

1987

Marsha Diane Rush v. Larry Gene Rush : Brief of Respondent

Utah Court of Appeals

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Lee Anne Walker; Virginia Curtis Lee; Attorney for Respondent.

Phillip W. Dyer; Attorney for Appellant.

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MARSHA DIANE RUSH,
Plaintiff and
Respondent,

Defendant and Appellant.

Case Priority 14.b

APPEAL FROM THE JUDGMENT AND DECREE OF DIVORCE
IN AND FOR THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
CIVIL NO. D85-2636, THE HONORABLE RICHARD H. MOFFAT, PRESIDING

LEE ANNE WALKER
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FILE

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Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

STATE OF UTAH

Defendant and
Appellant.

Case Priority 14.b

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Attorneys for Respondent

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IN THE COURT OF APPEALS

STATE OF UTAH

MARSHA DIANE RUSH,

Plaintiff and
Respondent,

VS.

LARRY GENE RUSH,

Defendant and
Appellant.

Case No. 870092-CA

Case Priority 14.b

BRIEF OF RESPONDENT

IDENTIFICATION OF ADDENDA

Respondent/plaintiff has attached copies of the following as an addendum to this brief:

1. Stipulation as to Issues Settled and Issues Reserved dated November 14, 1986.
2. Decree of Divorce entered February 10, 1987.
3. U.C.A. 78-3a-2(10) and (14) [1953]

STATEMENT OF FACTS

This tragic case arose from brain and skull injuries appellant husband (Larry) sustained in a gyrocopter accident June 16, 1983. (R. 122) As a result, Larry suffers long-term disabilities affecting cognitive, emotional and intellectual control. These disabilities interfere with his ability to handle money and finances and his ability to care for his children. (R. 136-138, Ex. 1-P)

After reaching a plateau in his recovery, Larry repeatedly demonstrated poor financial judgment. In March 1985, he spent Social Security benefit money on himself, rather than paying bills. (R. 198) Later that year, Larry went to California with rental money from a shop on the parties' sole piece of real property; the rental payments had been temporarily awarded to respondent wife (Marsha). Marsha was unable to make the mortgage payments on the parcel; to avoid foreclosure she was forced to refinance her car. Larry then refused to pay the real property taxes and used Social Security money necessary to pay the taxes for truck repairs. (R. 104-105, 199-202) Larry withdrew monies from the parties' joint bank account without Marsha's knowledge, resulting in overdrafts. (R. 203, 212) Larry's mother signed to withdraw money from the account without Marsha's knowledge. (R. 212) At the time of trial, Larry was living with his mother and she was handling his money

for him. (R. 239)

The value of the parties' sole parcel of real property, the chief marital asset, was not a disputed issue. Nor was the equity in the property or the total amount of marital debt. Counsel for each party stipulated that a realtor suggested the parties' real property be listed for \$115,000. Larry's counsel commented, "Whether that is or isn't what it is worth is something we could ultimately determine with the passage of time. (R. 186-187) Larry was afforded the opportunity to put on evidence regarding the value of the real property; in his financial declaration he valued the property at \$60,000.00, based upon an "educated guess." (R. 58) At the trial, Larry presented no testimony whatsoever regarding the value of the real property, however. In fact, Larry did not testify at all; no guardian ad litem was appointed for him. No witness testified in Larry's behalf. Several medical reports offered in evidence constituted Larry's case in chief. (R. 246-248, Exs. 6-D, 7-D and 8-D)

The evidence was uncontroverted that both Larry and his mother were abusive toward the parties' children. The parties' oldest daughter, Sharon, was traumatized by Larry's abuse of her and didn't complete high school. (R. 189) In October 1985, when living with his mother, Larry badly battered and bruised the parties' son, Ricky.

(R. 190-193) The children were aware Larry was sexually violent toward Marsha; Larry exposed himself in front of the children. (R. 194) The judge interviewed the children.

