

No. 9284

IN THE MATTER OF
THE MARRIAGE OF

AVIAN ANN BIEDERMANN
AND
KENNETH KYLE BIEDERMANN

AND IN THE INTERESTS OF
KYLA RAE BIEDERMANN,
EMILY LAINE BIEDERMANN,
LOREN NOEL BIEDERMANN AND
DANA TRUE BIEDERMANN, MINOR
CHILDREN

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IN THE DISTRICT COURT OF

GILLESPIE COUNTY, TEXAS

216TH JUDICIAL DISTRICT

Brief In Support of Emergency Sua Sponte Order

Avian Ann Biedermann files this brief in support of the August 20, 2001 "Emergency Sua Sponte Order" [Exhibit A] of this court showing the court as follows:

1. Focus of Brief

This brief focuses only on the parent-child aspects of the divorce between Kenneth Kyle Biedermann and Avian Ann Biedermann.

FILED

AT 10:00 O'clock

A.M.

2. Relevant Orders

The relevant orders relating to the focus of this brief are:

SEP 26 2001

DARRELL MEYER

DISTRICT CLERK

GILLESPIE COUNTY, TEXAS

By *Jim Davis*
Chief Deputy

A. December 18, 2000, 12:30 p.m. Temporary Restraining Order:

... Petitioner and Respondent are immediately restrained from:

* Molesting or disturbing the peace of the children...

B. February 19, 2001 Mediation Agreement on Temporary Orders until March 22, 2001:

11. Each party shall refrain from engaging in conduct designed to alienate the children against the other parent.

C. **May 14, 2001 Agreed Temporary Orders Pursuant to "Mediation Agreement on Temporary Orders Until March 22, 2001:**

Minimizing Disruption

IT IS ORDERED that to minimize disruption of the children's education, daily routine, and association with friends, Avian Ann Biedermann and Kenneth Kyle Biedermann shall:

1. Refrain from engaging in conduct designed to alienate the children against the other parent;
2. Abide by the "Parent's Foals, Agreement and Guidelines Relating to the Children, " attached hereto as Appendix 2. (See immediately below)

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[Appendix 2]

Kyle and Avian agree to attempt at all times, to act in a manner consistent with the following goals, which Kyle and Avian believe to be in their children's best interest:

- * to provide the children with an emotional environment in which each is free to continue to love the other parent and to spend time with the other parent;
- * to encourage good feelings from the children about the other parent and their extended family, if any;
- * to plan together as parents rather than through the children;
- * to not take sides or take issue with decisions or actions made by the other parent, especially in front of the children;
- * to present a united front on the handling of any problems with the children;
- * to use discretion as to the time and frequency of phone calls to the children;
- * to behave discreetly with other people in the children's presence; and,

* * * * *

Kyle and Avian agree that it is in the best interest and welfare of the children that the children be accorded rights and as such are third-party beneficiaries of this agreement and stipulation between their parents. Both parents acknowledge the following rights of the children, to wit:

- * the right to a continuing relationship with both parents;
- * the right to know and appreciate what is good in each parent without one parent degrading the other;
- * the right to have a relaxed, secure relationship with both parents without being placed in a position to manipulate one parent against the other.

* * * * *

Temporary Injunction as to Children

The Court finds that, based on the public policy considerations stated in section 153.001 of the Texas Family Code, it is in the best interests of the children that the following temporary injunction be issued and related orders be entered.

IT IS ORDERED that Avian Ann Biedermann and Kenneth Kyle Biedermann and their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise are temporarily enjoined from:

1. Molesting or disturbing the peace of the children or of any other party.

* * * * *

Temporary Injunction

The Court finds that the parties have agreed that the existing restraining order shall remain in effect and to the entry of the following temporary injunctions while this case is pending.

The temporary injunction granted below shall be effective immediately and shall be binding on Avian Ann Biedermann and Kenneth Kyle Biedermann;

on their agents, servants, employees, and attorneys; and on those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise. The requirement of a bond is waived.

3. Placing one or more telephone calls, anonymously, at any unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication.

D. May 14, 2001 Temporary Orders hearing:

[p.7] MS. BERGMAN: Our office, the office - Law Offices of John Nichols, will call Dr. Jack Ferrell in San Antonio and set up appointments for custody evaluation, the parties and the children.

[p. 10] THE COURT: All right, then this is the agreement you have worked out this morning?

MR. HALM: That is correct, Your Honor.

THE COURT: The Court will consider that a Rule 11 Agreement and proceed on it.

E. May 31, 2001 Telephonic Conference:

[p. 12] THE COURT:... I think the main thing is this discussion business; and all the family members are included, the parents, and any other aunts and uncles, and so forth, and friends of the family are not to discuss this matter with the children.

F. June 4, 2001 Rule 11 Agreement for Additional Temporary Orders:

Pursuant to Rule 11, Tex. R. Civ. P., Avian Ann Biedermann, Petitioner, and Kenneth Kyle Biedermann, Respondent, through their respective attorneys of record, agree to additional temporary orders as follows:

3. The Parties agree and IT IS ORDERED that Dr. Jack G. Ferrell, 14310 Northbrook Dr., Suite 120, San Antonio, Texas 78232, 210-499-5025, 210-499-5825 facsimile, is appointed to interview, examine, evaluate, and consult with the parties and the children and the children to prepare a custody evaluation to be filed with the Court on or before August 1, 2001. The parties further agree and IT IS ORDERED that the earliest available appointments for the parties and the children shall be made through the Law Offices of John Nichols and notices sent to Allen J. (Jody) Halm forthwith.

G. July 5, 2001 Modification Hearing:

[pp. 111 & 112] MR. RUDKIN: I was going to raise one additional matter. I met with the children and in my perspective, these children are nine down to five years old. They have way too much knowledge - - -

THE COURT: Of what's going on?

