1995

Robin L. Michael v. Rodney C. Michael : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

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ROBIN L. MICHAEL,	:	
	:	**BRIEF OF APPELLANT**
Plaintiff/Appellant,	:	
	:	
v.	:	
	:	Priority No. 15
RODNEY C. MICHAEL,	:	
	:	
Defendant/Respondent.	:	Case No. 950146-CA
	:	

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**ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE TIMOTHY R. HANSON, DISTRICT COURT JUDGE**

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JURISDICTION OF COURT OF APPEALS

Appellant jurisdiction arises pursuant to §78-2a-3(2)(g), Utah Code Annotated (1987, as amended) (hereinafter "U.C.A.").

STATEMENT OF ISSUES

The issue presented on appeal is as follows:

1. Whether the trial court made an error in determining that Appellant Robin Michael did not show a substantial, material change of circumstances requiring the Court to reach the issue of whether a change of custody was in the best interests of the children herein.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following code provisions, statutes and rules are determinative in this case and complete copies are in the Appendix to this brief:

1. U.C.A. §30-3-10, statutory best interest criteria for custody.

2. U.C.A. §30-3-10.2 and 10.3, statutory criteria for modification of custody orders.

STATEMENT OF THE CASE

This is an appeal from an Order of Modification of Decree and Dismissal of Plaintiff's Petition issued by Judge Timothy R. Hanson of the Third Judicial District Court. This Order was entered December 14, 1994. No post trial motions were filed. This case originated as a divorce issued by a Colorado Court on July 1, 1991 after a marriage of eight years. Physical custody of the parties' two minor children was awarded to Respondent Rodney Michael. The Decree of Divorce awarded the parties joint legal custody and required that all significant decisions pertaining to the children's health, education, religious training and general welfare be made jointly by the parties. Appellant Robin Michael was awarded substantial and liberal visitation rights.

On or about October, 1992, Robin Michael filed a Petition to Modify concerning custody. A trial was held in July, 1994 at

which time the Court bifurcated the proceedings directing that it would first hear evidence pertaining to the issue of whether a substantial, material change of circumstances had occurred prior to considering whether it was in the best interests of the children to effect a custody change. On August 12, 1994, the Court issued a written Memorandum Decision that the evidence did not rise to the level necessary to meet the change of circumstances test and that the Court would not take any additional evidence on whether a change of custody was in the best interests of the children. Findings and an Order dismissing Plaintiff's modification petition were entered by the Court December 14, 1994.

STATEMENT OF FACTS

A. Overview.

1. The parties to this appeal were married September 23, 1983 and were divorced eight years later on July 1, 1991. On that date, the District Court for the County Jefferson, State of Colorado enter an order dissolving the marriage of the parties.

2. The Colorado Decree of Divorce (Appendix 1) awarded the parties joint legal custody of their minor children with the primary physical custody to Mr. Michael. The parties have two children namely Schuyler (born December 15, 1985) and Ashleigh (born July 10, 1987). (Record, p.8; paragraph 12, Colorado Decree).

3. During the pendency of the Colorado divorce action Mr. Michael was residing in Colorado with the children and Mrs. Michael was commuting between California and Colorado for employment reasons. She had taken a substantial job promotion and relocated to California with the expectation that Mr. Michael and the children would shortly follow. Instead, Mr. Michael filed for divorce and was awarded temporary custody. (Record p. 172-182, 854-856, Amended Petition to Modify).

4. The Colorado Court determined that it was in the best interests of the children that their parents be awarded joint legal custody with primary physical custody to Mr. Michael. Robin Michael was awarded substantial and liberal visitation and under the terms of the joint legal custody plan, the Court ordered all major decisions concerning the health, education, religious training and general welfare of the children to be made jointly by the parties. The Court found that the custody decision was quite difficult and that both parties were "excellent parents" stating was follows:

> "13. The Court finds that this has been a difficult case. Both parties are excellent parents. Both parties have taken substantial efforts in the past in the best interests of the children. Both parties have done a good job in parenting their children. There is no real difference in the parenting abilities of the parties. Both parties are well-adjusted and both parties are in good physical and mental health.

> 19. The Court has determined that joint legal custody is most advantageous to the two children. The Court does have some concerns because of the physical distance between the two parties. The Petitioner is in Utah and the Respondent is in California. Such a geographical distance is not conducive to communication.
>
> 20. The evidence, however, is that the parties are interested in making that type of arrangement work. Therefore, the benefit to the children of joint custody outweighs any difficulties a parent at this time with regard to their lack of geographic proximity.
>
> 22. The Court develops the following plan for joint legal custody. The Petitioner is to be the primary residential custodian. All major decisions concerning health, education, religious training, and general welfare are to made jointly. The legal residence of the children shall be with the Petitioner. The parties are to consult with each other on a prompt basis as appropriate without hostility or demeaning each other. . . ." (Record, p. 8-10; Colorado Decree of Divorce).

5. The Colorado Court also ordered that Robin Michael be awarded "substantial visitation" with the children as the parties could agree and established a minimum visitation schedule as follows: one weekend per month, ten days at Christmas, three weeks in the summer, and free telephone access to the children. The Court also ordered that both parties should promptly exchange information concerning the medical, dental and educational aspects of the children and that neither party should prohibit access of the other party to such information. The obligation to exchange

information specifically extended to report cards, notification of scheduled school events, parent-teacher conferences, and exchange of all preschool records and reports.

6. At the time the Colorado Decree was entered, Mr. Michael had already moved the children from Colorado to the State of Utah as he had been transferred by his employer. At that time, Mrs. Michael was residing in California having also been transferred there by her employer. (Record, p. 172-182, 1081-1085).

7. Once the Colorado Decree was entered Robin Michael left her job in California and moved to Utah to be closer to the children. She took a substantial reduction in status and compensation. (Record, p. 172-182; Amended Petition to Modify).

8. On or about August 10, 1991, Robin Michael domesticated the Colorado Decree in the State of Utah to obtain court review of the visitation terms since both parties would be residing in the same state. That petition was resolved by stipulation of the parties on or about October 7, 1991. (Record, p. 33-38) (Appendix 2, Third District Court Minute Entry). The visitation agreement was that the statewide standard schedule would be followed, that if Mr. Michael worked out of town the children were to be left with Mrs. Michael, that Mrs. Michael would be given a mid-week overnight visit every Wednesday. (Record, p. 29).

9. On or about October 8, 1992, Robin Michael filed a Petition to Modify concerning custody. That Petition was amended in December, 1992 alleging substantial material changes of circumstances had occurred since entry of the Decree. (Record, p. 172). The allegations of changed circumstances included the following:

a. Mr. Michael had remarried and delegated the primary care, custody and control of the minor children to his new wife. Mr. Michael's new wife was pregnant and during that time the children were often unsupervised, required to prepare their own breakfasts and get themselves ready and off to school without adult supervision. Mr. Michael traveled regularly, at least once per month and thus left the children with alternate caretakers and not Robin Michael.

b. The minor child Ashleigh had appeared during visitation with bruises on her legs and indicated her father spanked her "really hard". August 27, 1991 Ashleigh appeared with a large bruise under her eye.

c. Mr. Michael had terminated the physical therapy necessary for the treatment of Schuyler Michael. From birth, Schuyler has suffered from cerebral palsy and has participated in physical therapy since the age of five months. Since April 1992, Mr. Michael had cancelled numerous therapy sessions and delegated

the responsibility of that therapy to his new wife Cynthia Michael. Since entry of the Colorado Decree, Mr. Michael had refused to allow Robin Michael to actively participate in the physical therapy and did not provide her with regular information.

d. On January 22, 1991, Mr. Michael was ordered to provide therapy for both children on his arrival to Salt Lake City, Utah. He was further ordered to provide monthly written reports to the children's mother from the day care provider and the physical therapist. Mr. Michael had not complied with these orders.

e. Since entry of the Colorado order and the move of both parties to the State of Utah, the provisions of joint custody became unworkable in the following ways:

i. Mr. Michael had delegated the substantial care of the children to his new spouse;

ii. Mr. Michael had failed to cooperate with the shared responsibility of academic and medical matters concerning the children. Specifically, he had failed to allow Robin to participate in the children's school activities, failed to inform Robin of the children's teachers, school and medical care providers.

iii. Mr. Michael had unilaterally made important decisions about the children's health,

safety and welfare and academic development without permitting input from Robin Michael.

iv. Mr. Michael refused to let Robin Michael take the children to school or from participating in the children's after school activities and physical therapy.

v. Between August 1, 1991 and October, 1991 Mr. Michael refused to discuss the time of the children's return following visitation with their mother. On one occasion he arrived at the mother's home late at night after the children were asleep and insisted that the children leave with him. On another occasion, Mr. Michael arrived at the mother's home with police and forcibly removed the children.

f. Since entry of the Colorado Decree the children have expressed a desire to be with their natural mother and Mr. Michael has punished the children for these statements and for maintaining a relationship with their mother. This includes spanking Schuyler for talking to his mother on the telephone, refusing to allowing Schuyler to telephone his mother, and taking from the children toys, clothing and gifts given them by their

mother. Mr. Michael had also told the children they would never see their father again if Robin Michael was awarded custody.

g. Since entry of the Colorado Order Mr. Michael instructed the children to call their natural mother "Robin" and to refer to their step-mother as "madre" a Spanish term for mother.

h. On January 26, 1992, Robin Michael attempted to obtain information about her daughter's school status and was told that she could not obtain that information because the children's mother was Cynthia (the step-mother).

10. On or about November 9, 1992, Mr. Michael notified Robin Michael that he was leaving Salt Lake City, Utah and moving to Appleton, Wisconsin by Christmas as a result of an employment transfer. Mr. Michael's notice to Robin Michael was not consistent with the Court order that required a minimum of 90 days advance notice. (Record, p. 178-179).

11. Since the notification that the children would be moving from Utah, the children became extremely upset, and emotional and Ashleigh had begun bed wetting and clinging to their mother. (Record, p. 178-179).

12. At a hearing held before Commissioner Judith Atherton in December, 1992, Mr. Michael was allowed to move the children from the State of Utah subject to a liberal visitation schedule during the pendency of a child custody evaluation. That

schedule provided that Mr. Michael would pay the costs of transporting the children to Utah for a once per month visit pending the evaluation. Further, the Court appointed Dr. Jill Sanders to appoint a custody evaluation which order was entered on or about April 7, 1993. (Record, p. 253; Minute Entry)

13. Mr. Rodney Michael moved to Appleton, Wisconsin with the children in January, 1993.

14. Both parties have remarried since entry of the Colorado Decree, Mr. Michael married Cynthia Michael on November 30, 1991 and Robin Michael married Duane Clink on January 27, 1992.

B. Evaluation of Dr. Jill Sanders.

15. A custody evaluation was performed by Dr. Jill Sanders a clinical psychologist. Her initial report dated December, 1993 recommended that their be no change in the current order of joint custody, with Rodney Michael as primary physical custodian. (Appendix A-3; Dr. Sanders Conclusions and Recommendations). Shortly before the trial in July, 1994, Dr. Sanders reinterviewed the children and prepared a supplemental report stating that physical custody of at least the minor child Schuyler, should be awarded to the mother on a trial basis. (Appendix 4; Plaintiff's Exhibit 1). Dr. Sanders testified that the child had made a dramatic change in his expressions about where he preferred to live, that he was "adamant" about his dislike of

his step-mother Cynthia, and that he had articulated episodes of mistreatment by his step-mother such as being pushed against a bureau, dragged downstairs by his arm and her using foul language towards him. Also that he exhibited increased tantrum behavior at his father's home which doesn't occur with Robin. (Record 868-873). Dr. Sanders further testified unequivocally that Schuyler was certain to experience harm if he were returned to the custody of his father, outlining numerous harmful potential consequences including depression, rebellion and running away.

16. The following is an excerpt from the trial testimony of Dr. Jill Sanders in this case given July 12, 1994, Page 47 (Record, p. 888-889):

> "Well, on the side of not--let's talk about not letting him live with his mother. I think there are some substantial problems there. I think -- I would go to the bookie and bet on the fact that if he does not -- is not allowed to spend -- either live with his mother, or spend more time with his mother, that his negative behavior in Wisconsin will accelerate. This is textbook stuff. You read about it in -- about children of divorce that when they are uncomfortable with their placement, the easiest way for an eight year old to get things changed is to misbehave so badly that one of the parents doesn't want them any more. So this is real common. It's in my mind very predictable, and in fact Schuyler told me yesterday what his plans are if he isn't allowed to live with his mother. So this kid has already advanced to the point in his fantasy that he's developed a plan for what happens if he doesn't live with his mom.

> So I think we could certainly expect an acceleration of very difficult behavior.
>
> The kind of adjacent risk to that for Rod and Cynthia in particular is that if they have to become these really disciplinary parents, the good relationship that I think they truly have with Schuyler is going to be diminished, if not destroyed, by having to deal consistently with a kid who's misbehaving and acting out. The second primary risk of not letting him live with his mother is his sense of powerlessness, and helplessness and hopelessness and probably some degree of clinical depression would accelerate. I would be surprised if I wouldn't see that in Schuyler. The third risk is that if he goes back to Wisconsin, and lives in his regular placement, that the only thing that will happen to the idealization that's occurred around his mother is going to get worse. It's going to get bigger, and she's going to get bigger and better, and more wonderful, and more perfect in his mind the longer he has to be away from her. And I think that leads sometimes to real extreme behavior, such as running away, or truly violent behavior toward one of the custodial parents. In terms of the risks of -- "

17. Attached hereto as Appendix A-3, is the custody evaluation Conclusions and Recommendations made by Dr. Jill Sanders in her initial report dated December 1993.