Larry's mother demonstrated poor supervision of Ricky when he was visiting his father in the summer of 1986, allowing Ricky to witness sales of illegal drugs. (R. 228) In November 1985, Larry's mother told Ricky she had purposely killed Ricky's rabbits; then she stripped his new school clothes off him, dressed him in rags and sent him to Marsha with the police who had responded to a call of abuse. Several days later, Larry's mother told Ricky she had given his new school clothes to Deseret Industries. (R. 229-231, 235-236) On yet another occasion, Larry's mother beat Ricky and kicked him out to wander around Murray with no money. (R. 232)

Eighteen months after the accident, Larry's judgment was unpredictable, exposing himself and others to physical danger by building a huge fire in a small wood stove. (R. 149-150) His rehabilitation physician, Dr. Clark, advised him, and the Drivers License Bureau as well, that he was not able to make sufficient judgments to drive safely. (R. 13-14) Nevertheless, Larry insisted upon driving. In May 1986, Larry's driving, with the children in the car, scared "the living daylights" out of Marsha. (R. 117-118, 225)

Efforts at vocational rehabilitation from January 1984 through March 1985 failed. (R. 145-152, Ex. 2-P) Despite all the problems, however, Marsha was highly supportive of efforts to treat and rehabilitate Larry. (R. 126-127, 151, 175-176) Larry's mother was unable to accept his problems and limitations. (R. 127-129, 150-151, 152, 238) He was under his mother's control. (R. 239)

Larry was not the only disabled person in the family. Trial counsel stipulated to the admission of evidence that Marsha suffers from a learning disability. (r. 177, Ex. 5-P) Ricky has severe behavioral problems (hyperactivity) that require therapy and a high degree of supervision. (R. 187)

Marsha testified it would be her sole responsibility to raise the children. (R. 212-213) She testified it would be difficult to find housing comparable in expense to the mobile home she and the children lived in on the back of the parties' real property. (R. 92-93)

Marsha grossed about \$774 per month as a nurse's aide and received \$242 in Social Security benefits for the two minor children. (R. 215, 205) She testified that her adult daughter, Sharon, who lived with her and worked as a housekeeper in a nursing home, contributed "very little" to household expenses. (R. 217-218) Marsha's expenses were \$1,454 per month. (R. 53) Despite Larry's financial

irresponsibility, she was current in her expenses at the time of trial. (R. 204)

It does not appear in the record that Marsha stopped receiving the shop rental payment of \$500 per month in 1987 when the real property was sold. Nor does it appear that her \$121 Social Security benefit payment terminated upon divorce or that the net equity realized from the sale of the real property after payment of marital debts and Larry's medical bills, was about \$16,000.

Larry's Social Security income and expenses remained at \$708 per month. (R. 131) Larry presented no evidence of unmet financial needs. The \$242 benefit for the children and the \$121 for Marsha were not deducted from Larry's \$708, but were in addition to it. (R. 204-206) The Decree awarded only these benefits to Marsha as child support and "alimony." (R. 101-102) Larry's counsel stipulated in writing that Marsha should be awarded "at least the amount of the social Security disability payment for which she is eligible as defendant's wife or ex-wife." (R. 87) The trial court awarded her \$1.00 per year alimony. (R. 10.) Larry's medical expenses are covered by Medicaid. (R. 207) There was no testimony that either Marsha or the children had any health insurance protection.

Under these circumstances where Larry lacks the

ability responsibly to manage his own affairs and where the prospects for Marsha and the children are limited at best, the trial court's distribution of property was equitable and is entitled to a presumption of validity. The award of \$1.00 per year alimony was certainly not an abuse of discretion. The Court's order regarding visitation was not unreasonable given Larry's inability to adequately protect the children from others' abuse. The Decree of Divorce should be affirmed.

SUMMARY OF ARGUMENT

Appellant cannot complain to this Court about the trial court's distribution of marital property where 1) the value of marital assets was not disputed at trial; 2) he presented no evidence whatsoever regarding the valuation of marital assets or debts; 3) he presented no evidence of unmet financial needs or the ability to identify or manage financial resources; and 4) his only evidence indicated it might be good for him to putter around in the garage on the parties' real property.

The trial court effectively awarded respondent \$1.00 per year alimony "to preserve her right to alimony." Appellant stipulated that respondent "be awarded at least the amount of the Social Security disability payment for which she is eligible as defendant's wife or ex-wife." The trial court's order regarding support for respondent

was equitable. Appellant cannot be heard to argue otherwise.