MR. RUDKIN: - - - the buzz words and consternation and fighting back and forth with mom and dad, lawyers and this and that. I would request that there be an admonition that neither party discuss in any fashion, shape, or form the litigation process, court proceedings, anything to do with this matter.

THE COURT: That's an Order of the Court, should not be discussed or even mentioned other than the fact that if you have to, that we will be deciding it before school time, but it's very important; and financial conditions and so forth, I think the children should not be involved in this process.

If either parent - I find out either parent is making comments, derogatory comments or such about the other parent, this Court will certainly take sanctions against the person making the comments. It's very important, and I think - and I think the grandparents, this would also apply. I think the grandparents can do a lot on both sides, a lot to kind of ease the pressure of the children.

3. Dr. Jack Ferrell's Summary Report

Dr. Jack Ferrell is the court approved psychological and child custody evaluator on this case. Dr. Ferrell has prepared a 16 page initial report which has been filed with the court. In his report Dr. Ferrell states:

- A. He has evaluated Kyle and Avian Biedermann and the four Biedermann children. [p. 1]
- B. The evaluation period covered four months (April 17, 2001 to August 14, 2001). [p. 1]
- C. The evaluation consisted of:
 - (1) development of social history
 - (2) home visit evaluations
 - (3) the administration of psychological tests

- (4) review of specific documents, including medical reports and other health care
 - (5) the CASA Report
 - (6) school records
 - (7) collateral reports and anecdotal data. [p. 1]
- D. Kyle Biedermann "did not fill out this form" when asked to describe his relationship with Kyla Biedermann, age 9. [p. 10]
 - E. Kyla Biedermann related: "we" think mom has problems and then relates material or allegations reported by the father or suggested to her by him. She clearly is the father's biggest advocate and apparently discuss his feeling regarding the divorce often. [p. 10]
 - F. Issues about the father sleeping nude with the children were also addressed and the Court Ordered that he not sleep with the children at all. He did not during the trip to Florida, but did permit one child each night to sleep in a bed right next to his in his room as a special treat. He reported that he did so because the children wanted to and they would have been unhappy if he had not. He failed to appreciate that perhaps this was not an altogether appropriate manner in which to address the Court's Order, nor was the children's desire sufficient to abdicate (minimally) his responsibility in this regard. He appears to at times push the envelope and may have difficulty in some areas with respect to boundaries, which does concern this examiner. [p. 14]
 - G. Kyle Biedermann ... must cease and desist from further alienation of the children. [p. 16]
4. **Transcripts from Audio Taped Telephone Conversations of the Biedermann Children with Kenneth Kyle Biedermann in Violation of Relevant Orders:**
- A. In the May 14, 2001 Agreed Temporary Orders Pursuant to "Mediation Agreement on Temporary Orders Until March 22, 2001" the parties agreed to refrain from engaging in conduct designed to alienate the children against the other parent. The following audio taped conversations occurred after the Agreed Temporary Orders pursuant to the Mediation Agreement were signed, and thus, Kenneth Kyle Biedermann is in direct violation of the Orders.
 - 1. **Audio Taped Transcript of May 24-25, 2001:**

KYLE BIEDERMANN: Well, they just said I should be allowed to talk to you girls. That's what, um, the court says. And, Mommy wouldn't let me talk to you girls last night.

EMILY: Why?

KYLE BIEDERMANN: I don't know. You'll have to ask Mommy that.

EMILY: Well, Daddy, Loren and Kyla were crying about you, 'cause they thought the police took you to jail.

KYLE BIEDERMANN: No, no. Not at all. They, uh, you know, they, uh, I just came, I, you know, just waited for them to come, so they would know that Mommy's not letting me talk to you girls.

EMILY: (inaudible)

KYLE BIEDERMANN: (inaudible) that, you know, I'm allowed to talk to you girls, and Momma wouldn't let me. So, I came over to see you. Now, where were you, Emmy?

EMILY: Um, I'm at home, on the couch.

KYLE BIEDERMANN: No, when, where were you, last night?

EMILY: Oh, why?

KYLE BIEDERMANN: Oh, well, just, did you look out the window? Did you see anything?

EMILY: Well, um, we thought that, um, we thought that you, uh, got arrested.

KYLE BIEDERMANN: No, no. I didn't do anything wrong.

KYLE BIEDERMANN: Dana True, you hang up right now. Dana True, if you don't hang up, you will be in trouble when I see you. Do you understand me? One at a time—

DANA TRUE: (inaudible) go on a trip.

KYLE BIEDERMANN: —hang up; hang up the phone, Dana True, now.

DANA TRUE: (inaudible) go with Mommy, right?

KYLE BIEDERMANN: Well, we'll see. But, you're gonna get in trouble if you

don't hang up the phone—

DANA TRUE: For what? What happened?

KYLE BIEDERMANN: Dana True, if you do what I told you—

DANA TRUE: But, what happened?

KYLE BIEDERMANN: Dana True, I'm gonna spank you so hard, and you're not gonna get to do some things this weekend, if you don't hang up the phone right now. You'll get your turn.

2. Audio Taped Transcript of May 24-25, 2001:

KYLE BIEDERMANN: Dana True, get off the phone. Between us, Kyla, Mommy went ahead and just got you all involved, and got you girls all upset about calling the cops. But, there's no reason to do that. And, she was in the wrong. Now, I'm not allowed to come to the house. But, I know I was wrong, too. But, I'm gonna come there, 'cause I want to see you girls, and I'm supposed to be able to. It was wrong for Mommy not, not to let me talk to you girls. Do you understand?

KYLA: Uh-huh.

KYLE BIEDERMANN: That's the whole, if she doesn't want, if she wants to protect you girls from this, and keep you, you know, keep, you know, not have you affected by it, right?

KYLA: Yes.