18. Attached hereto as Addendum A-4 is a three page update to her recommendations prepared by Dr. Jill Sanders for trial dated July 10, 1994. This summary contains her revised recommendations for custody.

19. The initial custody recommendation of Dr. Sanders recommends no change to the physical custody relationship but does suggest several specific changes to visitation. Dr. Sanders recommends that the children spend nine weeks continuous visitation with their mother during the summer months, that they spend a seven day period in the fall and a seven day period in the spring with their mother, that they alternate the Christmas holiday with their mother, and that their mother be allowed to visit the children in Wisconsin upon providing two weeks notice. (Appendix 3; Dr. Sanders Conclusions and Recommendations).

20. In her revised recommendations prepared at the time of trial, Dr. Sanders recommends that at least the child Schuyler be allowed to reside with his mother on a trial basis. At the end of that time, the child's custody situation should again be reviewed. Her summary outlines several reasons for the new recommendation. Among these are the following:

a. Schuyler's preference has dramatically changed--he is adamant about residing with his mother, he has expressed a strong dislike for his step-mother and has stated episodes of physical and emotional abuse.

b. Dr. Sanders believes this change is based on a true attachment and affinity for his mother as well as a fantasy that there may be a "better life" with his mother.

21. Dr. Sanders believes that the preference and reasons outlined by the child Schuyler represent his "psychological reality" and that there are significant risks to the child by not allowing a trial change of physical custody. Those risks include the following:

a. Increased acting out behavior in his father's home;

b. Increased sense of helplessness, hopelessness, powerlessness and depression.

c. Increased idealization of relationships possibly leading to extreme behavior such as running away.

C. Findings and Order of the Trial Court.

22. A trial was held on the amended petition to modify custody on July 12 through 15, and 18, 1994 before the Honorable Timothy R. Hanson, District Court Judge, presiding.

23. The trial Court bifurcated the proceedings directing that it would first hear evidence pertaining to the issue of whether a substantial, material change of circumstances had occurred prior to considering whether it was in the best interests of the children to effect a custody change.

24. The judge issued a written Memorandum Decision on August 12, 1994 finding that the trial evidence did not rise to the level necessary for the Court to reach the question of whether a

custody change was in the best interests of the children. Attached hereto as Appendix 5 is the Memorandum Decision. (Record, p. 559-573)

25. On December 14, 1994, the Court entered Findings and an Order in this matter. Copies are attached hereto as Appendix 6. (Record, p. 726-758).

26. The Findings and Order of the Court contain the following specifics on the changes of circumstances alleged by Robin Michael and on which evidence was presented at trial:

a. Intended move of Mr. Michael from Utah to Wisconsin. This move of Mr. Michael was worked related and foreseeable at the time of the parties' divorce. The Court sees no improper motive on the part of Mr. Michael to relocate to Wisconsin for his employment and sees no improper motive on the part of Robin Michael to leave Utah for the state of Missouri since without the children residing in Utah she has no ties to the State and her extended family support resides in Missouri. The evidence shows that the children have made a reasonable transition to Wisconsin, and are doing well in school.

b. Mr. Michael's Remarriage. This is a positive rather than a negative factor in the lives of the children. The Court interviewed the child Schuyler in chambers and found that his description of alleged "abuse" by his mother was not typical of a

child's language and he may have been influenced to make such statements. The allegations that the children have been mistreated by their step-mother are not supported by believable evidence.

c. Visitation Problems. There have been ongoing visitation disputes since the divorce was entered in July of 1991 and this is a continuity of conduct and not a specific change of circumstances.

d. Schuyler's Preference. The Court's designated expert, Jill Sanders, has notably changed her position as regards custody for Schuyler. She stated that Schuyler had maintained a neutral position when initially interviewed and that it changed shortly before trial where he asserted strongly that he wanted to live with his mother. Dr. Sanders also reported that Schuyler told her his step-mother "abused" him. Dr. Sanders could not account for this change in position of the minor child other than he perceived life with his mother would be better and that perception may be based on fantasy and not reality as he has not recently lived with his mother on a long term basis. The Court acknowledges the strong preference of Schuyler is certainly a change but since it is not based on reality, it cannot be considered a change for purposes of determining whether or not there has been a significant change of circumstances. The Court has no evidence that Schuyler has been influenced by Robin Michael but finds that some of the

child's words and demeanor suggest adult language which may not be his own. Further, that even if the Court believed the stated change of preference by Schuyler was a material change of circumstances, that change in and of itself is insufficient to allow the Court to find a material change of circumstances which would allow it to move forward to the question of best interests. The appellate courts have found that a child's stated change in preference alone is insufficient to establish such a change of circumstances.

SUMMARY OF ARGUMENTS

The trial court erred and abused its discretion in determining that the evidence presented at trial by Robin Michael was not sufficient to support a substantial, material change of circumstances to review the issue of child custody. In evaluating the evidence, the Court erred in finding that the child's strong preference to change households was insufficient to support a review of the custody issue. There was more in this case to support a change of circumstances than simply the unsupported preference of a minor child. That preference was also analyzed, corroborated and supported by the undisputed testimony of the custody evaluator Dr. Jill Sanders who testified that the child was adamant about changing households and the failure to acknowledge this preference would result in real harm to this child such as

depression, rebellion or running away. The Court thus erred in ignoring the testimony of Dr. Sanders or in substituting his own judgment for the clear unopposed testimony of the Court's designated expert.

ARGUMENT

I. CURRENT STANDARDS TO ESTABLISH A BASIS FOR CUSTODY MODIFICATION IN UTAH.

A. The Legal Standard--Hogge Test.

It has been established by the Court's of this State that a party moving for modification of a custody decision must first establish that a substantial change in circumstances has occurred subsequent to the entry of the Decree of Divorce, and then show that the substantial change is one affecting the custodial relationship. The leading case is Hogge v. Hogge, 649 P.2d 51 (Utah 1982) where the appellate court articulated a two prong test for considering requests to change custody awards. First, the party seeking modification must show that there has been a change in the circumstances upon which the original custody award was based which substantially and materially affects the custodial parent's ability or functioning of the custodial relationship. If this test is met, the petitioner must show that a change in custody is in the best interests of the child. This change of circumstances test has been clarified and expanded in subsequent cases among them, Becker v. Becker, 694 P.2d 608, 610 (Utah 1984).

In that case the Court of Appeals explained the nexus between the changed circumstances and the welfare of the child as follows:

> "The asserted change must, therefore, have some material relationship to and substantial effect on parenting ability or the functioning of the presently existing custodial relationship. In the absence of an indication that the change has or will have such effect, the materiality requirement is not met.

In the case of Kramer v. Kramer, 738 P.2d 624 (Utah 1987), the Utah Supreme Court created a limited exception holding that the circumstances of a non-custodial parent may also bear upon the issue of whether a change of custody is appropriate.

The Court has articulated at least two major policies which are served by the change of circumstances rule as applied to custody cases. These are succinctly set forth in the Elmer case as follows:

> "First, the emotional, intellectual, and moral development of a child depends upon a reasonable degree of stability in its relationships to important people and to its environment. Second, the Courts typically favor the one time adjudication of a matter to prevent the undue burdening of the Courts and the harassing of parties by repetitive actions." Elmer v. Elmer, 776 P.2d 599 at 602.

The Elmer case also made the important policy statement that the "res judicata" aspect of the change of circumstances rule must always be subservient to the best interests of the child, stating that if the circumstances pertaining to a Decree had subsequently

changed, a new determination should be made based on a full development of all material facts. Id. at 603. This is emphasized by Justice Howe in his concurring opinion in the Kramer case:

> "The best interests of the child should never be lost sight of, and rules on change in custody should not be so rigid that this over arching principle is not followed. Certainly, it is possible that the principle of stability, if too rigidly adhered to, can result in the continuation of custody in a parent who is indifferent to, or destructive of, the child's welfare." Elmer v. Elmer, 776 P.2d at 604.

B. Standard of Appellate Review.

The standard of appellate review for trial court findings are that they are usually not disturbed on appeal unless they are found to be "clearly erroneous". Crouse v. Crouse, 817 P.2d 836, 838 (Utah App. 1991), Walton v. Walton, 814 P.2d 619 (Utah App. 1991). A trial court's factual determinations are clearly erroneous only if they are in conflict with a clear weight of the evidence, or if the Court of Appeals has a "definite and firm conviction that a mistake has been made." State v. Bobo, 803 P.2d 1268, 1271-72 (Utah App. 1990).

II. THE EVIDENCE WAS SUFFICIENT AT TRIAL TO ESTABLISH A MATERIAL CHANGE OF CIRCUMSTANCES HAD OCCURRED TO THE CUSTODIAL RELATIONSHIP.

The evidence presented to the trial Court by Robin Michael should be found sufficient to establish that a substantial

material change in circumstances had occurred to the custodial relationship justifying review of the custody placement. The Court erred in finding that the evidence was insufficient. The testimony of Dr. Jill Sanders, the Court appointed custody evaluator was emphatic and persuasive that at least the child Schuyler should be allowed a trial placement in the physical custody of his mother. There was no contrary expert evidence before the Court recommending any opposing course of action to that recommended by Dr. Sanders.

The testimony of Dr. Sanders outlined serious and clear risks to the child if he were not allowed to change households and reside with his mother. (Record, p. 859-871). These risks are also summarized in the supplemental report submitted at trial by Dr. Sanders contained in Plaintiff's Exhibit "1" (Appendix 4). That summary states that Schuyler was the child most traumatized by the divorce and that his strong preference to reside with his mother was his "psychological reality". Based on this reality, the risk of not letting him reside with this mother would result in the following:

1. Increase in acting out behavior in Wisconsin to make [his father] not want him.

2. Increased sense of helplessness, hopelessness, powerlessness, and possibly depression.

3. Increased idealization of relationships, possibly leading to extreme behavior (i.e. run away). (Appendix 4)

Dr. Sanders also outlined the risk of letting him live out his fantasy [residing with this mother] as follows:

1. Extreme disappointment and anger when fantasy of exceeding better life does not materialize.

2. Considerable guilt about leaving father, siblings (Appendix 4).

After presenting careful testimony about the change in preference of the child Schuyler and analyzing for the Court the above-stated risks, Dr. Sanders recommended that Schuyler's time with his mother be extended for approximately two months, that this preference be reviewed at that time. If the preference was still strong, then Schuyler should be allowed to remain with this mother from September through December and again be reevaluated at that time along with a review of status of his younger sister Ashleigh and what impact there may be on the splitting of the sibling unit. (Record, p. 891-893)

The testimony of Dr. Sanders was very strong and unequivocal which is the same way she reports the preference as stated by the child Schuyler. There was no contradiction to the testimony of Dr. Sanders at the time of trial and no opposing expert or factual dispute was made as to the child's preference

which was admitted by all parties. The judge interviewed the child Schuyler in chambers and in his Memorandum Decision filed in this case agrees that the preference was reiterated. He also finds that Schuyler used inappropriate, overly adult language in describing "abuse" in his home and that overall his statements were "not as strong" as those related by Dr. Sanders. For these reasons the judge apparently discounts the preference of the child Schuyler, and overrides the testimony of Dr. Sanders. He also finds that the preference is based on fantasy so it does not support a change of circumstances. This is contrary to what Dr. Sanders stated that it is important and part of the child's psychological reality even if his preference may be based on fantasy. (Record, p. 887). He also finds specifically that "a child's stated change in preference, even when based in reality, is not sufficient in and of itself to make a change of circumstances to meet the requirements of the first phase in the petition to modify custody." (Record, p. 559-573; Memorandum Decision--Appendix 5).

The Court errs in stating that it is merely a preference of a child being asserted by Mrs. Michael to support a modification of custody. Rather, it is the testimony of the Court designated expert that is being relied upon which corroborates and evaluates that preference in a larger context. The evaluator has thoroughly interviewed all parties and the child over a significant period of

time. thus, many other elements support her conclusion to modify custody such as the child's strained relationship with his father and his dislike of his stepmother which led to tantrums in the custodial home which did not occur with his mother. The tantrums were significant enough that the father sought therapy for the child with Dr. Seay. (Record, p. 860-861; 943). There were also suggestions of physical abuse toward Schuyler in the home. (Record, p. 868-871). Dr. Sanders then testified to the dramatic and certain harmful consequences that would occur to the child Schuyler if he were not allowed to change households. In light of this unrefuted, expert testimony it was error for the Court not to proceed to the issue of whether it was in best interests of the child to change households.

The facts of this case are very similar to that of Williams v. Williams, 655 P.2d 652 (Utah 1982), where the trial court held a custody decree should be modified. In that case the Court found sufficient circumstances to modify custody where four of the parties children expressed strong preferences to change households in addition to the custodial parent having another child out-of-wedlock and the remarriage and greater stability shown by the non-custodial parent since the divorce. The Supreme Court commented on the children's preferences stating:

> "such preference are properly considered by the trial court in determining future custody

> although they are not necessarily controlling". Id. at 652.

Similarly the case of Mitchell v. Mitchell, 668 P.2d 561 (Utah 1983), also presents a case where a modification occurred based on a combination of children's preference and other factors showing problems in the custodial placement. Significant to that Court was the ongoing conflict between the parents which had affected the children. Such tensions were also shown in the case at bar although minimized by the trial court. It was error for Judge Hansen to minimize the acts of Mr. Michael towards Robin Michael which directly affected the children's relationships. He had restricted the communications between the children and Robin (Record, p. 884-886); interfered with their visits, and did not provide information to her, interrupted Schuyler's therapy (Record, p. 1120-1145) moved the children away from their mother, (Record, 725, 939) and would not allow Robin to attend Ashleigh's gymnastics (Record, p 8).