Given the uncontroverted evidence of child abuse by appellant and his mother, the trial court's award of unsupervised reasonable visitation to appellant was more than equitable. The prospective restriction in the visitation order reflects the trial court's intention that future abuse not occur in appellant's home. Residual parental rights and duties encompass more than the right to visitation; restricting appellant's right to visitation would not constitute a deprivation of parental rights.

ARGUMENT

POINT I: TRIAL COURT'S DISTRIBUTION OF THE MARITAL ESTATE IS EQUITABLE UNDER THE CIRCUMSTANCES AND IS ENTITLED TO A PRESUMPTION OF VALIDITY.

In the distribution of the marital estate there is no fixed rule or formula. Within certain limits that have been set by the Supreme Court, the trial court may make such orders in relation to the parties as may be equitable. The trial court in a divorce action is permitted considerable discretion in adjusting the financial and property interests of the parties, and its actions are entitled to a presumption of validity. Burnham v. Burnham, 716 P.2d 781 (Utah 1986); Gill v. Gill, 718 P.2d 781 (Utah 1986); Sinclair v. Sinclair, 718 P.2d 396 (Utah 1986); and Olson v. Olson, 704 P.2d 564 (Utah 1985).

This Court has recognized an exception to this general rule. In Peck v. Peck, 61 Utah Adv. Rep. 30, filed July 2, 1987, the valuation of marital assets was was hotly disputed by the parties. Respondent/plain-

tiff, not appellant /defendant, had prepared the findings. The findings failed to assign individual values to each of the assets or a total value to the cumulative share being awarded to each party. Absent property values in the findings, this Court was unable to determine whether the trial court distributed the property equitably. The matter was remanded to clarify which party's valuation the trial court had adopted.

A party may not avail himself of the Peck exception where valuations have not been included due to that party's omission. Boyle v. Boyle, 735 P.2d 669 (Utah 1987); and Jones. v. Jones, 700 P.2d 1072 (Utah 1985). In each of those cases the valuation of assets was also a hotly disputed issue. The findings had been prepared by the appellant/defendant, however, and failed to assign values to the distributed assets. Because appellant/ defendant had failed to identify property values, this Court and the Utah Supreme Court, respectively, deemed the appellant/ defendant to have waived the right to challenge on appeal the distribution of property.

The rule can be stated, then, that in order to challenge the distribution of property an appellant must show: 1) the value of assets was disputed at trial; 2) appellant presented evidence regarding the valuation of property; and 3) through no fault of appellant valuations

were not included in the findings.

The Case at Bar

In the case at bar, the valuation of marital property and debts was not disputed. Appellant totally failed to attempt to present any evidence of valuation of any marital property or debts. The only evidence appellant presented was that it might be good for him to putter about in the garage on the real property. Appellant was given the opportunity to present evidence regarding the valuation of the real property. In response, counsel for appellant replied, "Whether (\$115,000) is or isn't what it is worth is something we could ultimately determine with the passage of time." That respondent prepared the findings is immaterial where 1) the value of marital assets was never disputed; 2) appellant made no effort to present any evidence concerning valuation; and 3) appellant presented no evidence that he wanted, needed, could manage or would even have access to any money he might be awarded from the sale of the real property. Through his failure to attempt to value the real property or indicate a financial justification for any distribution to him, appellant waived any claim to challenge on appeal the trial court's distribution of the marital estate.

Appellant was unable to manage his own finances; his mother handled his money for him. He was living with

his mother; the testimony was that his mother controlled him. Indeed, it would have been an abuse of discretion for the trial court to have awarded appellant any equity from the sale of the real property when it did not appear he might know he had it or would have any control over it.

The trial court's distribution of marital property was equitable and is entitled to a presumption of validity. This is not a case where the valuation of property was disputed and the Peck exception does not apply.

POINT II: THE TRIAL COURT'S AWARD OF ALIMONY TO RESPONDENT WAS EQUITABLE.

Appellant complains that the trial court abused its discretion in effectively awarding respondent \$1.00 per year alimony from him. Counsel for appellant stipulated that "plaintiff should be awarded at least the amount of the Social Security disability payment for which she is eligible as defendant's wife or ex-wife." The Court called this alimony in its award of support to respondent. Appellant complains.