KYLE BIEDERMANN: And, uh, I, I would think that calling the police so quickly, like that, really gets you involved, doesn't it?

KYLA: Uh-huh.

3. Audio Taped Transcript, undated, 2001:

DANA TRUE: Could you come by?

KYLE BIEDERMANN: Well, I can't come by. I would, right now, if I could, Dana True.

DANA TRUE: Why?

KYLE BIEDERMANN: Well, Mommy won't let me come by.

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DANA TRUE: Well, why won't you just drive over here?

KYLE BIEDERMANN: Well, last time I came over, she called the police on me, Dana True.

- B. In the May 14, 2001 Agreed Temporary Orders Pursuant to "Mediation Agreement on Temporary Orders Until March 22, 2001" the parties agreed to abide by the "Parent's Foals, Agreement and Guidelines Relating to the Children." A specific provision in the agreement states that the parties agree to "plan together as parents rather than through the children." The following audio taped conversations occurred after the Agreed Temporary Orders pursuant to the Mediation Agreement were signed, and thus, Kenneth Kyle Biedermann is in direct violation of the Orders.

1. **Audio Taped Transcript May 24-25, 2001:**

KYLE BIEDERMANN: I told you to call me back, and you didn't, right?

KYLA: Yes, I got the information. I went and asked Tara for the information—Dana True. I went and asked for the information, and, Mommy asked me why. And, I said, I called, I said, because Daddy wants to know. And, I called him, and he said, get the information and call him back. She said, no. Go to bed.

KYLE BIEDERMANN: Well, I didn't get a chance to talk to your sisters, did I?

KYLA: No.

KYLE BIEDERMANN: See. I get to talk to all of you every night. So, did you think the police took me in to jail?

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KYLE BIEDERMANN : I need to get to talk to you girls every day.

KYLA: Did Momma get in trouble?

KYLE BIEDERMANN: Well, I don't know. We'll have to ask her. It also says, if you go out of Gillespie County, (inaudible) she's got to let me know when she takes you. And, that, that's why she wouldn't let me (inaudible)—

KYLA: Dana True.

KYLE BIEDERMANN: —and so, she wouldn't tell me that, either. That's against the court order, also.

KYLA: Can you come with us?

KYLE BIEDERMANN: **Kyla, it's not a good thing for me to be— I mean, I would love to go with you girls. But, Mommy doesn't want me to be there, and you know that.**

- C. The May 14, 2001 Agreed Temporary Orders Pursuant to "Mediation Agreement on Temporary Orders Until March 22, 2001" the parties agreed to abide by the "Parent's Foals, Agreement and Guidelines Relating to the Children." A specific provision in the agreement states that the parties agree to "present a united front on the handling of any problems with the children."

1. **Audio Taped Transcript July 2001:**

AVIAN BIEDERMANN: If they're not going to Fiesta, Texas tomorrow, they need to come home.

KYLE BIEDERMANN: Okay. How about you take them to Grandma and Pappa's to spend the day.

AVIAN BIEDERMANN: I don't know. Why don't you (inaudible) think about it?

KYLE BIEDERMANN: **How about Wednesday? How about Thursday? Do I have to go to court, in a hearing, just to see the kids more? Instead of you lying about me not wanting the kids?**

AVIAN BIEDERMANN I didn't lie.

KYLE BIEDERMANN: Yeah. You guys lied, telling them that we didn't want to see the kids any more. I (audible) one day a week. That's not the case.

AVIAN BIEDERMANN: You're the one that came up with that.

KYLE BIEDERMANN: I want it just for 30 days. That was what that was for. 30 days, and you—

AVIAN BIEDERMANN: You're, hey, I didn't like, you're the one that came up with the plan.

KYLE BIEDERMANN: Okay. I'm going to court to get the kids more often. Do I have to go to court, or would you just let me see the children more often? Yes or no?

AVIAN BIEDERMANN: I already said, if you want to take the children to Fiesta, Texas tomorrow, that's fine.

KYLE BIEDERMANN: **Okay. I'm going to court. You already know that. We're already going to court, just so I can see the kids, 'cause you're a fucking asshole.**

AVIAN BIEDERMANN: I'm a what?

KYLE BIEDERMANN: You heard me. You won't even let me see the girls.

AVIAN BIEDERMANN: That is not true.

AVIAN BIEDERMANN: Discuss it with my lawyers.

KYLE BIEDERMANN: Oh, it's for your lawyers' kids? Oh, my goodness. I didn't know that they were the lawyers' kids. Oh, gosh. I'm glad that they care more about your children than you do. I'm glad to hear that. We're going to court, so I can see the kids more. And, that's because you're making me. 'Cause, you don't care about the kids. All you want to do is hurt me. You're not gonna hurt me very long. And, the truth be know, we have to go to court, just so I can see them. The kids know that. You don't have to hide it from them. You can't hide it from them.

- D. In the July 5, 2001 Modification Hearing the court made it explicitly clear that the children should not be involved for any reason and that sanctions would be imposed against any person making derogatory comments about the other parent.

July 5, 2001 Modification Hearing:

THE COURT: That's an Order of the Court, should not be discussed or even mentioned other than the fact that if you have to, that we will be deciding it before school time, but it's very important; and financial conditions and so forth, I think the children should not be involved in this process.

If either parent - I find out either parent is making comments, derogatory comments or such about the other parent, this Court will certainly take sanctions against the person making the comments. It's very important, and I think - and I think the

grandparents, this would also apply. I think the grandparents can do a lot on both sides, a lot to kind of ease the pressure of the children.

The following audio taped conversations occurred after the July 5, 2001 Modification Hearing, and thus, Kenneth Kyle Biedermann is in direct violation of the Court's Order.

1. Audio Taped Transcript of July 6, 2001:

KYLE BIEDERMANN: Uh-huh. Well, I mean, have you been home? I've called twice.