The current case is also similar to that of Wiese v. Wiese, 469 P.2d 504 (Utah 1970) an early custody modification case where a custody change was made. Although this case does not arise in the context of the Hogge-Becker, modification test, it presents a useful guide to the question of how expert testimony should impact a custody modification issue. In that case, two clinical psychologists testified that the psychological state of

the children was such that a change of households from the father's home to the mother, was necessary to serve the best interests of the children. Each of the parties in that case had an independent psychologist evaluate the children and testify at trial. Both psychologists were in agreement that the children were emotionally disturbed showing insecurities, depression and other symptoms after having residing with and been in the care of their father for a period of time. In the present case, Dr. Sanders makes similar conclusions as regard Schuyler that he will become depressed, hopeless or worse if not allowed to live with this mother.

In the context of the Hogge-Becker line of cases the evidence presented in the current trial by the strong, unrefuted testimony by the expert coupled with the child Schuyler's preference must be considered sufficient to establish a substantial, material change of circumstances. The Hogge case requires that a change must be shown which "affects the custodial parent's parenting ability or the functioning of the custodial relationship . . .". The risks outlined by Dr. Sanders if Schuyler were forced to remain in his father's care include increased rebellion, depression or running away. Moreover, the child's preference was described as "adamant" and such a strong preference of a child to live with his other parent can only be the result of a substantial change in the relationship between the custodial

parent and the child. Indeed, that was dramatically pointed out in the instant case when the child appeared to be struggling to maintain a neutral position at the time of the initial evaluation in December of 1993 and then six months later was expressing a very strong, preference. This is unquestionably a "change in the custodial parent circumstance" and/or "a change affecting the custodial relationship" as contemplated in the case of Hogge, Becker and subsequent cases. Moreover, there were additional factors beyond the preference of the child Schuyler which were pointed out by Dr. Sanders in her testimony. She indicated that the child had a very tense and unhappy relationship with his step-mother and accused her of dragging him down the stairs by his crippled arm, and pushing him roughly against bureau. That the step-mother used foul language and the child had frequent tantrums in the father's home which led him to be enrolled in therapy. She also notes historical charges of physical abuse by Mr. Michael during the marriage toward his step-daughter. (Record, P. 857-859, 861, 868-873).

Language in the Elmer case also supports a finding that the evidence presented by Mrs. Michael supports a finding of changed circumstances. In Elmer, the Court clearly articulated the policies behind the change of circumstance rule. Among these is to "further the emotional, intellectual and moral development of the

child". Unquestionably, the expert testimony in this case outlined potent and real risks to the child's emotional and mental health if he were forced to remain in his father's home.

Moreover, the Elmer court took pains to discuss the type of stability intended by the rules outlined in that decision. Rather than emphasizing stability of the "legal custody arrangement as such" the Court again emphasized that it viewed stability as the means to promote "psychological and emotional security that underlies a child's well developed sense of self-worth and self-confidence. Elmer at 604. In reviewing the policy issues, it is important to acknowledge the wide acceptance given to two concurring opinions in the Kramer case by Justices Howe and Stewart, See, Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989), and Crouse v. Crouse, 817 P.2d 836 (Utah 1991), among others. These concurring opinions cautioned against a rigid application of the Court's "change of circumstances" requirement and Justice Stewart proposed that the "preservation of stability in a destructive parent-child relationship would ultimately be more detrimental to the interests of the child". Kramer, 738 P.2d at 628 (Stewart, J., concurring in the result). Justice Howe also suggested certain situations where rigid application of the Hogge rule would work against the best interests of the child, as where custody is originally grounded on the temporary incapacity of one

parent, where both parents were marginal, or where custody is obtained by default. Kramer, 738 P.2d at 629 (Howe, J., concurring in the result).

Thus, it is imperative that the trial courts not impose an overly rigid approach to questions of custody modification. Rather, it is vital that "the res judicata aspect of the changed circumstances rule must always be subservient to the best interests of the child". Elmer, 776 P.2d at 603.

The evidence presented by Robin Michael at trial clearly meets the requirement that there are changes and problems to be addressed in the custodial parent's household. Arguably, there can be no better evidence of problems and concerns in a custodial parent's household than a child who is reporting episodes of abuse and articulating a strong preference to leave that household which is undisputed. It is also important to realize that it is more than a child's preference being discussed in the instant case rather it is the "psychological reality" of the child which the expert witness has outlined in terms of serious, harmful future consequences to the child if unheeded. To require this child to remain in his father's household in the face of such clear evidence that there are serious problems in the custodial relationship with that child, must be considered a dangerous and in this case, unnecessary risk.

CONCLUSION

The trial court herein committed error in dismissing Plaintiff's Petition for Modification for failure to establish a substantial material change of circumstances concerning custody. The Court ignored the weight of the evidence, significantly the strong preference of the child Schuyler and unopposed testimony of the designated expert Dr. Jill Sanders who outlined serious, unequivocal risks of serious harm to the child if a change of household did not occur. The overriding consideration in child custody determinations is the child's best interests Paryzek v. Paryzek, 776 P.2d 78 (Utah App. 1989) and that has been reiterated in the custody modification cases notably Hogge, Becker, and Kramer. Given the high certainty of harm anticipated by the expert to at least one child in this case, it was inappropriate for the Court to ignore the expert recommendation to change custody on a trial basis.

DATED this ____ day of July, 1995.

LITTLEFIELD & PETERSON

_____
SUZANNE MARELIUS
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, a true and correct copy of the foregoing, BRIEF APPELLANT, this _____ day of July, 1995, to:

Mr. David S. Dolowitz
COHNE, RAPPAPORT & SEGAL
525 East 100 South, #500
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Attorney for Defendant/Respondent

s6\michael.brf

APPENDIX

Statutes

Utah. Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94 (1959).

Where a wife obtained an interlocutory divorce decree in California and, subsequent to the expiration of one year therefrom, married a second husband and later applied for and received a nunc pro tunc final divorce judgment dated prior to the second marriage, the second marriage was valid. Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94 (1959).

Cited in Van Der Stappen v. Van Der Stappen, 815 P.2d 1335 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d Divorce and Separation § 432.

C.J.S. — 27C C.J.S. Divorce § 764.

Key Numbers. — Divorce ⇐ 320.

30-3-9. Repealed.

Repeals. — Section 30-3-9 (R.S. 1898 & C.L. 1907, § 1213; C.L. 1917, § 3005; R.S. 1933 & C. 1943, 40-3-9), relating to the forfeiture of marital rights by the guilty party in a divorce proceeding, was repealed by Laws 1969, ch. 72, § 26.

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

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

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

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

History: L. 1903, ch. 82, § 1; C.L. 1907, § 1212x; C.L. 1917, § 3004; R.S. 1933 & C. 1943, 40-3-10; L. 1969, ch. 72, § 7; 1977, ch. 122, § 5; 1988, ch. 106, § 1; 1993, ch. 131, § 1.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, added Subsection (3).

Cross-References. — Disposition of property and children, § 30-3-5.

Removal of children from homestead, § 30-2-10.

NOTES TO DECISIONS

ANALYSIS

Appeals.
Application of section.
Award proper.
Change of custody.
—Burden of proof.
Children's choice.
Custody evaluation reports.
Factors in determining best interests of child.
—Improper factors.
—Moral character.
—Sexual abuse.

interest of the child often requires that a primary physical residence for the child be designated; and

(5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

History: C. 1953, 30-3-10.1, enacted by L. 1988, ch. 106, § 2.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Statutory Enactments — Family Law, 1989 Utah L. Rev. 363.

30-3-10.2. Joint legal custody order — Factors for court determination — Public assistance.

(1) The court may order joint legal custody if it determines that joint legal custody is in the best interest of the child and:

(a) both parents agree to an order of joint legal custody; or

(b) both parents appear capable of implementing joint legal custody.

(2) In determining whether the best interest of a child will be served by ordering joint custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;

(d) whether both parents participated in raising the child before the divorce;

(e) the geographical proximity of the homes of the parents;

(f) the preference of the child if the child is of sufficient age and capacity to reason so as to form an intelligent preference as to joint legal custody;

(g) the maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents; and

(h) any other factors the court finds relevant.

(3) The determination of the best interest of the child shall be by a preponderance of the evidence.

(4) The court shall inform both parties that an order for joint custody may preclude eligibility for public assistance in the form of aid to families with dependent children, and that if public assistance is required for the support of children of the parties at any time subsequent to an order of joint legal custody, the order may be terminated under Section 30-3-10.4.

(5) The court may order that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

History: C. 1953, 30-3-10.2, enacted by L. 1988, ch. 106, § 3; 1990, ch. 112, § 1.

NOTES TO DECISIONS

Construction and application.
The 1990 amendment of this section did not make a mere procedural change or simply clarify how the 1988 statute should have been understood originally. The amendment was substantial and substantive; thus, retroactive application is not appropriate. Thronson v. Thronson, 810 P.2d 428 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991).

COLLATERAL REFERENCES

A.L.R. — Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655.
Child custody and visitation rights of person infected with AIDS, 86 A.L.R.4th 211.

30-3-10.3. Terms of joint legal custody order.

(1) Unless the court orders otherwise, before a final order of joint legal custody is entered both parties shall attend the mandatory course for divorcing parents, as provided in Section 30-3-11.3, and present a certificate of completion from the course to the court.

(2) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

(a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;

(b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;

(c) the rights and duties of each parent regarding the child's present and future physical care, support, and education;

(d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends; and

(e) as necessary, the remaining parental rights, privileges, duties, and powers to be exercised by the parents solely, concurrently, or jointly.

(3) The court shall, where possible, include in the order the terms agreed to between the parties.

(4) Any parental rights not specifically addressed by the court order may be exercised by the parent having physical custody of the child the majority of the time.

(5) (a) The appointment of joint legal custodians does not impair or limit the authority of the court to order support of the child, including payments by one custodian to the other.

(b) An order of joint legal custody, in itself, is not grounds for modifying a support order.

(c) The agreement may contain a dispute resolution procedure the parties agree to use before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

DISTRICT COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

Case No. 89 DR 3178, Div. 6/R-4

PERMANENT ORDERS

In re the Marriage of:

RODNEY C. MICHAEL, Petitioner,

and

ROBIN L. MICHAEL, Respondent.

THIS MATTER came before the Court on April 24 and April 25, 1991 for a Decree of Dissolution of Marriage and Permanent Orders. The Petitioner was represented by his attorney of record, Carolyn L. Sampson. The Respondent was represented by her attorney of record, Owen L. Oliver. The Court has reviewed the evidence, the two custody evaluations, and has heard the statements of counsel.

THE COURT hereby makes the following findings of fact and enters the following orders:

1. The parties were married on September 25, 1983 in Liberty, Missouri. The Court has jurisdiction over both parties and the subject matter of this action.

2. At least one party has been a resident and domiciliary of Colorado for at least ninety days prior to the commencement of this action.

3. Ninety days have elapsed since the Court obtained jurisdiction over the Respondent.

4. The Respondent submitted herself to the jurisdiction of this Court by filing a response to the Petition for Dissolution of Marriage.

5. The marriage is irretrievably broken.

6. The marriage is hereby dissolved and a Decree of Dissolution of Marriage enters.

7. The parties have entered into a stipulation providing for the division of property and debt, and the responsibility for

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
MICHAEL, ROBIN L	:	
PLAINTIFF	:	CASE NUMBER 915900171 MI
	:	DATE 10/07/91
VS	:	HONORABLE SANDRA PEULER
	:	COURT REPORTER TAPE 1(600-1046)
MICHAEL, RODNEY C	:	COURT CLERK SPO
DEFENDANT	:	

TYPE OF HEARING: ORDER TO SHOW CAUSE
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. ALLEN, JANE
D. ATTY. PRO SE

STIPULATION
ON MOTION OF
PLAINTIFF

---

1. STANDARD VISITATION TO OCCUR.
2. IF DEFT WORKS OUT OF TOWN, HE IS TO CONTACT HER & LET HER VISIT CHILDREN.
3. PLTF PAY 1/2 CHILD CARE AS SPECIFIED THROUGH HER EMPLOYMENT.
4. PLTF PAY CHILD SUPPORT PER GUIDELINES AS SPECIFIED.
5. GRANDPARENTS HAVE VISITATION AS SPECIFIED.

IN DISPUTE, COMM. RECOMMENDS:

1. CHANGE IN CHILD SUPPORT - DEFERRED.
2. MIDWEEK VISITATION - PLTF HAVE MIDWEEK VISITATION EVERY WEDNESDAY (OVERNIGHT).

Sandra Peuler

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT FILED IN THIS COURT, SALT LAKE COUNTY, STATE OF UTAH

5-22-92

DEPUTY CLERK

the payment of attorney's fees and costs. The Court determines that said stipulation is fair, equitable, and not unconscionable. The Court has considered the stipulation in light of the factors set forth in C.R.S. 14-10-113. The Court hereby approves the stipulation and makes it an Order of this Court.

8. Neither party has requested maintenance and therefore both parties have implicitly waived it. The Court finds from the evidence that neither party is eligible for maintenance. The evidence clearly establishes that each is capable of supporting him or herself.

9. The primary issue before the Court is the custody of the two minor children of the marriage. Two children were born as issue of this marriage: Schuyler Michael, born December 17, 1985, and currently 5 years old and Ashleigh Michael, born July 10, 1987, and currently 3 years old. No other children are expected.

10. The Court finds that these two children are minors and unemancipated. The Court finds that it is appropriate for this Court to exercise jurisdiction over the issue of custody pursuant to the Uniform Child Custody Jurisdiction Act.

11. The Court finds that C.R.S. 14-10-124 and 14-10-123.5 are both applicable. The Court is to determine custody in the best interests of the children.