The uncontroverted evidence was that the \$121 Social Security benefit respondent was to receive was not deducted from appellant's \$708 Social Security permanent disability award, but was in addition to it. The \$121 award from the Social Security Administration derived from

the fact that respondent was the spouse of a permanently disabled person. The \$121 award cost appellant nothing. If respondent were denied the right to receive it, appellant would not be entitled to receive any part of it. As a federal disability benefit effectively passed through to respondent, no ability to pay or need analysis was needed. especially where appellant stipulated that respondent should be entitled to the award.

Appellant's argument that the \$1.00 per year alimony the trial court awarded respondent constitutes an abuse of discretion is spurious. His attempt to deprive respondent of the Social Security benefit he stipulated she should receive is vindictive. The Court should affirm the trial court's award to respondent of the right to receive the Social Security benefit and the \$1.00 per year alimony.

POINT III: THE TRIAL COURT'S DETERMINATION RESPECTING VISITATION WAS EQUITABLE.

A trial court's determination respecting custody and visitation is equitable and will be overturned on review only for an abuse of discretion. Walker v. Walker, 707 P.2d 110 (Utah 1985).

The tragedy in this case is the extent to which appellant has been left cognitively, emotionally and intellectually unable to manage and control his own affairs. Before the accident he was an able father; his children love him.

Respondent expressed her desire that the children be able to spend time with their father.

Unfortunately, there was considerable evidence of child abuse by appellant and by his mother. Appellant lives with his mother. Appellant objects to the trial court's visitation order because "it predicated husband's visitation on the conduct of a non-party over whom he has no control. Nowhere does the court indicate . . . that husband can control the conduct of his mother."

Sadly, it is appellant's lack of control over his mother, with whom he lives, and his inability to protect his children from her conduct, which prompted the trial court to enter the visitation order it did. The trial court balanced the children's right to safety with husband's right to unsupervised, unrestricted reasonable visitation. The visitation order imposes only the minimal restriction that there be no abuse of the children when the children are visiting appellant. Clearly, the visitation order is in the best interest of the children under the circumstances of historical abuse. The visitation order is surprising liberal given the abuse.

Appellant equates his right to reasonable visitation with all of those statutorily defined residual parental rights and duties he yet possesses after he stipulated that the trial court award respondent custody of the minor

children:

1. Responsibility for support;
2. Right to consent to adoption;
3. Right to determine the child's religious affiliation;
4. Right to reasonable visitation unless restricted by the court;
5. Right to consent to marriage;
6. Right to consent to enlistment;
7. Right to consent to major medical, surgical or psychiatric treatment. (U.C.A. §78-3a-2(10))

The statute defines "termination of parental rights" to mean "the permanent elimination of all parental rights and duties, including residual parental rights and duties, by court order." (U.C.A. §78-3a-2(14), emphasis added.) That simply is not the case here. The trial court's order not not purport to affect any residual parental right or duty other than the right to reasonable visitation. The legislature has given the trial court the right to restrict visitation. The trial court did not restrict appellant's visitation, unless and until there is abuse. Given the uncontroverted evidence of abuse and the fact that the trial judge interviewed the children, the restriction is grounded in reason and compassion for appellant's rights as a non-custodial parent. The visitation order

should be affirmed.

CONCLUSION

Respondent/appellant Marsha Diane Rush respectfully requests that this Court affirm the Decree of Divorce entered by the trial court in this matter on February 10, 1987. Under the facts of this case, the award of the balance of the equity in the parties' real property to respondent, after payment of marital debts and appellant's medical bills, was equitable and is entitled to a presumption of validity. This was not a case where the value of marital property was disputed. Appellant presented absolutely no testimony indicating an interest in or need for any proceeds from the sale of the parties' real property; there was testimony indicating that if appellant were awarded any of the net proceeds, he would not be able to responsibly manage the money anyway. Appellant cannot challenge the distribution of the marital estate where he presented no evidence for the trial court to weigh.

The award of alimony was based upon appellant's stipulation and he cannot be heard to complain that it was inequitable.

Given the uncontroverted evidence of child abuse by appellant and by his mother, the visitation order is quite liberal. If appellant is not able to protect his children when they visit him, only his visitation rights

will be affected. His remaining parental rights and duties will not be affected. The trial court's visitation order should be affirmed.