KYLA: Yeah.

KYLE BIEDERMANN: (inaudible)

KYLA: It did.

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KYLA: Um, yeah. Um, hold just a minute. I need to tell Momma something. Momma, Momma? I need to go to the bathroom. Okay. Momma doesn't like, Momma doesn't know that, you know, when I talked to you, when you were (inaudible)?

KYLE BIEDERMANN : Uh-huh.

KYLA: Yeah? Well, um, Tara was down there. When she was about to come upstairs, but she heard me talking to you about the thing. She had heard me talking to you, and telling you what I was telling you, and she got pretty mad. And, and she got (inaudible), too. And, um, so, she sent one of my sisters up to come get me, um, to open up presents and cake.

KYLE BIEDERMANN: Uh-huh.

KYLA: Yeah? Um, well, Momma made up a new rule that we cannot go, um, out of the room where a grown-up is in.

2. Audio Taped Transcript of August 3, 2001:

EMILY: You glad I remembered to call you back?

KYLE BIEDERMANN : Yes, I am. Very, very much. Very, very, very much. You know, 'cause I, see, I didn't talk to you girls for a couple of days, and I kept calling, calling, calling. And, I never got a call back.

EMILY: You kept doing what?

KYLE BIEDERMANN: I kept calling you girls and leaving messages. And, I never got a call back. So, I didn't know what was going on.

EMILY: Well, Momma says that we can't answer the phone, without her permission.

KYLE BIEDERMANN: Well—

EMILY: She says that if we do, she's gonna spank us (inaudible).

KYLE BIEDERMANN: Oh, that's not right, Emmy. Oh, Emmy. You girls are big enough. You don't need to get spanked.

EMILY: No, that's what we get all the time. Every single day.

KYLE BIEDERMANN : **Well, what if somebody asked you questions about that? What would you say? What if the, what if the court asked you something? What would you say?**

EMILY: Um, a question?

KYLE BIEDERMANN : Yeah. What if they ask you if you still, if you got (inaudible), what would you say?

EMILY: I would say that Momma switch, spank us every day.

KYLE BIEDERMANN: And, what would they spank you for?

EMILY: What?

KYLE BIEDERMANN: What would they spank you for?

EMILY: Calling on the phone without permission, when you say that we can, you know.

3. **Audio Taped Transcript of August 3, 2001:**

KYLE: Yeah, wait 'til you see it. It's really good. I just thought I'd get you today, and then we could, you know, then you could be at Ace with me, tomorrow, to help me do the garage sale. **I, there's no reason for you not to be able to come over here, except that Mommy doesn't want you to see me. That's it.** Well, we just have to wait, huh, precious?

KYLA: Dad, you know what?

KYLE: What?

KYLA: Momma's watching movies for child discipline.

KYLE BIEDERMANN : **Oh, gosh. I guess she needs to learn something. She's just spanking you girls for—**

KYLA: Nothing.

KYLE BIEDERMANN : —for no reason. And, that's not good, is it?

KYLA: Uh-huh. I think the child discipline is telling her that.

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KYLE BIEDERMANN: Well, why don't you bring the video with you? Okay? Put it in your bag. And, I'll watch it and see what I think.

KYLA: Okay. 'Cause, we don't know. We just know she's watching it, when we are not around.

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KYLE BIEDERMANN: **Well, I mean, that's, the Bible says that, you know. I don't know. The problem is that you girls shouldn't be spanked when Mommy (inaudible), like not letting you come to the phone.**

KYLA: Uh-huh.

KYLE BIEDERMANN: **Or, when you come, not letting you see your dad.**

KYLA: Uh-huh.

KYLE BIEDERMANN: **That's bad.**

KYLA: Well.

KYLE BIEDERMANN: Oh, my precious.

LOREN: I want to talk to Daddy.

KYLE BIEDERMANN: Well, no matter what, Kyla, I'm gonna see you Sunday morning. Okay?

4. **Audio Taped Transcript of August 3, 2001:**

KYLE BIEDERMANN: Hi, precious. How'd you know it was me.

KYLA: 'Cause the phone says who it is.

KYLE BIEDERMANN: Oh, it does?

KYLA: Yeah.

KYLE BIEDERMANN: That's why Mommy doesn't answer 'cause she knows it me.

KYLA: Yeah.

KYLE BIEDERMANN: How are you girls going? I haven't talked to you for a couple of days.

KYLA: Fine.

KYLE BIEDERMANN: What did you girls do yesterday?

KYLA: We went swimming.

KYLE BIEDERMANN: Where'd you go.

KYLA: (indiscernible) Johnson's.

KYLE BIEDERMANN: Uh-huh.

KYLA: But we went really late.

KYLE BIEDERMANN: What do you mean?

KYLA: We went really late and Mom's was being mean. I asked her if we could come by grandma and papa's and get the goggles. And she said, we're not making any stops. And so Loren put the top of her bathing suit in the clothes that we gave you. And Mamma spanked me for giving the clothes to you.

KYLE BIEDERMANN: Uh-huh. Oh God. You could have come and gotten them. They're in my truck.

KYLA: I know.

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KYLE BIEDERMANN : I'll take you to the bus.

KYLA: You will?

KYLE BIEDERMANN : Yes.

KYLA: Mamma said we weren't going to get to see you.

KYLE BIEDERMANN : That's not the truth. I'll pick you all up at eight o'clock in the morning, and I'll take you to the bus.

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KYLE BIEDERMANN : **Now, can you believe that Mommy wasn't going to let me see you girls at all this weekend. It's my weekend. Did you know is my weekend to see you girls. Now, I'm not going to see you at all.**

Why would she do that Kyla?

KYLA: Well, Daddy, I wanted choir.

KYLE BIEDERMANN: I know, I'm glad you got choir.

