohabiting with another male, or the youngest child reaching age eighteen.

Father is awarded the business, the camper and personal property as described but is liable for repaying the children's trust accounts the amount which the business borrowed and to pay wife one half of the value of the business.

The evening out of the various liabilities of the parties to each other will occur by adjustment to the home equity owed by Mother to Father.

Mother owes Father:

	\$62,500	Home equity
less	\$14,174	business equity he owes her
less	\$ 7,000	mortgage debt she will pay
plus	<u>\$ 1,500</u>	excess of value of personal property
TOTAL	\$42,826.	

(A-411)

value than Mother receives. The estimated difference in value is approximately \$1,500. Father is entitled to receive that sum from Mother.

62. The truck which Father drives is owned by the business. As he will keep the business, he gets the truck. Its value is included in the business valuation, as is its debt.

63. The remaining balance of the First Security Bank home equity loan, a loan to the business, is secured by a mortgage on the home. Mother has agreed to pay this mortgage. Thus, in arriving at a disposition of the assets and debts of the parties, she must receive credit for this debt, a business debt for which she will be responsible.

64. Mother seeks alimony.

65. Given the amount of his reasonable living expenses and child support, when contrasted with his income from the store, Father does not have the capacity to pay alimony. Even at \$21,000, the amount of his income in 1993, he does not have the capacity to provide for his own needs, to pay child support and still pay alimony. Thus, although Mother seeks alimony, Father does not have capacity to pay.

66. Nor does Mother demonstrate significant need. She receives income of \$1,000 and she has support of \$495. She asserts expenses of \$1,737. Because she has control over the amount of riding lessons which she gives, she has control over her ability to pay her own way.

67. Father's attorney's fees are in the sum of \$8,020, which appears necessarily incurred and reasonable in amount.

claims need, it was not really demonstrated. She has income and support of around \$1,500 per month. Her expenses are listed as \$1,737. Mother has control over the amount of riding lessons she teaches. As such, it appears she has capacity to earn the shortfall which exists between her income and her listed expenses. Mother anticipates completing schooling in about 5-6 years. Then she anticipates sufficient income to meet her needs.

Nor does Father have the ability to pay alimony. To a great extent this family has lived on the generosity of Father's parents. While he has a legal obligation to his divorcing wife, his parents do not. The Court imputes income to him for purposes of protecting the children but will not do so where with a modest stretch, Mother can provide for her own needs without receipt of alimony.

Attorney's fees.

Neither party has the ability to pay the other's attorney's fees. None are awarded.

Parenting plan.

In the custody decision the Court directed the parties to agree on a parenting plan. They came close but did not complete the negotiation process. The Court therefore will direct appropriate adjustments to the draft parenting plan received as exhibit 17 and the offsetting comments received as exhibit 19.

Visitation, though liberal, only includes five weeks for summer time visitation with Father, whose visitation will be divided into a two week period and a three week period. Mother shall have a two week period between the two visitation periods with

This amount is due from Mother to Father at the appointed time. This is equitable as Mother has a home to live in but he does not. It is appropriate he not pay her the equity from the business until she pays him the equity from the home. This allows him maximum funds for the present from which he can finance his own housing and living expenses.

Father is obligated to replace into the children's trust accounts the sum of \$7,000. To ensure the funds are available for the children, both parties are to be signatories on the children's trust accounts; withdrawals only can occur upon the child reaching eighteen or upon further order of the Court. These funds are to be replaced within one year of entry of the decree.

Both parties are to share equally in the cost of the custodial evaluation. To the extent one party has born a greater share of the cost than the other, that party is entitled to reimbursement from the other so that each pays an equal amount.

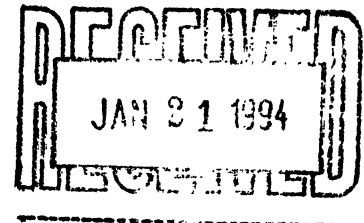
Child support.

Pursuant to the guidelines, child support is fixed at \$495 per month. As Father has always paid child support and as he is an owner of the business rather than an employee, withhold and deliver is not required unless subsequent evidence is provided which demonstrates a failure to pay on a timely basis.

Alimony.

