

2007

# Hanson v. Hanson : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bradley G Nykamp.

Scott L Wiggins.

---

## Recommended Citation

Brief of Appellant, *Hanson v. Hanson*, No. 20070575 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/385](https://digitalcommons.law.byu.edu/byu_ca3/385)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

## IN THE UTAH COURT OF APPEALS

---

CHAD JASON HANSON,

Petitioner/Appellee,

vs.

ALLISON SARA HANSON,

Respondent/Appellant.

**BRIEF OF APPELLEE  
(CHAD J. HANSON)**

Appellant Case No. 20070575-CA

(District Court No. 014905177)

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah  
The Honorable Robert P. Faust

Scott L. Wiggins (5820)  
**ARNOLD & WIGGINS, P.C.**  
American Plaza II, Suite 105  
57 West 200 South  
Salt Lake City, Utah 84101  
Attorney for Ms. Hanson  
Respondent/Appellant

Bradley G. Nykamp (8390)  
**PETERSON & NYKAMP, LLC**  
5383 South 900 East, Suite 103  
Salt Lake City, Utah 84117  
Telephone: (801) 261-2220  
Facsimile: (801) 261-2230  
Attorney for Mr. Hanson  
Petitioner/Appellee

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES & STANDARD OF REVIEW .....	1
CONSTITUTIONAL OR STATUTORY PROVISIONS OR RULES.....	2
STATEMENT OF THE CASE.....	3
Nature of The Case & Procedural History.....	3
STATEMENT OF FACTS.....	5
SUMMARY OF ARGUMENT.....	14
ARGUMENTS	
Introduction .....	17
<b>A.    A Finding of Change In Circumstance             Where Custody Arrangement Is Stipulated             and Non-litigated Has Been Satisfied. ....</b>	<b>19</b>
<b>B.    The “Best Interest of The Children”             Factors Were Carefully Considered By The Court. ..</b>	<b>21</b>
i) <b>Ms. Hanson has been an obstructionist                 and has repeatedly denied Mr. Hanson                 visitation and has undermined his                 relationship with the children. ....</b>	<b>22</b>
ii.) <b>Lack of good moral standards, and                 stability by Ms. Hanson and Mr. Hanson’s                 good moral standards and stable home                 environment are substantial factors in                 having the children in Utah. ....</b>	<b>24</b>
iii) <b>All of the children desire to live in Utah                 and the custody evaluator found that it                 would be in the best interest of the children</b>	

to reside in Utah. Mr. Hanson is also more “tuned” into the children’s feelings than Ms. Hanson. ....	26
iii.) The Children Have Significant Extended Family In Utah Which Love and Support The Children. ....	28
iv.) The court also considered other relevant factors and realized that any decision would have controversy but it was a choice between good and much better.....	28
v.) The court also considered other relevant factors and realized that any decision would have controversy but it was a choice between good and much better.....	28
CONCLUSION .....	29