But why can't I see you tonight or tomorrow? Or tomorrow?

KYLA: Tonight and tomorrow? Or today?

KYLE BIEDERMANN: Yes. You know, if she's going to take me days, then why can't she give me another day?

KYLA: Why is she taking it? How could she do that? Why can't you?

KYLE BIEDERMANN: ***Because her attorneys are ... They don't care about you girls. They just want to hurt me. That's it. They're good at it. They don't care one bit about what you girls want. They are trying to keep you away from me.***

KYLA: We won't let them.

KYLE BIEDERMANN: And they're doing everything they can to do that, Kyla.

KYLA: Well, how come they say that they love us?

KYLE BIEDERMANN: Well, what do you think?

Call and see ... You call and say, hey listen, if you love me so much, let me see my daddy for a day. What do you think they'll say?

KYLA: I don't know – They'll laugh at me.

KYLE BIEDERMANN: Okay.

KYLA: And then they'll say, huh, well, that's the court's decision.

KYLE BIEDERMANN: It's not the court's decision.

KYLA: Mommy says it is.

KYLE BIEDERMANN: **Yeah, well, she's just telling you a lie, Kyla.**

It's up to Mommy, completely. Nobody tells her that she can't let – She has control of you girls when she has you, and she can do whatever she wants. She can let me have you. She can let you go with me if she wants. It's all up to her. The court doesn't tell her that she can't. All right.

When it was Mother's Day. Remember when it was Mother's Day.

KYLA: Mother's Day.

KYLE BIEDERMANN: Mother's Day, was Sunday. That was my day. I let you go with Mommy, didn't I.

KYLA: Why?

KYLE BIEDERMANN: Because that was the right thing to do.

The court said it was my day. But does that mean that I can't let Mommy have you? Of course not. It's up to me. It's my day, and if I want to let you go with Mommy, I can let you go with Mommy.

Mommy has given you to me one other day. We went someplace and she gave me – she let you come early, right? A few times.

KYLA: Yes.

KYLE BIEDERMANN: She decided to let me come early.

KYLA: Yeah.

KYLE BIEDERMANN: The court says at five o'clock I can pick you up. But Mommy let you go early. Why? Because it's up to Mommy. The court doesn't tell her you can't do that. The court didn't tell me I can't let you girls go with Mommy on Mother's Day. But I let you go. 'Cause that's the right thing to do. The court will never tell us you can't do anything.

KYLA: Mommy has gotten worse.

KYLE BIEDERMANN: I know she has, Kyla. I'm just gonna – You know. I'm sorry that you that you girls have to go through this. I'm just sorry you have to go through it.

* * * * *

KYLA: Mamma, daddy wants to talk to you.

AVIAN BIEDERMANN : Yes.

KYLE BIEDERMANN: Avian, I don't want any arguments or complaints, but you get the girls through the fourth, which is Saturday and I get them on the 5th.

AVIAN BIEDERMANN: No, you only get two of them on the 5th.

KYLE BIEDERMANN: I'm picking all up at eight o'clock in the morning. I talked to my attorney. And I'll have the police there if you don't give them to me. You call your attorney if you want to change. Okay, let me talk to the girls. All four at eight o'clock in the morning.

5. **Audio Taped Transcript of August 3, 2001:**

EMILY: That's not fair, everybody else has dads.

KYLE BIEDERMANN: **Well, you tell Mommy. She's the one keeping you away from me, Emmy. There's nothing I can do about it. It's her and her attorneys. They don't want you to see me. They won't let me pick you**

up at eight o'clock in the morning on Sunday, did you know that?

EMILY: Why?

KYLE BIEDERMANN: Because they don't want me to see you

Mommy just told me she won't let you come at eight o'clock in the morning. She said, I can't see you and Kyla at all. I said, uh-huh, I'm going to pick them up at eight o'clock in the morning. So don't let her trick you Emmy. I'm picking you up at eight o'clock in the morning, no matter what. If not, I don't get to see you at all. And for some reason, I don't know why, Emmy, they don't want you to see me.

EMILY: Well, why don't you then tell the court?

KYLE BIEDERMANN: I did tell the court, but I can't do anything about it. They played some mean tricks, Emmy.

EMILY They're not going to do anything about it?

KYLE BIEDERMANN: I can't do anything about it.

EMILY: No, the court.

KYLE BIEDERMANN: You just have to ask Mommy why. You ask Mommy why. She won't tell you. But the bottom line is, they didn't want you to see me, and so they tricked the court and made it out so that – made sure that I wasn't going to get a chance to see you.

EMILY: That's not fair.

KYLE BIEDERMANN: I know. I'm sorry, Emmy. But I'll see you Sunday morning, Okay?

EMILY: Everyone else gets to see their dad almost every day.

KYLE BIEDERMANN: Well, tell Mommy that. Ask her if maybe I can take you out for ice cream or something. Okay?

EMILY: Okay.

KYLE BIEDERMANN: Okay. All right.

EMILY: Okay.

KYLE BIEDERMANN: Okay. Well, Emmy, I got to go.

* * * * *

KYLA: I want you to call.

KYLE BIEDERMANN: Well, I'll be happy to do anything Kyla. Just remember, I'll pick you up at eight o'clock in the morning, and don't let Mommy fool you that I'm not.

KYLA: **Why is she always trying to lie to us that we're not.**

KYLE BIEDERMANN : 'Cause –

6. **Audio Taped Transcript of August 8-10, 2001:**

KYLE BIEDERMANN: But, you can also tell Mommy, Mommy, please don't spank Loren. And, uh, if she does, you can call your attorney.

EMILY: Attorney?

KYLE BIEDERMANN: You can call the, the, there's a, that man, Kurt Rudkin, that we sat around the room and talked to, that one day at Grandma and Pappa's.