DATED: September 25, 1987


VIRGINIA CURTIS LEE


LEE ANNE WALKER

Attorneys for Respondent

ADDENDUM

FILED IN CLERK'S OFFICE
Salt Lake City, Utah

DEC 18 1986

H. Dixon Hindley, Clerk 3rd Dist. Court
By [Signature] Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

MARSHA DIANE RUSH,)	STIPULATION AS TO ISSUES
)	SETTLED AND ISSUES RESERVED
PLAINTIFF)	
V)	
LARRY GENE RUSH,)	CIVIL NO. D85-2636
)	JUDGE <u>[Signature]</u>
DEFENDANT)	

Upon the stipulation of the parties, based on the prior orders, the partial agreement reached at the pre-hearing before Commissioner Pueller, and the distribution of personal property pursuant to that agreement, the following matters have been settled:

1. Plaintiff should be awarded the custody of the parties' minor children, subject to reasonable visitation by defendant, not to include visitation inside the plaintiff's residence, and not to involve picking up or delivering the children before 8 a.m. or after 8 p.m. It is contested whether there should be other restrictions on visitation, as no overnight visitation.

2. That the issues of support, payment of debts and obligations, and disposition of the real property are reserved for disposition by the Court. The issue of plaintiff's attorney's fees and costs is reserved.

3. That the Court should award the mobile home to

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plaintiff, the 1981 Subaru to plaintiff, and the truck to the
defendant, as in the prior orders. The parties should assume the
obligations of these respective items as awarded and hold the
other harmless therefrom.

4. That defendant be responsible for and hold plaintiff
harmless from any debts or judgments he incurred since the
separation of the parties and for the repair bill incurred for
his truck. That the parties be responsible for and hold each
harmless from their own debts and obligations from the date of
the divorce.

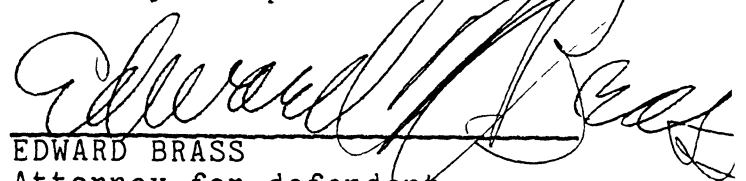
5. That plaintiff be awarded at least the amount of the
Social Security disability payment for which she is eligible as
defendant's wife or ex-wife. It is contested whether she should
be awarded alimony.

6. Issues raised in prior proposed stipulations and not
included in this stipulation are to be considered contested.

DATED this 14 day of NOVEMBER, 1986.



LEE ANNE WALKER
Attorney for plaintiff



EDWARD BRASS
Attorney for defendant

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FEB 6 1987

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H. Dixon Hendley, Clerk 3rd Dist. Court
By R. Grotz Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

MARSHA DIANE RUSH,)	DECREE OF DIVORCE
PLAINTIFF)	<i>BL 212 NO. 3864</i>
V)	<i>2-10-87 - 8:34 AM</i>
LARRY GENE RUSH,)	JUDGE RICHARD H. MOFFAT
DEFENDANT)	CIVIL D85-2636

This matter came on regularly for hearing on Wednesday, the 19th day of November, at 10 a.m. and thereafter as required for the matter to be heard. The plaintiff was present and represented by her counsel, Lee Anne Walker. Defendant was present and represented by his counsel.

Upon the testimony of the parties and their witnesses, exhibits received, the stipulations of the parties, the argument of counsel, and for good cause appearing, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Plaintiff is granted a decree of divorce, to be final upon entry.

2. Plaintiff is awarded the custody of the parties' minor children, subject to reasonable rights of visitation at reasonable times and places being vested in the defendant. In this regard, visitation will not take place at the residence or home of the plaintiff, and defendant shall give 48 hours

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advance notice of when he wishes to visit with the children. The children shall not be required to go on visitations with the defendant if they reasonably do not desire to do so. The minor son of the parties may visit overnight with the defendant on those occasions when the defendant and the minor son so agree. The minor son is in no way obligated to visit overnight with the defendant, and may refuse to do so at any time.