12. The Court finds that the best interests of the children is served by the parties having joint legal custody of both children, with the primary physical custody of both children with the Petitioner.

13. The Court finds that this has been a difficult case. Both parties are excellent parents. Both parties have taken substantial efforts in the past in the best interests of the children. Both parties have done a good job in parenting their children. There is no real difference in the parenting abilities of the parties. Both parties are well adjusted and both parties are in good physical and mental health.

14. The Court also finds that both parties have used poor judgment in the past which has had an adverse impact on the children. The Petitioner on one occasion over-reacted with respect to the discipline of another child of the Respondent to the point that the discipline was abusive. The Respondent's decision to take the children and hide for a period of time was not appropriate.

15. The Court also finds that on occasion both parties have made career decisions that indicated a priority for their

career over their children. Those decisions, however, do not reflect on either party's parenting ability.

16. The Court therefore has determined custody primarily on two factors.

17. The first of these factors is that these children are relatively young and that they had a number of unsettling events in their life. These include the fact that they were separated from their mother at an early age, that the Respondent took the children from Missouri, and the Petitioner's recent move with the children to Salt Lake City. The Court determines that it would be inappropriate to modify the children's present situation in that it would simply be one more unsettling event to which they would need to adjust.

18. The second of these factors is that the children appear to be doing well in the current situation. They are generally happy and well adjusted under the physicial custody of the Petitioner. If the Court continues the physical custody with Petitioner, there is assurance that the children will continue to do well. If the Court were to change physical custody, there would be uncertainty as to how the children would do.

19. The Court has determined that joint legal custody is most advantageous to the two children. The Court does have some concerns because of the physical distance between the two parties. The Petitioner is in Utah and the Respondent is in California. Such a geographical distance is not conducive to communication.

20. The evidence, however, is that the parties are interested in making that type of arrangement work. Therefore, the benefit to the children of joint custody outweighs any difficulties apparent at this time with regard to their lack of geographic proximity.

21. The Court is also concerned about the substantial amount of distrust between the parties. Such distrust is not conducive to good communications between the parties. The Court hopes that the entry of final orders will assist the parties with regard to this issue.

22. The Court develops the following plan for joint legal custody. The Petitioner is to be the primary residential custodian. All major decisions concerning health, education, religious training, and general welfare are to be made jointly. The legal residence of the children shall be with the Petitioner. The parties are to consult with each other on a prompt basis as appropriate without hostility or demeaning each other. In the

case of a medical emergency, that parent having physical care of the children at the time shall make the necessary decisions.

23. The Court orders that the Respondent shall have substantial visitation with her children as the parties can agree. The Court feels that it is appropriate for the Respondent to have visitation with the minor children.

24. The Court establishes the following minimum visitation:

A. One weekend per month;

B. Ten days at Christmas;

C. Three weeks in the summer; and

D. Free telephone access to the children.

25. The Court orders that both parties shall promptly exchange information concerning the medical, dental, and educational aspects of both children. Neither party is to prohibit access of the other party to that type of information. The obligation to properly exchange information extends to report cards, notification of scheduled events at school, notification of scheduled parent/teacher conferences, and exchange of all preschool records and reports.

26. The Court finds that C.R.S. 14-10-115 is applicable.

27. The Court determines that the income of the Petitioner is $5,334 per month. This is computed on the basis of a $1,654 base salary every two weeks for a base salary of $3,584 per month. To this is added an average commission of $1,750 per month, based on $5 per $1,000 of sales for total sales of $150,000 and $2 per $1,000 of sales for total sales of $500,000.

28. The Court finds that the income of the Respondent is $4,875. The Court determines that the Respondent has a salary of $4,385 and that she has an average bonus on a monthly basis of $490.

29. The Petitioner can deduct the $31 that he pays each month for medical insurance which includes coverage for the children.

30. The Respondent can deduct the support obligation which she has for a child by a prior marriage in the amount of $610 per month.

31. This gives the Petitioner an adjusted gross income of $5,303 and the Respondent an adjusted gross income of $4,275 for a combined monthly adjusted gross income of $9,578.

32. The Petitioner's share of the combined monthly adjusted gross income is 55% and the Respondent's share of the monthly adjusted gross income is 45%.

33. The basic child support obligation is $1,484. The Court determines that the work related child care costs after the federal tax credit are $278 per month for a total child support obligation of $1,762 per month.

34. The Respondent's share of that total child support obligation is $792.

35. Therefore, it will be the Order of this Court that the Respondent shall pay child support in the amount of $792 per monnth commencing on May 1, 1991. Said child support is due on the first day of each month thereafter and shall be paid directly to the Petitioner.

36. The Petitioner is to maintain health insurance for the benefit of the minor children.

37. The Petitioner's counsel is to file the Stipulation of the parties, a written form of these Permanent Orders, and the appropriate Worksheet A on or before May 24, 1991.

SO ORDERED this 1 day of July, 1991.

BY THE COURT:

DISTRICT COURT JUDGE

APPROVED AS TO FORM:

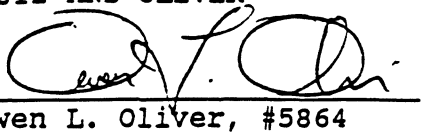
SAMPSON & ASSOCIATES, P.C.

Carolyn L. Sampson, #7606
Attorney for Petitioner
2801 Youngfield, Suite 230
Golden, CO 80401
Ph: (303) 237-7998

DISTRICT COURT
County of Jefferson, Colorado
Certified to be full, true and correct copy
of the original in my custody.
Jaclyn Sanese
Clerk of the District Court
By _____
Deputy Clerk

SEAL
JEFFERSON COUNTY

LUTZ AND OLIVER



Owen L. Oliver, #5864
Attorney for Respondent
7903 Ralston Road
Arvada, CO 80002
Ph: (303) 424-4463

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
MICHAEL, ROBIN L	:	
PLAINTIFF	:	CASE NUMBER 915900171 MI
	:	DATE 10/07/91
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2. MIDWEEK VISITATION - PLTF HAVE MIDWEEK VISITATION EVERY WEDNESDAY (OVERNIGHT).

Sandra R Peuler

CONFIDENTIAL

CUSTODY EVALUATION CONCLUSIONS AND RECOMMENDATIONS

IDENTIFYING INFORMATION:

MICHAEL v. MICHAEL
Utah No. 915900171CV
Judge Timothy R. Hanson
ATTORNEYS: Suzanne Marelius and John Mason
DATES OF EVALUATION: 4-16-93, 6-7-93, 8-9-93, 8-10-93, 10-22-93, 1-26-93. Collateral Interviews: 11-23-93; additional phone conversations/interviews with Robin, Rodney and Cynthia, not individually listed; review of documents (see attached list).

EVALUATOR:

Jill D. Sanders, Ph.D., Clinical Psychologist

CASE SUMMARY

Rodney Michael was awarded temporary custody of Ashleigh and Schuyler Michael in December, 1989, in Colorado. Following two custody evaluations, Rodney and Robin were awarded joint legal custody and Rodney was awarded physical custody of both children in 1992. Robin Michael is seeking a change in the physical custody arrangement. Both parties have remarried. Robin and Duane Clink and Haley Coleman (Robin's daughter from her first marriage) live in Salt Lake City, Utah. Rodney, Cynthia, Ashleigh, Schuyler, and Jake Michael (Rodney and Cynthia's biological child) live in Appleton, Wisconsin.

FACTORS CONSIDERED:

Preference of Child

Over the course of the last two evaluations, these children have made various statements regarding preference. Dr. Hansen, in her evaluation dated 4-4-91, reported that Schuyler; "Stated that he always wanted to live with his dad and Ashleigh said she wanted to live with her mother." During my interviews with the children, they were able to articulate factors which they liked about each adult party, including stepparents, and had very little negative information to report about anyone. Schuyler indicated to me that he felt best when staying with his grandparents in Missouri, while Ashleigh indicated that she felt best in Missouri and Wisconsin (biological father's home). Both children also indicated that they would like to spend more time with their mother, though neither child verbalized a desire to switch primary residence. It is my opinion that Schuyler is working very hard to maintain neutrality. This is occurring at considerable cost to him in terms of anxiety, hypervigilance, and fear that he will alienate one or both parents. Ashleigh, probably because of her younger age at the time of the divorce, appears to have adjusted well to having two homes. Both children prefer Missouri,

Jill D. Sanders, Ph.D.
Clinical Psychologist

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simply because they perceive it to be neutral territory. In my opinion, preference of the children is not a controversial or significant issue in this case.

Maintenance of Sibling Unit

Ashleigh and Schuyler should continue to reside together. They have a significant relationship with each other and probably rely on each other for stability. Ashleigh and Schuyler have a half-sister, Haley, who lives with their mother, and a half-brother, Jake, who lives with their father. I found no evidence to suggest that either of these half-sibling relationships was emotionally more important to Schuyler and Ashleigh than the other.

Parent-Child Bond

These children appear to be appropriately and equivalently bonded to both parents. Neither parent appears to have attempted to emotionally coerce the children. Additionally, Schuyler and Ashleigh have significant relationships with both stepparents.

Maintenance of Previously Determined Custody Arrangement

This is a significant ~~factor.~~ Rodney Michael has been the primary custodial parent of Ashleigh and Schuyler for the past four years. There is no evidence to suggest that these children have been neglected or abused in Rodney's care. There is considerable evidence to suggest that Ashleigh and Schuyler are happy and well-adjusted in this placement, and that they are receiving appropriate educational, medical, and social support.

Capacity to Parent

Both Robin Clink and Rodney Michael are persons of high moral character, as are their respective spouses. Neither party is emotionally unstable. Neither party has a history of functional impairment due to substance abuse. Both parties have the capacity to financially support these children. Religious incompatibility was not raised by either party as a significant issue.

In regard to demonstrated depth and desire for custody, Robin Clink has the weaker history. She voluntarily left Haley in the care of Rodney Michael when she went to Missouri to recover from Ashleigh's birth. During this absence, Rodney used excessive physical force in disciplining Haley. When Robin moved to California in 1989, she voluntarily left Ashleigh, Schuyler, and Haley, in Rodney's care. After nine months of Haley living with Rodney, Robin allowed Haley to live with Haley's maternal grandparents for the next 1-1/2 years. Ashleigh was eighteen months old when Robin left for California. This long-distance parent-child relationship continued for the next two years, until Robin moved back to Utah in 1991. In my opinion, these instances constitute significant lapses in desire on Robin's part to

provide daily care. This opinion is tempered only in part by the fact that Robin did provide the bulk of primary care for all three children prior to moving to California.

The fact that Rodney Michael physically abused Haley, Robin's daughter from her first marriage, on at least one occasion, was not minimized. Rodney's behavior was inexcusable. Haley's current statements about repeated abuse from Rodney have limited credibility. Haley personally reports that she remembers very little about that time in her life, and believes memories of more extensive abuse have been spurred by discussions with her grandmother and mother. There is no question that Rodney used inappropriate force with Haley on one occasion, but further abuse does not appear substantiated. Both Robin Clink and Rodney Michael have used spanking as a form of punishment for their children. And though this evaluator believes spanking is inappropriate and ineffective, there is no evidence to suggest that either Robin or Rodney have used excessive force in recent years.

Willingness to Foster A Relationship with the Other Parent

Though Robin perceives that Rodney has interfered with her visitation, it is my opinion that instances where visitation did not occur, were not malicious attempts on Rodney's part to deprive Robin of Visitation. Documents suggest that Rodney offered Robin more visitation than required when she returned to Utah and before Rodney moved to Wisconsin. The current visitation schedule is logistically difficult, and I found that Rodney has, for the most part, complied to the best of his ability.

RECOMMENDATIONS:

1) It is recommended that Rodney Michael and Robin Clink continue to exercise joint legal custody. This aspect of the custody arrangement has created little conflict.

2) It is recommended that Rodney Michael continue as primary physical custodian. These are both good parents, with demonstrated parenting skills, and good intentions. The recommendation to maintain primary residence with Rodney is on the basis of continuing an in-place arrangement which is functioning well.

3) The current visitation schedule is unworkable. From the perspective of the child, it requires a great deal of travel, much of it unaccompanied, in return for a very short visit. It is highly disruptive of their school schedule. It is also financially burdensome. These children are of the age that longer visitation periods with their mother, as opposed to more frequent visits, are preferable. Consequently, I propose the following changes in visitation:

a) Ashleigh and Schuyler spend nine continuous weeks with their mother during the summer months.

b) Ashleigh and Schuyler spend one 7-day period in the early fall and one 7-day period in the early spring with their mother. Travel to their mother would occur on Saturday, travel to Wisconsin would occur on the following Sunday.

c) Ashleigh and Schuyler spend one 7-day period at Thanksgiving with their mother one year, and the entire Christmas holiday with their mother the next year.

d) Robin could also exercise visitation in Wisconsin, with a 2-week notice given to Rodney.

4) As per Utah guidelines for non-custodial parents, Robin should have direct access to all personnel involved with her children's academic, medical, and extracurricular activities. Robin should take responsibility for regularly contacting such persons in order to maintain an understanding of her children's activities. Robin should be notified immediately in the case of any medical emergency. She is allowed to attend any/all of the children's school conferences, school activities, and extracurricular activities. She should have free telephone access to the children.

5) Cynthia Michael has enthusiastically assumed the stepparent role with Ashleigh and Schuyler. She exhibits very good parenting skills and is well suited to parenthood by desire and disposition. At times, however, her well-intentioned gestures invade the parental relationship between these children and their mother. - I would caution Rodney and Cynthia to keep gifts and emotional letters to a minimum while the children are with their mother. Though the intent of these communications is to maintain contact and express love, they in fact make it more difficult for Ashleigh and Schuyler to focus on their relationship with their mother. Robin, of course, perceives such communiques to be malicious interference. I simply perceive them to be distracting and perhaps distressing at times for these children.