EMILY: Yes, but we don't know his phone number.

KYLE BIEDERMANN: **I'll give you the phone number, if you want to call. But, you can tell Mommy, if you spank, that, you know, tell that you'll call your attorney, if you have to. Okay? I don't want you to get in trouble Emmy. I'm sorry. Oh boy. I just love you girls. I know God's gonna take care of you girls, no matter what, Emmy.**

EMILY: Okay.

KYLE BIEDERMANN : God's watching every second.

EMILY: If I find Momma, before she spanks Loren, I'll tell her that you wanted to talk to her.

KYLE BIEDERMANN: Yeah.

EMILY: And to call her.

KYLE BIEDERMANN: That's right.

EMILY: But, if it doesn't work?

KYLE BIEDERMANN: Then, say, then, then you're gonna, then Daddy's gonna call the attorney.

* * * * *

KYLE BIEDERMANN: Okay. Lord Jesus, we just thank you that you love Kyla and Emmy and Loren and Dana True so much, and that you've promised to protect them in every way, Lord. And, we just pray that, that they will in no way have any anger or bitterness toward Mommy, even though Mommy may not be being nice to them—

EMILY: Well, I'll tell her, that, uh, that you're gonna call your attorney—

KYLE BIEDERMANN: Uh-huh.

7. **Audio Taped Transcript of August 8-10, 2001:**

KYLE BIEDERMANN : Oh, girls I am so sorry. Oh, girls, I just can't believe this. Do you remember anything else that you talked to the guy about, yesterday, precious?

KYLA: Uh, no, not really.

KYLE BIEDERMANN: Did he ask you anything about, um, watching movies that were, you know, about, um, babies being born?

KYLA: Yes. He asked me that question, um, uh, asked me, did you ever watch a movie of a baby being born, with one of your parents? And, I said, um, yes, but it wasn't with my parents. It was with Heather, I said, my cousin.

KYLE BIEDERMANN : Uh-huh.

* * * * *

KYLE BIEDERMANN: Yeah. Anything else, Kyla, that he asked for?

KYLA: No, except for the potty stuff, you know. And, I told him about that.

KYLE BIEDERMANN: About, the only thing you knew about was the kitten?

KYLA: Yeah. I said the kitten peeing on me, uh, because it was me, it was my fault. But, um, and then, my other cat, um, peeing on my sleeping bag.

KYLE BIEDERMANN : Was he trying to ask if it, did he think it was me that peed on you?

KYLA: Well, actually, um, I don't know what, I told him about the cats. And then, I told him the one time, one morning, I told him that, when you were, you used to live with us, we used to all get up in the morning. We used to all come on you and Momma's bed, and when we did, um, Loren came, and she got sick. And, she threw up.

KYLE BIEDERMANN : Uh-huh.

KYLA: Sort of on you. I told him that.

KYLE BIEDERMANN: Yeah. Okay, precious. All right, precious. Well, what kind of doughnuts do you want?

KYLA: Um, let me see. Uh, do they still have tiger tails?

KYLE BIEDERMANN : Yeah. Want a tiger tail?

KYLA: I guess.

KYLE BIEDERMANN: Okay.

KYLA: And, if they don't, um, I, I don't know what I want.

KYLE BIEDERMANN: Well, don't let Mommy know I'm coming.

KYLA: Okay.

KYLE BIEDERMANN: And then, you guys just look out the window. It's gonna take me about 15 minutes to get them. Okay?

KYLA: Okay.

8. Audio Taped Transcript of August 8-10, 2001:

KYLE BIEDERMANN: Hi.

KYLA: Um, you know, right after I called you, I went to the beauty shop. I sat down, and the phone rang, and it was you.

KYLE BIEDERMANN : Oh, good, Kyla.

KYLA: 'Cause, you got right back, right, you got back right after I called you.

KYLE BIEDERMANN: Well, good.

KYLA: Did she, did, um—

KYLE BIEDERMANN : Linda told me you called.

KYLA: Yeah?

KYLE BIEDERMANN: *I just wanted to make sure I got you. I didn't think I'd get you on the phone. So, is Mommy taping these phone calls?*

KYLA: How am I supposed to know? I think so.

KYLE BIEDERMANN: Well, you know, is there a record button, or some kind of beeping thing on the phone, that you have to (inaudible)—

KYLA: I don't know.

* * * * *

KYLA: Okay, Daddy? I think I told the guy about, um, what Momma and, I know I told the guy that, um, that, about the, them telling us it's our fault that ya'll have arguments. And, I told him that me and Laura think, feel like, um, uh, we, it's our fault that the divorce came up.

KYLE BIEDERMANN : Uh-huh. But, that they're making you feel that way?

KYLA: Yeah.

KYLE BIEDERMANN : Okay.

KYLA: I told them all the bad things about Momma, and I told them (inaudible).

9. Audio Taped Transcript of August 8-10, 2001:

KYLE BIEDERMANN : Next summer. A whole school year, when you're off for the summer, again, and you're—What's the little beeping noise?

DANA TRUE: I don't know.

KYLE BIEDERMANN : **That must be the, that must be the tape. They're probably taping our conversations, girls.**

DANA TRUE: What?

KYLE BIEDERMANN: Who's on the phone, right now?

DANA TRUE: Me.

KYLE BIEDERMANN: Just you?

DANA TRUE: Yes.

KYLA: And me, and Kyla.

KYLE BIEDERMANN: You hear that little beeping noise? The beep-beep?

KYLA: Yes.

KYLE BIEDERMANN: That must be the, that they're taping it.

* * * * *

KYLA: —she told us that, um, she told us that Daddy shouldn't be coming by, 'cause it makes, 'cause we know it makes trouble. And, she said, I don't come by and see you, when, um, when you're with Daddy. And, I said, yeah, that's because you don't love us that much.