Mother would like alimony while she goes to school. Yet, she is quite able to provide for her own care, particularly when the amount of child support is added in. As well, she has use of a home without rent or significant mortgage debt. While she

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**IN THE FOURTH DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

JERRI K. SCHWARTZ,
Plaintiff,

vs.

RANDALL I. SCHWARTZ,
Defendant.

CASE NUMBER: 934400154

DATE: JANUARY 19, 1994

DECISION

ANTHONY W. SCHOFIELD, JUDGE

Trial on the issue of custody and visitation was held December 20, 1993. All other issues were reserved for trial on March 1, 1994. Don R. Peterson represented plaintiff ("Mother") and C. Robert Collins represented defendant ("Father"). The Court heard the testimony of witnesses, received the documentary evidence, and heard the arguments of counsel. On January 5, 1994 the Court interviewed the children in chambers. The Court now makes its ruling.

FINDINGS OF FACT

The Court finds that the following facts have been proven by a preponderance of the evidence.

1. The parties were married in 1980 and are the parents of four

children:

Cari Jo Schwartz, age 12

Kelli Schwartz, age 10

Derek Schwartz, age 6

Tyler Schwartz, age 3.

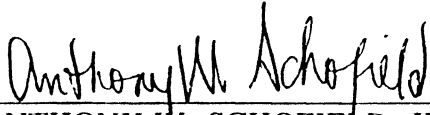
A-45

Father. Mid-week visitation will end at 8:00 p.m. on school nights and 9:00 p.m. on non-school nights. The Christmas holiday will alternate every year, with one party having the children from the beginning of the school Christmas recess until December 26 and the other party having the children from December 26 until the end of the school recess. The party having visitation starting after Christmas day will get Thanksgiving visitation during that year. Father will pick up children for visitation and Mother will pick up the children at the conclusion of visitation. Given the extent of mid-week visitation, no special visitation for the children's birthdays will be provided. Other than these modifications, the parenting plan, exhibit 17, is adopted. The parties may agree upon such additions or changes to the plan as they think appropriate, but are directed to execute the plan, as amended hereby unless they otherwise agree in writing on a different plan.

Pursuant to Rule 4-504, Utah Code of Judicial Administration, Mother's counsel is directed to prepare findings of fact, conclusions of law and a decree of divorce consistent with the findings in this and the custody decision and to circulate them to counsel.

Dated this 30th day of March, 1994.

BY THE COURT:


ANTHONY W. SCHOFIELD, JUDGE

cc: Don R. Petersen, Esq.
C. Robert Collins, Esq.

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source of genuine stability for the other children, shouldering a burden that a 12-year old should not have to bear. In a sense, she is a surrogate parent for the younger children.

13. Kelli is ten, and is bright and able. She is a happy child that is resilient and less troubled by circumstances than Cari Jo. She has a warm, loving relationship with both parents.

14. Each of the two boys is active, inquisitive and warm-hearted. Each is relatively unaware of all that the divorce implies and each has a strong bond with both parents.

15. Given the observed interaction of the children, they each would be best served by being kept together. It would be destructive to Cari Jo, who has a strong, protective nature for her siblings, to be separated from them. Equally, it would be damaging to Derek and Tyler, who rely to a large extent on their older sisters, to be separated from them. For the present, the children must be kept together.

16. Cari Jo has a more strained relationship with Father than with Mother. He has not understood her as well and doesn't relate as well with her as does Mother.

17. Each of the parents is morally responsible. Each has a commitment to teach values appropriate for our society and community. Each has similar religious values. Either would do well in exemplifying values for the children.

2. Each of the children are well-adjusted and each has significant interaction with both Father and Mother.
3. Father's parents live near the marital home and have provided extensive child care over the years for each of the children.
4. Under a temporary order, Mother has lived in the marital home.
5. Under the temporary order, Mother has temporary custody of the children.
6. By agreement between the parties, the children have visited with Father every other weekend and have had two midweek visits with Father each week.
7. The effect of the visitation schedule is that the children have retained a strong bond with both parents. Each has been able to spend considerable time with the children.
8. The parties have been reasonably cooperative with each other to insure the children have ready access to both parents.
9. Mother has been particularly sensitive to have the children spend time with Father.
10. Each of the parents desires custody of the children.
11. Each of the parents desires that the children be kept together.
12. Cari Jo, the oldest child, is a very sensitive young woman, demonstrably affected by the divorce proceedings. She has responded by becoming protective and caring for the younger children. She has been a

(A 46)

with his grandparents.