Jill D. Sanders, Ph.D.
Clinical Psychologist

JDS/js

Trial Prep
Michael v. Michael
Trial Date: July 10, 1994

1. Parenting style/strengths:

   Rod: good structuring, organizational, and rational skills
   Robin: spontaneous, fun, active
   -neither style inherently bad
   -styles dramatically different -- offers child "illusion" of change when shifting residences

2. Each made one significant error in parenting judgment:

   Rod: excessive use of force with Haley
   Robin: abandonment of primary care of children for extended period (career drive explains her decision only to certain point, perhaps six months, after that she had evidence family was not coming to California and marriage might not work, she chose to remain in California and removed children abruptly and without psychological preparation to California)

3. Schuyler:

   -1st two interviews positive about everyone
   -intent on remaining neutral
   -tantrums have long history; related to some degree to CP; not simply related to custody issue

4. Ashleigh:

   -able to provide positives and negatives about all adults (logical, realistic perspective)
   -independent
   -not as emotionally traumatized by divorce as brother

5. Original recommendation based on these conclusions:

   -Rod more consistent in desire for primary care
   -children adjusting and doing well in his care
   -no reason to disrupt previously determined, long standing custodial arrangement

6. What has changed since original recommendation?

    -only Schuyler's preference
    -now he is adamant about living with Robin
    -now he strongly dislikes Cynthia
    -now he feels "abused"

7. Is this preference reality or fantasy based?

    -Fantasy
    -support for it being fantasy based is:
        -relationships have become exceedingly idealized and demonized (nothing negative about mother, nothing positive about Cynthia); no longer has realistic perspective on parties
        -preference not based on experience
        -believes he can avoid contact with father altogether (wants to avoid contact because he feels guilty, and is afraid to hurt father's feelings, concerned about father's reaction)
        -has not considered the realities of life with mother (i.e., daycare)

8. What factors influenced his preference change? Probably combination of at least the following factors:

    -true attachment/affinity for mother
    -fantasy of "better life" with mother
    -continuing discussions with mother about change of custody
    -attraction of moving to Missouri
    -normal seeking of better child position in the family (i.e.. only child, youngest child, etc.)

9. What are the psychological bases for his change of preference?

    -Needs to answer 2 questions:
        1. Will Mom take me and keep me ?
        2. *Will Dad let me go in love?*
    -Living out "abandonment script"

10. Though I am unsure about which of the above factors actually provoked the current statement of preference, I am absolutely convinced that Schuyler is devoted to and fixated on the idea of living with his mother. Given that "psychological reality" for him, what are the risks involved?

    -Risk of not letting him live out fantasy =
    1. Increase in acting out behavior in Wisconsin to make Rod not want him
    2. Increased sense of helplessness, hopelessness, powerlessness, and possibly depression
    3. Increased idealization of relationships, possibly leading to extreme behavior (i.e. runaway)

    -Risk of letting him live out fantasy =
    1. Extreme disappointment and anger when fantasy of exceeding better life does not materalize
    2. Considerable guilt about leaving father, siblings

11. If the court, after hearing the evidence presented, decides to honor Schuyler's preference, I recommend the following:

    1. Extend Schuyler's summer visitation . Re-evaluate his adjustment and preference on or before August 20th.
    2. If at that time his preference to live with mother remains, extend visitation through December, 1994, and re-evaluate at that time.
    3. If Schuyler stays with mother through December, she must have him in bi-monthly therapy to help monitor his adjustment.
    4. Ashleigh returns to Wisconsin as scheduled. If custody of Schuyler is changed at some future date, then the pros and cons of splitting this sibling unit will need to be addressed.
    5. I am strongly opposed to a permanent change of custody for either child at this point in time.

    This recommendation allows:

    -Schuyler to experiment with living with mother without permanent legal consequences
    -Allows these siblings to experience living apart
    -May pave the way for a more fluid custodial relationship between the parents

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBIN L. CLINK, fka ROBIN L. MICHAEL,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 915900[illegible]
vs.	:	
RODNEY C. MICHAEL,	:	
Defendant.	:	

This matter was before the Court for trial on the plaintiff's Amended Petition to Modify Custody, said hearing taking place on the 12th, 13th, 14th, 15th and 18th of July, 1994. The plaintiff's Petition to Modify primarily centers around a request that the custody of the two minor children be changed from the defendant to the plaintiff, and related issues. On the aforementioned dates, the Court took evidence on the initial evidentiary phase of the change of custody issue, to wit: whether or not there has been a material and significant change of circumstances. The Court limited evidence to that initial inquiry as is required in a change of custody proceeding. At the conclusion of the evidence offered in connection with the plaintiff's assertion that there had been a change of circumstances, the Court took defendant's Motion to Dismiss the Petition under advisement so as to evaluate the weight of the evidence relating to the issue on change of circumstances

since the entry of the original Decree of Divorce in Colorado on July 1, 1991. In that Colorado Decree, the defendant was awarded physical custody of the two minor children in question, with certain visitation rights in the plaintiff, and providing that the parties had joint legal custody so that each party would have access to important information relating to the children's education, medical records and providers, as well as other information of interest to parents.

As further hearing dates were scheduled at the time this matter was taken under advisement on July 18, 1994, and in that travel arrangements needed to be made in advance of the evidentiary hearing on the second phase of the change of custody Petition, the Court orally advised counsel on July 21st, that the Court was satisfied that the evidence received during the course of the initial phase of the proceedings did not rise to the level necessary and requisite to show a change of circumstances so as to allow this matter to proceed to a consideration by this Court of the children's best interests. Counsel were further advised by the Court on July 21, that the hearings relating to the second phase scheduled (consideration of the best interests of the children) were cancelled, and that a written opinion setting forth the Court's analysis of the evidence relating to change of custody

would follow. This Memorandum Decision sets forth in summary form the Court's analysis of the evidence that leads the Court to the conclusion that there was no requisite change of circumstances, and that therefore the plaintiff's Petition for Change of Custody must be dismissed.

As indicated above, the parties were divorced by a Colorado court on July 1, 1991. Custody of the children was determined following a two day contested hearing. Defendant was awarded physical custody of the children, with visitation in the plaintiff. As this proceeding follows a custody determination made after a contested divorce trial, this Court must look critically at the alleged change of circumstances, as opposed to a more relaxed standard that might be applicable to a situation where custody is awarded based upon default or stipulation. A contested and trial determination relating to custody is entitled to, under Utah law, greater deference than a custody determination made upon default or stipulation.

Interestingly, at the time of the Colorado trial, both the plaintiff and the defendant were residing outside that state. Defendant resided in the state of Utah with the children, and the plaintiff resided in California. Each were outside the state of Colorado because of employment requirements. Following the

Colorado divorce Decree, the plaintiff moved from the state of California to the state of Utah, where both parties resided until the defendant's employment was transferred to the state of Wisconsin at the end of 1992. Plaintiff has advised the Court in her testimony that she will relocate to the state of Missouri, regardless of the Court's decision on this Petition, and is in the process of selling her Utah residence in anticipation of that move.

This matter was originally filed as a Petition to Modify a foreign Decree of Divorce on August 20, 1991, less than two months after the Colorado Decree. A change in the visitation schedule was originally sought, because the plaintiff had relocated from California to Utah, and that matter was resolved by stipulation approximately one year later. In November of 1992, the plaintiff filed a second Verified Petition to Modify the Colorado Decree of Divorce in this action, seeking a change of custody, alleging the change of circumstance to be the remarriage of the defendant.

On December 31, 1992, the plaintiff filed a further Amended Verified Petition seeking to modify physical custody that had been lodged with the defendant on multiple bases, including the remarriage of the defendant, the relocation of the defendant from Utah to Wisconsin, and generally speaking, a deteriorating relationship between the children and the defendant and their

stepmother. The parties have then for all intents and purposes been involved in ongoing litigation regarding the Colorado custody order since it was entered.

Since the divorce, both the plaintiff and the defendant have remarried. In summary fashion, the plaintiff claims that there has been a significant change of circumstances in that:

1. The defendant has remarried, and that the children and particularly the older child, Schuyler, does not get along with his stepmother, Cynthia Michael.

2. That defendant's move to Wisconsin as a result of his job transfer constitutes a change of circumstances.

3. That defendant's direct involvement with the children has been reduced, because he now has help with rearing the children from his current spouse, Cynthia Michael, and that that constitutes a change of circumstances.

4. That the children, again, at least the older child, Schuyler, has expressed a strong desire to reside with the plaintiff and manifested an unwillingness to reside with the defendant.

5. Finally, plaintiff has asserted that the plaintiff's refusal to facilitate visitation since the defendant's move to the state of Wisconsin constitutes a change of circumstances.

There is nothing new since the Colorado Decree on the basis that the parties live in different states. Except for a short period of time in Utah, both the plaintiff and the defendant have moved and lived elsewhere. Immediately prior to the commencement of the Colorado divorce action, the defendant resided in Colorado and the plaintiff in California. At the time of the divorce trial in Colorado, the plaintiff resided in California, and the defendant resided in the state of Utah. The plaintiff later moved to the state of Utah and following that, in the early part of 1993, the defendant relocated to the state of Wisconsin.

All of the moves by both parties since the divorce, with the exception of plaintiff's move to the state of Utah were work-related. At the time of the divorce, the Judge was certainly aware that the parties lived in states other than the state of Colorado, and accordingly would have been aware that at that time both parties had relocated outside the state of Colorado for work-related reasons. There is nothing new in defendant's work-related location change from Utah to Wisconsin. The plaintiff's claim that the defendant's move was to distance the children from her is not supported by any believable evidence. The Court finds that the defendant's move was certainly something that could and should have

been reasonably foreseen at the time of the divorce, and also anticipated as a possibility later on, inasmuch as this Court during the pendency of the proceedings and before the move, required an advance notice of relocation provision. The plaintiff and the defendant both made appropriate job-related relocations, and even though the defendant was not able to provide the requisite advance notice of his move to Wisconsin, an appropriate pre-move hearing was had and the intent of the notice was therefore met. The Court finds that the defendant's relocation was not only something foreseeable to the parties at the time of the divorce, but likely anticipated at that time.

Neither party has any connection with the state of Utah, other than jobs and the children. Plaintiff's extended family support is outside the state of Utah in Missouri, where she is moving as soon as she is able to accomplish the sale of her residence. The evidence in this case shows no improper motive on the part of the defendant in relocating to the state of Wisconsin as a result of his employment.

Plaintiff's move-related claim that the relocation has negatively impacted the children, and that such impact constituted a change of circumstances is likewise not supported by the believable evidence. The Court recognizes that any change,

including relocation, has some effect, usually perceived by the children to be negative, on children. The evidence does show, however, that the children are doing well in school in the state of Wisconsin, and have adequately adjusted and become part of the community at their new residence. The Court also notes that the evidence supports a finding and the Court does find that the defendant took extraordinary steps as referred to in this record to minimize the natural adverse effect of the move on the children by seeking advice from professionals in the area who could instruct the defendant on what steps to take with the children on that issue.

Defendant's remarriage, rather than being a negative factor in the children's lives, is a positive factor. Cynthia Michael is able to assist her husband, the defendant, to some degree in meeting the children's daily needs. Cynthia Michael has not attempted to act inappropriately towards the children, and evidence suggesting to the contrary is not persuasive. Defendant's present wife has not attempted to replace the plaintiff as the children's mother any more than the plaintiff's present husband has attempted to take the place of the defendant as the children's father. The Court notes that Schuyler's testimony in chambers did not rise to the level claimed as to the defendant's present wife, Cynthia

Michael's, and on that issue, even to the extent negative, was animated and used language uncharacteristic of a child of the age and maturity of Schuyler. The Court believes that Schuyler's statements regarding his stepmother may have been implanted, hopefully inadvertently, by persons with the plaintiff's interests in mind. The children, whether with the plaintiff or the defendant, are in a better position, having contact with a stepparent, especially an appropriate stepparent, than the children would be in a daycare or spending time when not with the plaintiff or the defendant, with a person who would constitute a "legal" stranger. To the extent that the defendant's remarriage has been a change in circumstances, it constitutes a positive change in the defendant's household and not a basis to find a change of circumstances for the purposes of considering a change of custody.

The allegations that the children are being "abused" (Schuyler's term), by their stepmother are not supported by the believable evidence. There is no sufficient change in circumstances that would allow this Petition to proceed, based upon the defendant's remarriage or the children's relationship with their stepmother, Cynthia Michael.

The Court turns to the defendant's assertion of change of circumstances due to visitation problems. A review of this record

shows that it is replete with visitation disputes since the divorce was entered in July of 1991. Accordingly, continued disputes are not new, and do not constitute a change of circumstances as unfortunate as they may be.

The evidence in this case shows that since the defendant's move to the state of Wisconsin, the visitation, considering its frequency and the fact that the defendant bears the total financial obligation therefore has gone reasonably smooth. The evidence shows that weather, and on one occasion finances, have impacted visitation. The majority of the visitation problems revolve around agreeing upon times for make-up visitation when the weather has prohibited the children visiting their mother because problems with airline schedules. Neither party has been particularly cooperative regarding alternative visitation days. Inasmuch as the visitation difficulties have not changed since the inception of the divorce Decree, there is not a change of circumstances, and to the extent that difficulties in rescheduling missed visitation under the circumstances of the temporary Order, considering its frequency and the distance between the children and their mother, there is no evidence to support that difficulties in visitation constitute a change of circumstances sufficient to allow this Court to revisit the issue of custody. The difficulties are merely ongoing, and to

a large degree a result of a monthly visitation schedule requiring two small children to be shuttled by air halfway across the country, principally at defendant's expense.