KYLE BIEDERMANN : Oh. Oh, my precious. Well, that's because she sees you, all the time. I don't get to see you. And, that's because I want to see you, and she really doesn't need to, 'cause she sees you all the time.

KYLA: Well, that's what I told her, because she doesn't love us.

KYLE BIEDERMANN: Yeah. And, what'd she say?

KYLA: She said, no that is not true.

KYLE BIEDERMANN: Yeah, well. See, Kyla, you understand what's going on. That's what's so good, Kyla. You can see right through all that

garbage. You can see right through it. And, uh, and, if you girls want to see me, that's what's important. That's what you girls want, not what she wants. Right?

KYLA: Uh-huh.

KYLE BIEDERMANN: Well, I appreciate you girls very much. I appreciate it very much. All right, girls, why don't you try to give me a call a little bit later, Okay?

KYLA: Okay.

10. **Audio Taped Transcript of August 16, 2001:**

KYLA: It was good. Where did you go?

KYLE BIEDERMANN: Huh? (inaudible)

KYLA: (inaudible) And, that's it?

KYLE BIEDERMANN: That's it.

KYLA: (inaudible) Why? We still haven't convinced them yet? (inaudible)

KYLE BIEDERMANN: I've got (inaudible)

KYLA: **Why haven't we? We've told them everything that Momma does wrong. There's so many things bad. And, everything you do right. And, we still haven't convinced them?**

KYLE BIEDERMANN: Not yet, Kyla.

KYLA: Why? What more do they need?

* * * * *

KYLA: On Monday, and then Momma gets us again? Why? I feel—

KYLE BIEDERMANN: Well, it's gonna be like this for a while. I'm sorry.

KYLA: ***Have we come to a point where I can go down to pharmacy and call you?***

KYLE BIEDERMANN: I don't thing (inaudible)

KYLA: Why?

KYLE BIEDERMANN: Kyla, I can't talk about this (inaudible), okay?

KYLA: Why?

KYLE BIEDERMANN: I just can't.

KYLA: What's wrong? Do they know that you're thinking it?

KYLE BIEDERMANN: **Well, no. But, they tape everything you say, Kyla. So (inaudible)**

KYLA: Who does?

KYLE BIEDERMANN : (inaudible) I'll talk to you tomorrow, okay? I'll come and get you tomorrow, and (inaudible)—

5. **Actions of Kenneth Kyle Biedermann Violating “Emergency Sua Sponte Order” of August 20, 2001**

Emergency Sua Sponte Order in pertinent part states:

THEREFORE, the Court does make and enter the following Orders which are effective immediately for the protection of said minors and for their best interest.

- (1) The original Petitioner, AVIAN ANN BIEDERMANN, the natural Mother, shall be the sole temporary managing Conservator of the four minor children with all the power, authority, duties, etc., as provided by law.
- (2) Until further Orders of the Court, the natural Father, KENNETH KYLE BIEDERMANN, the original Petitioner, shall have no contact or communication, **in any manner, way, form or fashion** with said minors until further Orders of this Court. Moreover, said Father shall not go, for any reason, within one hundred (100) yards of the original Petitioner's residence and/or where a reasonable person would anticipate said minors being at such time, including schools, churches, etc.
- (3) Any and all Orders and agreements heretofore made in this case, not in conflict with this Order, or that does not violate [sic] the intent or spirit of this Order, shall remain in full force and effect.

- (4) The Father shall not contact and/or attempt to contact, in any manner, the Mother, except by or through her attorney, the attorney ad litem in this case, Dr. Jack Ferrell or such party the said Dr. Jack Ferrell shall designate in writing.

Kyle Biedermann has directly violated the Emergency Sua Sponte Order on at least four instances:

1. On **September 10, 2001**, during the school's open house, Dana True's teacher, Sharon Holmes, told Avian Biedermann that Kyle Biedermann has called the school to talk to her. Kyle Biedermann attempted to convince Sharon Holmes to allow Kyle Biedermann to see and speak with Dana True while she is at school.
2. On or about **September 14, 2001**, Kyle Biedermann threatened Avian Biedermann's brother-in-law, insisting that he convince Avian Biedermann to let him speak with the children. Avian Biedermann's brother-in-law works at Ace Hardware for Kyle Biedermann.
3. On **September 15, 2001**, Brad Sultemeier approached Avian Biedermann after church and forcefully insisted that he speak with her. He insisted that Avian Biedermann let Kyle Biedermann visit with the children. Brad Sultemeier is a friend of Kyle Biedermann's, they play basketball together.

The instances described directly violate the Sua Sponte Order, which the Court entered on August 20, 2001. Kyle Biedermann was ordered by this Court to refrain from contacting or communicating with the children and Avian Biedermann *in any manner, way, form or fashion*. Kyle Biedermann intentionally engaged the help of his friend to harass Avian Biedermann at church. Kyle Biedermann went straight to Dana True's teacher to coerce her into helping him violate the Emergency Sua Sponte Order and see Dana True. Kyle Biedermann took advantage of his position at Ace Hardware to entice and blackmail Avian Biedermann's brother-in-law into helping him violate the Order. Kyle Biedermann obviously fails to recognize the serious nature of this Order and of the Court's authority to the detriment of the children.

6. **Authority for the August 20, 2001 "Emergency Sua Sponte Order"**

The Texas Supreme Court has previously addressed this type of order, with approval, in *Page v. Sherrill*, 415 S.W.2d 642, 645 (Tex. 1967), and stated:

There would seem to be no room for doubt of the power of a court to enter an order, without notice to the parents, for the temporary custody of a child of parties to a pending suit for divorce.

Statutory support for the order is found in Tex. Fam. Code Ann. § 105.001.