24. Joint legal custody as defined in Utah Code Ann. § 30-3-10.1 would be in the best interests of the children.

- a. Both parents appear capable of implementing joint legal custody as each has cooperated to a large extent in insuring that the children have access to both parents.
- b. As the four children each have a significant bond with each parent, that bond would be fostered by a determination of joint legal custody.
- c. Each of the children has been well cared for physically, psychologically and emotionally. During the temporary period the parents have been able to meet the needs of the children without undue difficulty. The children would continue to be cared for physically, psychologically and emotionally if an award of joint legal custody is entered.
- d. The parents have demonstrated an ability to give first priority to the welfare of their children and have been able so far to reach shared decisions in the best interests of the children.
- e. Each parent so far has and is capable of encouraging positive relationships between the children and the other parent. The Court is impressed with the maturity of the parents and the willingness they demonstrated to work cooperatively together in

A-49

18. Each of the parents is similarly situated with respect to financial understanding and money management. The family has received considerable financial support from grandparents of the children and neither parent has demonstrated a better ability to manage the family's financial resources than the other. Without the consistent support of grandparents, the family would have faced financial ruin long ago.

19. Neither parent has personality quirks or particularly unrealistic expectations that would render that parent less fit to serve as custodial parent.

20. Father is more rigid and somewhat less flexible than Mother.

21. Mother is significantly involved in improving her lot through additional education. She tends to over extend herself some as she works, goes to school, and has a major commitment to horse care and riding, which is both a hobby and an outlet for stress and frustration.

22. While each parent has been a significant care giver for the children, Mother has provided a greater portion of the parental care as between the parents although Father's parents (the children's paternal grandparents) have provided considerable care for the children both in the form of day care as well as care in the marital home. Directly and through his parents, Father has been able to provide meaningful care to the children while they have been in his care for visitation.

23. Tyler goes to Kinder Care day care. He also receives day care from his grandparents. This should be allowed to continue as he has a bond

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Liberal visitation is awarded to Father, to include the statutory visitation, augmented by allowing Father, so long as he lives close and it is convenient, to have the children visit more regularly after school in his parents' home and by allowing Father to provide day care for Tyler personally or through Tyler's grandparents.

The Court could spell out precise terms of the joint legal custody order and a precise visitation and day care schedule. Rather, however, given the time until trial of the remaining issues in this divorce proceeding, the Court orders the parties to meet together, with their attorneys within fifteen (15) days, to develop a co-parenting plan and a visitation and child care schedule which is in the best interests of the children and which provides for liberal visitation with Father and the ability by him and his parents to provide child care service for Tyler. If the parties are unable to develop a co-parenting plan within fifteen (15) days after such meeting the Court orders mediation as to such issues. These parties have accomplished much cooperatively. They are ordered to attempt to resolve these remaining issues cooperatively.

This is an interim order so no formal findings and conclusions need be prepared at this time. At the time of final hearing the Court will order one of the parties to prepare findings and conclusions as to the issues resolved in this

A51

the best interests of the children.

f. At present the parents live just a few blocks apart. The children are able to walk between residences and to receive support from each parent.

25. Based upon these findings, joint legal custody has a significant likelihood of working in this case and each of the parents has demonstrated the ability to work cooperatively for the benefit of the children.

DECISION

Based upon the foregoing findings, the Court concludes that it is in the best interest of the children that an order of joint legal custody be entered. The Court commends both parents for their demonstrated ability to work cooperatively together for the benefit of the children. The separation of divorce and temporary decisions as to custody and visitation place great emotional strains upon parents who share a mutual love for their children. In this case these parents have been able to work together in spite of that emotional strain. The Court finds that there is significant potential for success in a joint legal custody arrangement and orders joint legal custody.

While the Court orders joint legal custody, it concludes that primary physical custody should rest with Mother. Given the ages of the girls, Cari Jo's much closer bonding with her mother and the express conclusion of all, including the Court, that the children be kept together, the Court concludes Mother is best suited to serve as the primary custodial parent.

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decision.

Dated this 19th day of January, 1994.

BY THE COURT:

Anthony W. Schofield
ANTHONY W. SCHOFIELD, JUDGE

cc: Don R. Petersen, Esq.
C. Robert Collins, Esq.

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