Turning to the last major area that the plaintiff alleges constitutes a change of circumstances, Schuyler's recently stated preference to live with the plaintiff, and his stated reluctance to be with his father, the defendant, the Court notes with some interest as did Dr. Sanders (the Court's designated expert), that both children had continually maintained a neutral position regarding their preference as to living location until Dr. Sanders' last interview, which was the day before this hearing was scheduled to commence, when Schuyler asserted that he wanted to live with his mother and effectively didn't want anything to do with his father.

It was further reported by Dr. Sanders that Schuyler advised her that his stepmother "abused" him. Dr. Sanders was unable to account for this sudden and drastic change from the "safe" and neutral position adopted by Schuyler, except that she was of the opinion that Schuyler's perception of life with his mother, the plaintiff, and how that would be if he resided with her was based upon fantasy and not reality. She did not believe that the child had been influenced by the plaintiff. While Schuyler's announced change from a position of refusing to state a preference to a

strong preference towards residing with the plaintiff is certainly a change, unless the change is based upon reality, it has no basis and cannot be considered a change for purposes of determining whether or not there has been a significant change of circumstances. The following observations are relevant to the present stated position of Schuyler.

Schuyler has been with his mother for the six week period of time prior to the hearing. Part of that time Schuyler has been with his maternal grandparents at their farm in Missouri. The visitation periods at his grandparents in Missouri and with his mother are clearly filled with fun activities and carefree times. There are no schedules, no schoolwork, no lessons, or athletic practice, household chores or the like. All the activities are geared towards having an enjoyable time, especially, things that are enjoyable for a child the age of Schuyler. He has the opportunity to be involved with farm animals, he is allowed to operate four-wheel off-road vehicles, participates in trips to amusement parks such as Lagoon and Raging Waters. Those activities are surely enjoyable for Schuyler, and he is lucky to have access to those activities with his mother, but they are not what would occur on a long-term basis when school, children's household responsibilities, and the like must be considered. To the extent

that Schuyler's stated preference is based upon his activities with his mother, the plaintiff, and her extended family, those activities are not the reality of what would occur on a day-in and day-out basis if he was with his mother, the plaintiff, full-time. The Court determines such to be the case, even in the face of plaintiff's attempts to portray her lifestyle as being "laid back" and involving a lot of fun activities. The Court does not believe that the plaintiff's normal lifestyle is such that it includes nonstop fun activities for children.

While the Court has no evidence that Schuyler has been influenced by the plaintiff, some of his words and demeanor suggest that his statements may not be his own. As indicated earlier, his statements in chambers were not as strong as those made to Dr. Sanders and related by her during her testimony during the course of this trial. Finally, the Court is concerned that the plaintiff's extended family may be influencing Schuyler. The Court notes that the plaintiff's mother, Arlene Wilcox, who testified as a witness in this case, indicated among other things, that she had a poor relationship with one of her other children, one of the plaintiff's siblings, because she (Arlene Wilcox) had intervened in a custody dispute between her son and his spouse. The children have spent considerable time with their maternal grandmother, and

she, in view of her position, could certainly exercise considerable influence over them if she chose to do so. As she indicated in the circumstance with her own son, the children's grandmother, Ms. Wilcox, has chosen to be involved in some of her other grandchildren's custody issues.

For all the foregoing reasons, the Court does not believe that Schuyler's stated desire to reside with his mother constitutes a significant or material, or valid change of circumstance. Further, even if the stated change of preference by Schuyler constituted a material change of circumstances, that change in and of itself is insufficient to allow this Court to find a material change of circumstances, and then proceed on to the question of best interests. The appellate courts of this state have clearly announced that a child's stated change in preference, even when based in reality, is not sufficient in and of itself to make a change of circumstances to meet the requirements of the first phase in a petition to modify custody.

The Court is therefore unable to find a legitimate change in circumstances since the entry of the Decree of Divorce between the parties, and is therefore compelled to dismiss the defendant's Petition to change custody of the parties' minor children.

The defendant has requested attorney fees as a result of plaintiff's Petition to Modify. The Court will consider the attorney fees request and therefore directs that defendant's counsel submit an appropriate Affidavit setting forth the fees requested and a supporting Memorandum outlining the factual and legal basis that should impact an award of fees and/or costs. The expenses related to Dr. Sanders should also be addressed. The Affidavit and Memorandum should be filed within fifteen (15) days. The plaintiff may respond in accordance with Rule 4-501 of the Code of Judicial Administration. Defendant's counsel should prepare appropriate Findings and an Order of Dismissal reserving costs and fees.

Dated this 12 ~~day of~~ August, 1994.

/s/
TIMOTHY R. HANSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 12 day of August, 1994:

Suzanne Marelius
Attorney for Plaintiff
426 South 500 East
Salt Lake City, Utah 84102

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Telephone (801) 532-2666
Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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ROBIN L. CLINK, fka ROBIN L. MICHAEL	)	
Plaintiff,	)	ORDER OF MODIFICATION OF DECREE AND DISMISSAL OF PLAINTIFF'S PETITION
vs.	)	**Civil No.** 915900171
RODNEY C. MICHAEL,	)	Judge: TIMOTHY R. HANSON
Defendant.	)	

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The above-entitled matter came before the court for trial on Plaintiff's Amended Petition to Modify Custody on the 12th, 13th, 14th, 15th and 18th of July, 1994, the Honorable Timothy R. Hanson presiding. The Plaintiff was present in person, represented by counsel Suzanne Marelius. The Defendant was present in person represented by counsel, David S. Dolowitz. The court heard and considered the testimony of each of the parties and the witnesses offered by each, the testimony of the custody evaluator appointed by the court, Dr. Jill Sanders, and received into evidence various exhibits offered by the parties. At the conclusion of trial on the 18th day of July,

1994, the Defendant moved the court to dismiss the Petition of the Plaintiff as to a change in custody based on there not being a material and substantial change of circumstances. The court following the direction of the Utah Supreme Court in change of custody matters, had limited evidence in the initial inquiry to a material and significant change of circumstance. At the conclusion of hearing the evidence and the argument, on Defendant's Motion to Dismiss Plaintiff's Petition, the court took the Defendant's Motion under advisement so as to evaluate the weight of the evidence relating to the issue of change of circumstances since the entry of the original Decree of Divorce in Colorado on July 1, 1991, which Decree was entered after a two day trial on the issue of custody. The court also heard prior to and during the course of trial various stipulations from counsel for their clients as to other issues presented in the Petition of the Plaintiff and the request of the attorneys for an award of attorney's fees and costs in this matter. The court set further hearings for the 1st and 2nd of August, 1994, because travel arrangements had to be made in advance of that hearing on the second phase of the custody petition. The court orally advised counsel on July 21, 1994 that the court was satisfied that the evidence received during the course of the initial phase of the proceedings did not rise to the level necessary to show a material and substantial change of circumstances so as to allow the matter to proceed to consideration of the best interest of the children and those proceedings were vacated. Thereafter, the court on the 12th day of August, 1994, issued its written Memorandum Decision in this matter and having heretofore entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has jurisdiction over the parties, their minor children and subject matter of this action.

2. The Petition of the Plaintiff to change physical custody from the Defendant to herself is denied and dismissed with prejudice.

3. This court concludes it should accept the Stipulation of the parties as to visitation and therefore modifies its prior orders in regard to visitation to award visitation as follows:

a. Ashleigh and Schuyler shall spend nine continuous weeks with their mother during the summer vacation from school.

b. Ashleigh and Schuyler shall spend a week at Thanksgiving with the Plaintiff. This week shall commence on the Monday before Thanksgiving and end the Sunday after Thanksgiving.

c. Ashleigh and Schuyler shall spend a one week period during early spring with their mother which shall coincide with the spring vacation from school.

d. Ashleigh and Schuyler shall spend half their Christmas vacation with each parent with Christmas Day in 1994 with their father and Christmas Day in 1995 with their mother. They shall continue, thereafter, spending one-half the Christmas vacation from school with each parent and alternate Christmas Day each year.

4. If the Plaintiff is going to be in Wisconsin or where the children reside, she shall have the right to visit with the children on two weeks advance notice,

provided, however, that the visitation shall not interfere with their school or regularly scheduled activities.

5. The Plaintiff shall have direct access to all personnel involved with her children's academic, medical and extracurricular activities as previously ordered by this court, but, she shall be responsible for regularly contacting those persons in order to maintain an understanding of her children's activities and shall be allowed to attend any or all of the children's school conferences, school activities, and extracurricular activities. Defendant shall advise school, medical and occupational therapist personnel to send copies of any reports sent to him to Plaintiff.

6. The Plaintiff shall be notified immediately in the case of any medical emergency and the Defendant shall be notified of any medical emergency during visitation.

7. Plaintiff shall have free telephone access to the children. During the times that the children are visiting with the Plaintiff, the Defendant shall have free telephone access to the children.

8. Plaintiff shall continue Schuyler's physical exercises and physical/occupational therapy during visitation.

9. Pursuant to the Stipulation of the parties, the court reserves and takes under advisement the issue of Defendant's request that Plaintiff pay part of the visitation transportation costs for the minor children. Plaintiff is ordered to provide the court and counsel for the Defendant information regarding her earnings when she secures employment in Missouri and when her husband recovers from his surgery and

is employed and to supply information concerning his earnings once he is employed. The court will rule on this question when it has sufficient information to reach an appropriate determination.

10. Each of the parties shall exchange information about the children and be flexible regarding visitation facilitate travel in the best interests of the children and to permit the children to participate in special events in both the family of the Plaintiff and the family of the Defendant.

11. Defendant's counsel shall submit an appropriate Affidavit setting forth the fees requested and a supporting Memorandum outlining the factual and legal basis that should impact an award of fees and/or costs. The expenses related to Dr. Sanders shall also be addressed. The Affidavit and Memorandum should be filed within fifteen (15) days. The Plaintiff may respond in accordance with Rule 4-501 of the Code of Judicial Administration.

DATED this 14 day of December, 1994.

BY THE COURT:

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

APPROVED AS TO FORM
AND CONTENT THIS ____
DAY OF _____, 1994:

_____
SUZANNE MARELIUS, Counsel
for Plaintiff

_____
DAVID S. DOLOWITZ, Counsel
for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered this 11th day of November, 1994, a true and correct copy of the foregoing Order in the above-entitled matter to:

Suzanne Marelius, Esq.
426 South 500 East
Salt Lake City, Utah 84102
Counsel for Plaintiff

David S. Dolowitz

(dsd\mb\Michael.Order)

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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ROBIN L. CLINK, fka ROBIN L. MICHAEL	)	
Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	)	**Civil No.** 915900171
RODNEY C. MICHAEL,	)	Judge: TIMOTHY R. HANSON
Defendant.	)	

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The above-entitled matter came before the court for trial on Plaintiff's Amended Petition to Modify Custody on the 12th, 13th, 14th, 15th and 18th of July, 1994, the Honorable Timothy R. Hanson presiding. The Plaintiff was present in person, represented by counsel Suzanne Marelius. The Defendant was present in person represented by counsel, David S. Dolowitz. The court heard and considered the testimony of each of the parties and the witnesses offered by each, the testimony of the custody evaluator appointed by the court, Dr. Jill Sanders, and received into evidence various exhibits offered by the parties. At the conclusion of trial on the 18th day of July,

1994, the Defendant moved the court to dismiss the Petition of the Plaintiff as to a change in custody based on there not being a material and substantial change of circumstances. The court following the direction of the Utah Supreme Court in change of custody matters, had limited evidence in the initial inquiry to a material and significant change of circumstance. At the conclusion of hearing the evidence and the argument on Defendant's Motion to Dismiss Plaintiff's Petition, the court took the Defendant's Motion under advisement so as to evaluate the weight of the evidence relating to the issue of change of circumstances since the entry of the original Decree of Divorce in Colorado on July 1, 1991, which Decree was entered after a two day trial on the issue of custody. The court also heard prior to and during the course of trial various stipulations from counsel for their clients as to other issues presented in the Petition of the Plaintiff and the request of the attorney for an award of attorney's fees and costs in this matter. The court set further hearings for the 1st and 2nd of August, 1994, because travel arrangements had to be made in advance of that hearing on the second phase of the custody petition. The court orally advised counsel on July 21, 1994 that the court was satisfied that the evidence received during the course of the initial phase of the proceedings did not rise to the level necessary to show a material and substantial change of circumstances so as to allow the matter to proceed to consideration of the best interest of the children and those proceedings were vacated. Thereafter, the court on the 12th day of August, 1994, issued its written Memorandum Decision in this matter. Being thus advised in the premises the court now makes and enters the following as its

FINDINGS OF FACT

1. The Plaintiff filed a Verified Petition to Modify the Decree of Divorce requesting a change in physical custody of the children from the Plaintiff to the Defendant on or about October 8, 1992.

2. At the time of the filing of the Petition to Modify the Decree of Divorce, the Plaintiff and Defendant were both residents of Salt Lake County, State of Utah.

3. The parties were originally divorced by a Decree of Divorce entered July 1, 1991 in Jefferson County, Colorado after a two-day trial, April 24th and April 25th, 1991, over the issue of custody of their minor children. After the trial, April 24 and April 25, 1991, the District Court for Jefferson County, State of Colorado, awarded joint legal custody to the parties and placed physical custody of the children in the Defendant, Rodney C. Michael. Prior to the entry of that Order, custody evaluations were performed by Judith Jones Nugaris, MSW, filed in October of 1990 and by Dr. Mary Hansen, Ph.D. filed on April 4, 1991. At the time of the trial in Colorado, both the Plaintiff and Defendant were residing outside of Colorado. The Defendant resided in the State of Utah with the children and the Plaintiff resided in California. Each resided outside the State of Colorado because of employment requirements.