7. **Best Interest of the Child**

The “best interest of the child” is always the primary consideration in determining questions of managing conservatorship, possession, and support of and access to a child. *Tex. Fam. Code* § 153.002 [conservatorship]; § 153.252 [possession and access]; and § 154.122 [support]; *Davis v. Davis*, 794 S.W.2d 930 (Tex. App.--Dallas 1990, no writ). It has been stated that the best interest of the child is the backbone of American Family Law, when custody is an issue. *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App.--Houston [14th Dist.] 1995, mand. motion overr.). Additionally, the best interest of the child, and not rules of pleading and practice, are the primary concern in child custody and support cases. *Cohen v. Sims*, 830 S.W.2d 285 (Tex. App.--Houston [14th Dist.] 1992, writ denied). In determining child custody cases, the technical rules of pleading and practice need not be strictly followed: it is the best interests of the child that are paramount. *D _____ F _____ v. State*, 525 S.W.2d 933 (Tex. App.--Houston [1st Dist.] 1975, writ ref'd n.r.e.).

8. **Totality of The Circumstances**

Just as the best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession of, and access to a child, the court must give deliberate thought to and weigh all the facts and circumstances that bear directly or indirectly on a child, including, but not limited to, present or future physical, mental, emotional, educational, social, disciplinary and moral welfare, well-being, stability, and developmental needs. *Fair v. Davis*, 787 S.W.2d 422 (Tex. App.--Dallas 1990, no writ).

In determining the best interest of the child, the court must consider the circumstances of the parents. In a divorce suit, the trial court's findings of fact as to the mother's and father's emotional stability, the father's good moral character and mother's lack thereof, and the advantages of a superior home environment the child would obtain if the court granted the father custody supported the court's ultimate conclusion that it was in the child's best interest for the father to have custody. *Glass v. O'Hearn*, 553 S.W.2d 15 (Tex. Civ. App.--Fort Worth 1977, no writ). It is proper for the court to consider the influences the child may be subjected to and how the environment will affect the child's education and moral training and not just the question of food and clothing alone. *Sarosdy v. Sarosdy*, 297 S.W.2d 852 (Tex. Civ. App.--Dallas 1957, no writ).

Some factors to consider in determining the best interest of the child are:

1. the emotional and physical needs of the child now and in the future,
2. any emotional and physical danger to the child now and in the future,
3. the parenting ability of the individuals seeking custody,
4. the stability of the home or proposed placement,
5. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and
6. any excuse for the acts or omissions of the parent.

Holly v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976).

9. **Role of the Ad Litem**

Tex. Fam. Code Ann. § 107.014 mandates that a court appointed attorney ad litem shall investigate to the extent the attorney ad litem considers appropriate to determine the facts of the case.

10. **Child Abuse**

Tex. Fam. Code Ann. § 261.001(1) (A) &(B) defines [child] abuse to include the following acts or omissions by a person:

(A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning.

Tex. Fam. Code Ann. § 104.006 provides as follows:

In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside of the presence of the jury, the court finds that the time, content, and circumstances of the state provide sufficient indications of the statement's reliability and:

- (1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or

(2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.

11. Audio Taping of Children's Telephone Conversations With Parent

As long as a parent has the good faith belief that recording is in the child's best interest, the parent may vicariously consent on behalf of the child to the recording of the child's cell phone conversations. *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998). The custodial parent's good faith concerns for his minor child's best interest may, without liability under the Federal Wiretapping Statute, empower the parent to intercept the child's conversations with her non-custodial parent. *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998).

There may be limited instances where a parent may give vicarious consent on behalf of a minor child to the taping of telephone conversations where that parent has a good faith, objectively reasonable basis for believing that the minor child is being abused, threatened, or intimidated by the other parent. *Silas v. Silas*, 687 So. 2d 368 (Ala. App. 1996). As long as the guardian of the child has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interest of the children, the guardian of the child may vicariously consent to the interception on behalf of the children. *Wagner v. Wagner*, 64 F. Supp. 2d 895 (U.S.D.C. Minn. 1999).

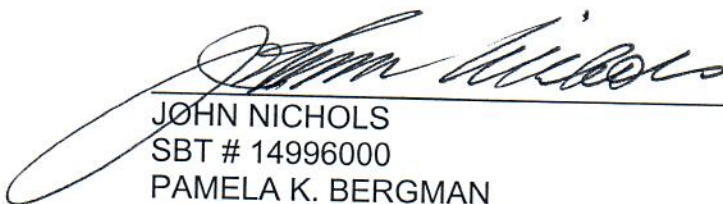
12. Parental Alienation Syndrome

Parental Alienation Syndrome refers to a pattern of behavior that arises almost exclusively out of child custody disputes. It is a disorder in which children, programmed by the allegedly loved parent, embark upon a campaign of denigration of the allegedly hated parent.

1. Alienating behaviors may arise when one parent becomes irrationally angry, feels shamed or fears loneliness. Looking at parental alienation from this broader perspective may allow for more accurate detection as well as more reliable findings.
2. A parent of questionable mental health might suffer profound damage to their self-esteem after a marital breakup and try to feel better by denigrating the other parent to the child. Some parents may engage in alienating behaviors to deflect attention from themselves, hoping their own personal imitations will not be discovered. The personality makeup of some parents is such that revenge seems like the only viable option in response to the feeling wounded by the divorce.

Respectfully submitted,

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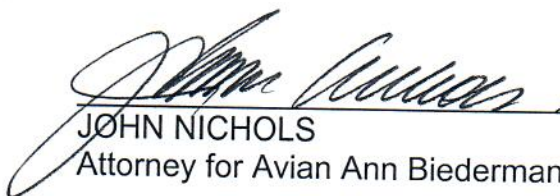
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Certificate of Service

I certify that a true copy of the above was served on each attorney or party in accordance with the Texas Rules of Civil Procedure on this the 25 day of September, 2001.



JOHN NICHOLS

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