3. If there is any problem about abuse of the minor son by the defendant or his mother, or if the mother of the defendant in any way interferes with the visitation privilege, such privilege will be terminated.

4. The defendant may drive a vehicle with the children in said vehicle only so long as the children are comfortable with him doing so. In the event they express any discomfort with his driving, he is to cease driving them immediately, and make other arrangements for transportation.

5. The real property of the parties is ordered sold. The past due debts of both parties that were incurred prior to separation, including the medical bills of the defendant, shall be paid out of the proceeds of that sale. The balance of the equity in said property is awarded to the plaintiff for the purpose of her procuring housing for her and the minor children.

6. Alimony is awarded the plaintiff in a sum equal to the monthly Social Security payment paid to her as the former spouse of a disabled person, plus \$1.00 to preserve her right to alimony.

7. Child support is awarded to plaintiff only in the amount

of the support benefit payable to the minor children under Social Security. The defendant is ordered to assign such benefits above-described, and do all other things necessary to assure that the plaintiff and children receive the same.

8. Each party shall pay their own attorney's fees and costs in this matter.

9. The Court awards the mobile home to plaintiff, the 1981 Subaru to plaintiff, and the truck to the defendant. The parties should assume the obligations of these respective items as awarded and hold the other harmless therefrom.

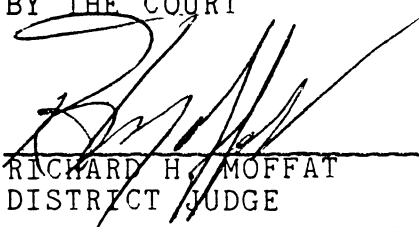
10. The defendant is ordered to be responsible for and hold plaintiff harmless from any debts or judgments he incurred since the separation of the parties and for the repair bill incurred for his truck. The parties are ordered to be responsible for and hold each harmless from their own debts and obligations from the date of the divorce.

11. The parties are both restrained from harrassing each other at all times.

12. The personal property and furniture is awarded as divided.

DATED this 6th day of February, 1987.

BY THE COURT



RICHARD H. MOFFAT
DISTRICT JUDGE

ATTEST

H. DIXON HINDLEY
CLERK

By K. Gutierrez
Deputy Clerk

APPROVAL AS TO FORM:

EDWARD BRASS
Attorney for defendant

MAILING CERTIFICATE

I CERTIFY that I mailed a true and correct copy of this Decree of Divorce to defendant's counsel, Edward K. Brass, at his office at 321 South 600 East, Salt Lake City, UT 84102 postage prepaid through the U. S. mails this 26th day of January, 1987.

Lee Anne Walker

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Utah Code Ann. 78-3a-2 .

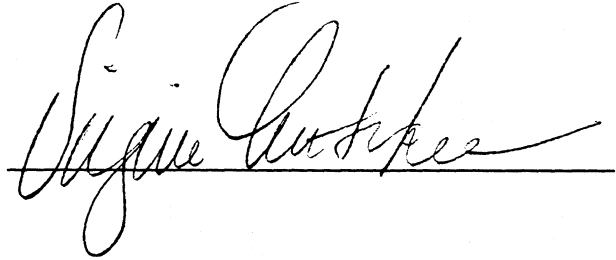
U.C.A. 78-3a-2. Definitions. - As used in this act:

(10) "Residual parental rights and duties" means those rights and duties remaining with the parent after legal custody or guardianship, or both, have been vested in another person or agency, including, but not limited to, the responsibility for support, the right to consent to adoption, the right to determine the child's religious affiliation, and the right to reasonable visitation unless restricted by the court. If no guardian has been appointed, "residual parental rights and duties" also include the right to consent to marriage, to enlistment, and to consent to major medical, surgical, or psychiatric treatment.

(14) "Termination of parental rights" means the permanent elimination of all parental rights and duties, including residual parental rights and duties, by court order.

CERTIFICATE OF SERVICE

The undersigned certifies by her signature affixed hereto that on this 25th day of September, 1987, she personally hand delivered seven copies and the original of Respondent's Brief to the Utah Court of Appeals and four copies of the same upon Phillip W. Dyer, Attorney for Appellant, Larry Gene Rush.

A handwritten signature in cursive script, appearing to read "Signe Rush", is written over a horizontal line.