4. Plaintiff filed a Verified Petition on about the 10th day of August, 1991 seeking to domesticate that Decree as a Utah Decree and modify its provisions in regard to visitation because Plaintiff had relocated from California to Utah. The matter was resolved by stipulation approximately one year later.

5. On September 29, 1992 an Order was entered effecting the

agreement of the parties made on October 7, 1991 when the Defendant appeared before the court, Commissioner Sandra Peuler presiding, and agreed to the visitation and child support relief requested by the Plaintiff as well as domestication of the Colorado Decree of Divorce as a Utah judgment.

6. Following the entry of the Colorado Divorce Decree, the Plaintiff moved from the State of California to the State of Utah. In August of 1991, when the Plaintiff filed her Petition to Amend the Decree in regard to visitation both parties both resided in Utah.

7. The Colorado Decree awarded physical custody of the two minor children, Schuyler born December 17, 1985, and Ashleigh, born July 10, 1987 to the Defendant their father, Rodney Michael, and awarded substantial visitation rights to the Plaintiff. It awarded joint legal custody to Plaintiff and Defendant so that each party would have access to important information relating to the children's education, medical records and medical providers as well as other information of interest to the parties as parents. As Schuyler suffers from cerebral palsy, it was and is important that both parents be involved in providing the appropriate physical therapy for him when residing with or visiting each parent.

8. As the parties were divorced by a Colorado court on July 1, 1991, after a two-day trial on the issue of custody and this proceeding followed, this court must view this case as one where a custody determination made after a contested custody trial is under challenge. This court is required by governing Utah law to look critically at

the alleged change of circumstances as opposed to a more relaxed standard that might be applicable where a custody was awarded based on default or stipulation. A contested custody determination relating to custody, is entitled to greater deference than a custody determination made upon default or stipulation.

9. Plaintiff filed her second Petition in the Utah proceedings on October 8, 1992, approximately one month after the Order establishing visitation and child support was entered in September of 1992. It alleged a modification in the Decree was necessary because of the change of circumstances effected by the Defendant's remarriage, which occurred on November 30, 1991 when the Defendant married Cynthia Michael. The Petition was amended on December 31, 1992 to add additional grounds for a change of circumstances and requesting that the Defendant not be permitted to move from the State of Utah which he was doing because he had received a promotion from his employer, Allan Bradley, which required relocation to Appleton, Wisconsin.

10. The Motion requesting that the Defendant not be permitted to move was denied. A visitation schedule was established and an Order appointing Dr. Jill Sanders to do the custody evaluation was entered on the 7th day of April, 1993.

11. The Defendant moved to Wisconsin as a result of his transfer and promotion by his employer in January, 1993. The Plaintiff advised the court in her testimony during July of 1994 that she is in the process of moving to her family home in the State of Missouri regardless of the court's decision in this Petition and is in the process of selling her Utah residence in anticipation of the move.

12. The Plaintiff moved from Colorado to California prior to the original

divorce of the parties as a result of her employment, a promotion. The Plaintiff remained with the same employer when she moved to Utah in 1991, but this was not as a result of a promotion. The Defendant moved from Colorado to Utah while the divorce was pending in Colorado after Plaintiff had moved to California as a result of a promotion by his employer. The Plaintiff testified that her move to Missouri would be for personal reasons as she intended to terminate her employment and look for employment in Missouri after she arrived. The extended family of the Plaintiff resides primarily in the State of Missouri.

13. The parties have, for all intents and purposes been involved in on-going litigation regarding the Colorado Custody Order since it was entered.

14. Since the entry of the Decree, both the Plaintiff and the Defendant have remarried. The Plaintiff married Duane Clink on June 27, 1992. The Defendant married Cynthia Michael on November 30, 1991.

15. The five grounds on which the Plaintiff in her Amended Petition filed December 31, 1992 asserted there had been a change of circumstances which required that physical custody of the children be moved from the Defendant to herself, are as follows:

a. The Defendant remarried and the children, in particular the older child, Schuyler, does not get along with his stepmother, Cynthia Michael.

b. Defendant's move to Wisconsin.

c. Defendant's direct involvement with the children was reduced

because now he has help with rearing the children from his current spouse, Cynthia Michael.

d. The children, at least the older child, Schuyler, expressed a strong desire to reside with the Plaintiff and manifested an unwillingness to reside with the Defendant.

e. The Defendant's alleged refusal to facilitate visitation since his move to the State of Wisconsin and Plaintiff believed that the primary caretaking duties had been shifted to her and Defendant travelled regularly leaving the children with alternate caretakers.

16. There is no change of circumstances regarding the residences and moves of the parties since entry of the Colorado Decree on the alleged grounds that the parties live in different states. Except for an eighteen month period of time in Utah, both the Plaintiff and the Defendant have moved and lived in different states. Immediately prior to the commencement of the Colorado divorce action, the Defendant resided in Colorado and the Plaintiff in California. At the time of the divorce trial in Colorado, the Plaintiff resided in California, and the Defendant resided in the State of Utah. The Plaintiff later moved to the State of Utah and following that, in the early part of 1993, the Defendant relocated to the State of Wisconsin. The Plaintiff related at trial she intends to and is in the process of moving to Missouri. Dr. Sanders did not believe the moves of the parties were a change in circumstances. She noted the parties had moved during their marriage, during the pendency of this matter and expected to move in the future.

17. All of the moves by both parties since the divorce, with the exception

of Plaintiff's move to the State of Utah were work-related. At the time of the divorce, the Judge in Colorado was aware that the parties lived in states other than the State of Colorado, and accordingly would have been aware that at that time both parties had relocated outside the State of Colorado for work-related reasons. There is nothing new in Defendant's work-related location change from Utah to Wisconsin. Robert Becker, formerly the Defendant's supervisor in Allen Bradley, testified that for one moving up the corporate ladder (the Defendant is very talented and moving up the corporate ladder) would expect to move every few years and such moves are a regular foreseeable occurrence. Each of the moves, from Colorado to Utah and from Utah to Wisconsin has been the result of a substantial promotion. The move of the Plaintiff from Colorado to California was also a promotion from her employer and she made that move believing that the Defendant would move to California with her. The Plaintiff's claim that the Defendant's move to Wisconsin was to distance the children from her is not supported by any believable evidence. The court finds that the Defendant's move was certainly something that could and should have been reasonably foreseen at the time of the divorce, and also anticipated as a possibility later on, inasmuch as this court during the pendency of the proceedings and before the move, required an advance notice of relocation provision.

18. The Plaintiff and the Defendant both made appropriate job-related relocations, and even though the Defendant was not able to provide the requisite advance notice of his move to Wisconsin, an appropriate pre-move hearing was had and the intent of the notice was therefore met. The court finds that the Defendant's

relocation was not only something foreseeable to the parties at the time of the divorce, but likely anticipated at that time.

19. Neither party has any connection with the State of Utah, other than jobs and the children. Plaintiff's extended family support is outside the State of Utah in Missouri, where she is moving as soon as she is able to accomplish the sale of her residence. The evidence in this case shows no improper motive on the part of the Defendant in relocating to the State of Wisconsin as a result of his employment.

20. Plaintiff's move-related claim that the relocation has negatively impacted the children, and that such impact constituted a change of circumstances is not supported by believable evidence. The court recognizes that any change, including relocation, has some effect, usually perceived by the children to be negative, on children. The evidence does show, however, that the children are doing well in school in the State of Wisconsin, have adequately adjusted and become part of the community at their new residence, have formed friendships and are happy and well adjusted. The court also notes that the evidence supports a finding and the court does find that the Defendant took extraordinary steps (consulting with psychologists about how to ease the stress of the move, and then taking the children to Appleton, Wisconsin, before the move to allow them to see their new school, to meet their classmates and to see the community to which they would move and help make choices about the house and living arrangements in Appleton) to minimize the natural adverse effect of the move on the children by seeking advice from professionals who could instruct the Defendant on what steps to take with the children on that issue and then to follow that advice.

21. Defendant's remarriage, rather than being a negative factor in the children's lives, is a positive factor. Cynthia Michael is able to assist her husband, the Defendant in meeting the children's daily needs. Cynthia Michael has not attempted to act inappropriately towards the children and evidence suggesting to the contrary is not persuasive. Defendant's present wife has not attempted to replace the Plaintiff as the children's mother any more than the Plaintiff's present husband has attempted to take the place of the Defendant as the children's father. The court notes that Schuyler's testimony in chambers did not rise to the level claimed as to negative feelings about the Defendant's present wife, Cynthia Michael and to the extent it was negative, Schuyler was animated and used language uncharacteristic of a child of the age and maturity of Schuyler. The court believes that Schuyler's statements regarding his stepmother may have been implanted, hopefully inadvertently, by persons with the Plaintiff's interests in mind. The children, whether with the Plaintiff or the Defendant, are in a better position, having contact with a stepparent, especially an appropriate stepparent, than the children would be in a daycare or spending time when not with the Plaintiff or the Defendant, with a person who would constitute a "legal" stranger. To the extent that the Defendant's remarriage has been a change in circumstances, it constitutes a positive change in the Defendant's household and not a basis to find a change of circumstances for the purposes of considering a change of custody.

22. The court finds Defendant was involved with caring for and sharing family activities with his children before and after his remarriage both in Utah and in Wisconsin. The court finds no change in this behavior by the Defendant or the children

after his marriage to Cynthia Michael.

23. Dr. Sanders recommended to the court that there not be a change in the custody Order in her original report to the court. Despite the fact that Schuyler in his interview just before trial with Dr. Sanders was very strong in stating that he desired to live with his mother, she felt that no change in custody should occur. The original findings and recommendations to the court by Dr. Sanders were very similar to that presented to the Colorado court by Dr. Mary Hansen, who recommended that physical custody of the children be placed with the Defendant, Rod Michael. Dr. Sanders noted that her original recommendation had been based on the Defendant's more consistent desire for custody, the children were adjusting and doing well in his care, and there was no reason to disrupt a previously determined long-standing custodial arrangement. The only change that Dr. Sanders found was Schuyler's preference in her last interview with the children. This preference was not as adamantly stated by Schuyler when he appeared before the court to express his own desires to the court in chambers as Dr. Sanders described them in his statements to her. This expressed preference occurred after spending 6 weeks with his mother, Robin Clink, the Plaintiff who did not permit contact with Rod Michael, until after Schuyler had seen Dr. Sanders. There had been no change in Ashleigh. Dr. Sanders related to the court that she believed this preference was not based on reality, it was based on fantasy which though based upon a true attachment for his mother, was a fantasy about a better life with his mother because he spends play times, that is unstructured time away from school with his mother while he spends structured school and work time with his father. He has had

continuing discussions with his mother about change of custody while the Defendant will not discuss changing custody or custody issues with Schuyler. Schuyler sees life with his mother as being life in Missouri where he has always gone to play and which he views as a sanctuary with his grandparents that removes him from the dispute between his parents over his custody and he would move from being the oldest child in a three child family (Cynthia and Rod Michael have had a child born of their marriage, Jake, who was born on March 31, 1993) to the younger of two children if he lived with his mother. The court finds that the evidence supports the findings and recommendations of Dr. Sanders and they are adopted as the findings of the court on these points.

24. The allegations that he is being "abused" (Schuyler's term), by his stepmother is not supported by the believable evidence.

25. There is no sufficient change in circumstances that would allow this Petition to proceed, based upon the Defendant's remarriage or the children's relationship with their stepmother, Cynthia Michael. In fact, the evidence was and the court finds that the children are happy, well adjusted and interact in a loving, happy relationship with Defendant and Cynthia Michael and Defendant as he did before his marriage to Cynthia Michael is very involved in caring for, interacting with, and raising his children.

26. At the final pretrial of this matter, counsel for the Defendant pointed out to the court and counsel for the Plaintiff that the children would have spent approximately 6 weeks with the Plaintiff prior to trial and that it would be a good idea for the children to again see Dr. Sanders, the court appointed psychologist, immediately prior to trial to see if there had been any change in circumstance. To facilitate this

evaluation, counsel for the Defendant requested that the children be returned to the Defendant before that meeting took place. The Plaintiff refused to do this. She permitted no contact between the Defendant and Schuyler or Ashleigh before they saw Dr. Sanders, though counsel for the Defendant attempted to arrange for Schuyler and Ashleigh to visit with the Defendant before and be taken to that interview by the Defendant. (Exhibits 16-D and 20-D).

27. The court advised counsel for the Plaintiff at the pretrial that if counsel for the Defendant's request was not honored, the court would have to consider the fact that Plaintiff would not agree to allow the children to see the Defendant before seeing Dr. Sanders. Despite this statement, Plaintiff refused to permit the children to see their father before seeing Dr. Sanders.

28. The court finds no change of circumstances due to visitation problems. A review of this record shows that it is replete with visitation disputes since the divorce was entered in July of 1991. Accordingly, continued disputes are not new, and do not constitute a change of circumstances as unfortunate as they may be.

29. The evidence in this case shows that since the Defendant's move to the state of Wisconsin, the visitation, considering its frequency and the fact that the Defendant bears the total financial obligation therefore, has gone reasonably smoothly. The evidence shows that weather, and on one occasion finances, have impacted visitation. The majority of the visitation problems revolve around agreeing upon times for make-up visitation when the weather prohibited the children visiting their mother because of problems with airline schedules. Neither party has been particularly

cooperative regarding alternative visitation days. Inasmuch as the visitation difficulties have not changed since the inception of the divorce Decree, there is not a change of circumstances, and to the extent that difficulties in rescheduling missed visitation under the circumstances of the temporary Order, considering its frequency and the distance between the children and their mother, there is no evidence to support that difficulties in visitation constitute a change of circumstances sufficient to allow this court to revisit the issue of custody. The difficulties are merely ongoing, and to a large degree a result of a monthly visitation schedule requiring two small children to be shuttled by air halfway across the country, at Defendant's expense.

30. The Plaintiff alleges a change of circumstances based on Schuyler's recently stated preference to live with the Plaintiff, and his stated reluctance to be with his father. The court notes with some interest as did Dr. Sanders (the Court's designated expert), that both children had continually maintained a neutral position regarding their preference as to living location until Dr. Sanders' last interview, which was the day before this hearing was scheduled to commence, when Schuyler asserted that he wanted to live with his mother and effectively did not want anything to do with his father. It was further reported by Dr. Sanders that Schuyler advised her that his stepmother "abused" him. Dr. Sanders was unable to account for this sudden and drastic change from the "safe" and neutral position adopted by Schuyler, except that she was of the opinion that Schuyler's perception of life with his mother, the Plaintiff, and how that would be if he resided with her was based upon fantasy and not reality. Dr. Sanders did not believe that the child had been influenced by the Plaintiff. While

Schuyler's announced change from a position of refusing to state a preference to a strong preference towards residing with the Plaintiff is certainly a change, unless the change is based upon reality, it has no basis and cannot be considered a change for purposes of determining whether or not there has been a significant change of circumstances.

31. The following observations are relevant to the present stated position of Schuyler. Schuyler had been with his mother for the six week period of time prior to the hearing. Part of that time Schuyler has been with his maternal grandparents at their farm in Missouri. The visitation periods at his grandparents in Missouri and with his mother are clearly filled with fun activities and carefree times. There are no schedules, no schoolwork, no lessons or athletic practice, no household chores or the like. All the activities are geared towards having an enjoyable time, especially, things that are enjoyable for a child the age of Schuyler. He has the opportunity to be involved with farm animals, he is allowed to operate four-wheel off-road vehicles, participates in trips to amusement parks. Those activities are surely enjoyable for Schuyler, and he is lucky to have access to those activities with his mother, but they are not what would occur on a long-term basis when school, children's household responsibilities, and the like must be considered. To the extent that Schuyler's stated preference is based upon his activities with his mother, the Plaintiff, and her extended family, those activities are not the reality of what would occur on a day-in and day-out basis if he was with his mother, the Plaintiff, full-time. The court determines such to be the case, even in the face of Plaintiff's attempts to portray her lifestyle as being "laid back" and involving a lot of fun

activities. The court does not believe that the Plaintiff's normal lifestyle is such that it includes nonstop fun activities for children. While the court has no evidence that Schuyler has been influenced by the Plaintiff, some of his words and demeanor suggest that his statements may not be his own. As indicated earlier, his statements in chambers were not as strong as those made to Dr. Sanders and related by her during her testimony during the course of this trial. Finally, the court is concerned that the Plaintiff's extended family may be influencing Schuyler. The court notes that the Plaintiff's mother, Arlene Wilcox, who testified as a witness in this case, indicated among other things, that she had a poor relationship with one of her other children, one of the Plaintiff's siblings, because she (Arlene Wilcox) had intervened in a custody dispute between her son and his spouse. The children have spent considerable time with their maternal grandmother, and she, in view of her position, could certainly exercise considerable influence over them if she chose to do so. As she indicated in the circumstance with her own son, the children's grandmother, Ms. Wilcox, has chosen to be involved in some of her other grandchildren's custody issues.

For all the foregoing reasons, the court does not believe that Schuyler's stated desire to reside with his mother constitutes a significant or materials, or valid change of circumstance. Further, even if the stated change of preference by Schuyler constituted a material change of circumstances, that change in and of itself is insufficient to allow this court to find a material change of circumstances, on which to proceed on to the question of best interests. The appellate courts of this state have clearly announced that a child's stated change in preference, even when based in reality, is not

sufficient in and of itself to make a change of circumstances to meet the requirements of the first phase in a petition to modify custody.

32. The court is unable to find a legitimate change in circumstances since the entry of the Decree of Divorce between the parties, and is therefore compelled to dismiss the Defendant's Petition to change custody of the parties' minor children.

33. The court finds that the minor children have resided with Defendant throughout their lives. They remained with him when Plaintiff, prior to the filing of the divorce action, moved to California to pursue her employment. The Defendant has provided a stable home and environment for the children and the children have thrived in the environment provided for them by the Defendant. The children have not resided with the Plaintiff, except for visitation, since she left the marital home in Colorado to accept a job promotion in California.

34. Dr. Sanders recommended and the parties stipulated that visitation should be as follows:

a. Ashleigh and Schuyler should spend nine continuous weeks with their mother during the summer vacation from school.

b. Ashleigh and Schuyler should spend a week at Thanksgiving with the Plaintiff. This week should commence on the Monday before Thanksgiving and end the Sunday after Thanksgiving.

c. Ashleigh and Schuyler should spend a one week period during early spring with their mother to coincide with the spring vacation from school.

d. Ashleigh and Schuyler should spend half their Christmas vacation with each parent. In 1994 the children should spend Christmas Day with their father and in 1995 spend Christmas Day with their mother. They should continue, thereafter, spending one-half the Christmas vacation from school with each parent and alternate Christmas day each year.

35. If the Plaintiff is going to be in Wisconsin or where the children reside, she should have the right to visit with the children on two weeks advance notice, provided, however, that the visitation should not interfere with their school or regularly scheduled activities.

36. The Plaintiff should have direct access to all personnel involved with her children's academic, medical and extracurricular activities as previously ordered by this court, but, she should be responsible for regularly contacting those persons in order to maintain an understanding of her children's activities and, she should be allowed to attend any or all of the children's school conferences, school activities, and extracurricular activities. Defendant should advise school, medical and occupational therapist personnel to send copies of any reports sent to him to Plaintiff.

37. The Plaintiff should be notified immediately in the case of any medical emergency as should the Defendant should the medical emergency occur during visitation.

38. Defendant should have free telephone access to the children during the times that the children are visiting with the Plaintiff, and the Plaintiff should have free telephone access to the children while they reside with Defendant.

39. Plaintiff should be required to continue Schuyler's physical exercises and physical/occupational therapy during visitation.

40. Pursuant to the Stipulation of the parties, the court reserves the issue of Defendant's request that Plaintiff pay part of visitation transportation costs for the minor children. The Plaintiff should be ordered to provide the court and counsel for the Defendant information regarding her earnings when she secures employment in Missouri and when her husband recovers from his surgery and is employed she should provide information about his earnings.

41. The court finds that the Defendant is not in contempt of the Orders of this court. The difficulties in regard to visitation were either caused by financial inability to comply with the Order of the court or problems that occurred through no fault of the Defendant in regard to weather and transportation problems.

42. Each of the parties should exchange information about the children and be flexible regarding visitation to facilitate travel and visitation in the best interests of the children and to permit the children to participate in special events in both the family of the Plaintiff and the family of the Defendant.

43. Each of the parties had requested that they be awarded their attorney's fees. As the court has determined that the Petition of the Plaintiff should be denied, her request should not be granted. The court will consider the Defendant's attorney's fees request and therefore directs that Defendant's counsel submit an appropriate affidavit setting forth the fees requested and a supporting memorandum outlining the factual and legal basis that should impact an award of fees and/or costs.

The expenses related to Dr. Sanders should also be addressed.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action, the parties and their minor children.

2. The Supreme Court of the State of Utah and the Utah Court of Appeals have articulated the standards for evaluating a Petition for Change of Custody. The present law is based on the decision first articulated in Hogge v. Hogge, 649 P.2d, 51 (Utah 1982) where the court articulated that prior to a change of custody, the Petitioner must show:

> "...a court would not reopen the custody question until it had first made a threshold finding of a substantially changed circumstances. This would protect the custodial parent from harassment by repeated litigation and protect the child from "ping-pong" custody awards."
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> ***
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> "Accordingly, we hold that in the future, a trial court's decision to modify a Decree by transferring custody of a minor child must involve two separate steps. In the initial step, the court will receive evidence only as to the nature and materiality of any changes in those circumstances upon which the earlier award of custody was based. In this step, the parties seeking modification must demonstrate (1) that since the time of the previous Decree, there have been changes in the circumstances upon which the previous award was based; and (2) that those changes are sufficiently substantial and material to justify reopening the question of custody. The trial court must make a separate finding as to whether this burden of proof has been met. If so, the court, either as a continuation of the same hearing, or in a separate hearing, will proceed to the second step. However, where that burden of proof is not met, the trial court will not reach the second step, the Petition to Modify will be denied, and the custody award will remain unchanged.

> In the second step, having found that a substantial and material change in the circumstances justifies a reconsideration of the custodial award, the trial court must consider the changes in circumstances along with all other evidence relevant to the welfare or best interest of the child, including the advantage of stability in custodial arrangements that will always weigh against changes in the party awarded custody."

649 P.2d at 53-54.

This test was further refined in Becker v. Becker, 694 P.2d 608 (Utah 1984) and Kramer v. Kramer, 738 P.2d 624 (Utah 1987) to require that the alleged change must occur in the custodial home. Then in 1989 the Utah Court of Appeals ruled:

> "Our reading of Hogge and its progeny suggest that on a petition for custody modification, trial courts should carefully scrutinize the facts behind the original award of custody. If the initial award was based on a thorough examination by the trial court of the various factors pertaining to the child's welfare, a rigid application of the change-in-circumstance[s] is in order. In such a case, the court has already considered the best interests of the child and made a determination consistent with that finding. Any subsequent petition for modification of custody must overcome a high threshold in order to 'protect the child from 'ping-pong' custody awards' and the accompanying instability so damaging to a child's proper development."

Maughn v. Maughn, 770 P.2d 156, at 160.

3. This court has concluded that there is no change in circumstances beyond that of Schuyler's stated preference which the court has determined is not based on reality but is fantasy encouraged by some other party. This court was advised by the Utah Court of Appeals in Cummings v. Cummings, 821 P.2d 472, 473 (Utah App. 1991) that it should take great care in making a change of custody based on the sole factor of a 12 year old child's expressed desires. In this case, Schuyler is 8 years of age and

articulating a request which is based on fantasy, not reality.

4. The court concludes that there has been no substantial or material change change in circumstances which would justify a modification of the custody award made by the District Court for Jefferson County, Colorado after a contested trial on the issue of custody, April 24, 25, 1991, effected by Decree entered July 1, 1991.

5. This court concludes it should accept the Stipulation of the parties as to visitation and therefore modify its prior orders in regard to visitation to award visitation as follows:

a. Ashleigh and Schuyler should spend nine continuous weeks with their mother during the summer vacation from school.

b. Ashleigh and Schuyler should spend a week at Thanksgiving with the Plaintiff. This week should commence on the Monday before Thanksgiving and end the Sunday after Thanksgiving.

c. Ashleigh and Schuyler should spend a one week period during early spring with their mother which should coincide with the spring vacation from school.

d. Ashleigh and Schuyler should spend half their Christmas vacation with each parent with Christmas Day in 1994 should be spent with their father and Christmas Day in 1995 should be spent with their mother. They should continue, thereafter, spending one-half the Christmas vacation from school with each parent and alternate Christmas Day each year.

6. If the Plaintiff is going to be in Wisconsin or where the children

reside, she should have the right to visit with the children on two weeks advance notice, provided, however, that the visitation should not interfere with their school or regularly scheduled activities.

7. The Plaintiff should have direct access to all personnel involved with her children's academic, medical and extracurricular activities as previously ordered by this court, but, she should be responsible for regularly contacting those persons in order to maintain an understanding of her children's activities and, she should be allowed to attend any or all of the children's school conferences, school activities, and extracurricular activities. Defendant should advise school, medical and occupational therapists to send copies of any reports sent to him to Plaintiff.

8. The Plaintiff should be notified immediately in the case of any medical emergency as should the Defendant should the emergency occur during visitation.

9. Defendant should have free telephone access to the children during the times that the children are visiting with the Plaintiff and the Plaintiff should have free telephone access to the children while they reside with Defendant.

10. Plaintiff should be required to continue Schuyler's physical exercises and physical/occupational therapy during visitation.

11. Pursuant to Stipulation of the parties, the court reserves the issue of Defendant's request that Plaintiff pay part of visitation transportation costs for the minor children and the Plaintiff is ordered to provide the court and counsel for the Defendant information regarding her earnings when she secures employment in Missouri

and when her husband recovers from his surgery and is employed and information about his earnings once he is employed.

12. Each of the parties should exchange information about the children and be flexible regarding visitation to facilitate travel in the best interests of the children and to permit the children to participate in special events in both the family of the Plaintiff and the family of the Defendant.

13. The court concludes that it will consider the attorney's fees request of the Defendant and therefore directs that Defendant's counsel submit an appropriate Affidavit setting forth the fees requested and a supporting Memorandum outlining the factual and legal basis that should impact an award of fees and/or costs. The expenses related to Dr. Sanders should also be addressed. The Affidavit and Memorandum should be filed within fifteen (15) days. The Plaintiff may respond in accordance with Rule 4-501 of the Code of Judicial Administration.

DATED this 14 day of December, 1994.

BY THE COURT:

TIMOTHY R. HANSON,
DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT
THIS ____ day of _____, 1994.

_____
Suzanne Marelius
Counsel for Plaintiff

David S. Dolowitz
Counsel for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered this 11th day of November, 1994, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law in the above-entitled matter to:

Suzanne Marelius, Esq.
426 South 500 East
Salt Lake City, Utah 84102
Counsel for Plaintiff

David S. Dolowitz

(dsd\mb\Michael.FOF)