## TABLE OF AUTHORITIES

### **Constitutional Provisions Cited: None**

### **Cases Cited:**

<i>Paryzek v. Paryzek</i> , 776 P.2d 78 (Utah Ct. App. 1989) . . . . .	1
<i>Martinez v. Martinez</i> , 728 P.2d 994 (Utah 1986) . . . . .	1
<i>Childs v. Childs</i> , 967 P.2d 942 (Utah Ct. App. 1998) . . . . .	1
<i>Hansen v. Hansen</i> , 736 P.2d 1055 (Utah Ct. App. 1987) . . . . .	1
<i>Smith v. Smith</i> , 793 P.2d 407 (Utah Ct. App. 1990) . . . . .	1, 18, 20, 23
<i>In Re Estate of Bartell</i> , 776 P.2d 885 (Utah 1989) . . . . .	2
<i>Sigg v. Sigg</i> , 905 P.2d 908 (Utah Ct. App. 1995) . . . . .	2
<i>Cummings v. Cummings</i> , 821 P.2d 472 (Utah Ct. App. 1991) . . . . .	2
<i>Moon v. Moon</i> , 790 P.2d 52 (Utah Ct. App. 1990) . . . . .	14, 17, 18
<i>Erwin v. Erwin</i> , 773 P.2d 847, 849 (Utah Ct. App. 1989) . . . . .	18
<i>Nutter v. Nutter</i> , 688 P.2d 454, 455 (Utah 1984) . . . . .	18
<i>Tucker v. Tucker</i> , 910 P.2d 1209, 1214 (Utah 1996) . . . . .	18, 19
<i>Davis v. Davis</i> , 749 P.2d 647, 648 (Utah 1988) . . . . .	18
<i>Moody v. Moody</i> , 715 P.2d 507, 510, (Utah 1985) . . . . .	19
<i>Shioji v. Shioji</i> , 712 P.2d 197, 201 (Utah 1985) . . . . .	19
<i>Hgge v. Hogge</i> , 649 P.2d 51, 55 (Utah 1982) . . . . .	19, 20, 21
<i>Elmer v. Elmer</i> , 776 P.2d 599, 605 (Utah 1989) . . . . .	20, 21
<i>Entwistle v. Entwistle</i> , 61 A.D.2d 380, 402 N.Y.S.2d 213 (1978) . . . . .	23

### **Statutory Provisions:**

<i>Utah Code Ann.</i> , § 78A-4-103(2)(h) . . . . .	1
<i>Utah Code Ann.</i> , § 30-3-37 . . . . .	3, 7, 15, 22
<i>Utah Code Ann.</i> , § 30-3-10(1)(a) . . . . .	17
<i>Utah Code Ann.</i> , § 30-3-10.2 . . . . .	17

### **Rules:**

<i>Judicial Council Rule</i> 4-903 . . . . .	14
--	----

## **JURISDICTIONAL STATEMENT**

Jurisdiction rests with this Court pursuant to *Utah Code Ann.*, § 78A-4-103(2)(h).

## **STATEMENT OF THE ISSUES & STANDARD OF REVIEW**

**Issue:** Mr. Chad J. Hanson has not appealed any part of the trial court’s decision. The issue appealed by Allison S. Hanson is whether the trial court abused its discretion and erred as a matter of law in modifying child custody.

**Standard of Review:** “Custody determinations are matters within the broad discretion of the trial court and [the appellate court] will not disturb their determinations so long as they are consistent with the standards set by appellate courts, and are supported by adequate findings of fact and conclusions of law.” *Paryzek v. Paryzek*, 776 P.2d 78, 83 (Utah Ct. App. 1989) (citing *Martinez v. Martinez*, 728 P.2d 994, 995 (Utah 1986)). And “[w]here the trial court may exercise broad discretion, [the court of appeals] presume[s] correctness of the court’s decision absent ‘manifest injustice or inequality that indicates a clear abuse of discretion.’” *Childs v. Childs*, 967 P.2d 942, 944 (Utah Ct. App. 1998), (quoting *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App. 1987)). See also *Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990) (holding that “[t]he trial court’s factual findings are presumed correct and unless they are shown to be ‘clearly

erroneous’ under Utah R. Civ. P. 52(a), they will not be set aside on appeal.”) (*quoting In Re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *see also Sigg v. Sigg*, 905 P.2d 908, 912 (Utah Ct. App. 1995) (holding that “[a] trial court’s factual findings and underlying a holding of material change of circumstances in a divorce decree and determination of the child’s best interest may not be disturbed unless clearly erroneous.” (*citing Cummings v. Cummings*, 821 P.2d 472, 476 (Utah Ct. App. 1991)). And a trial court’s findings regarding the children’s best interest will not be disturbed unless clearly erroneous. *Hudema v. Carpenter*, 989 P.2d 491, 497 (Utah Ct. App. 1999) quoting *Sigg v. Sigg*, 905 P.2d 908 (Utah Ct. App. 1995).

### **CONSTITUTIONAL OR STATUTORY PROVISIONS**

**Constitutional Provisions: None**

**Statutory Provisions:**

*Utah Code Ann.*, § 78A-4-103(2)(h)

*Utah Code Ann.*, § 30-3-37

*Utah Code Ann.*, § 30-3-10(1)(a)

*Utah Code Ann.*, § 30-3-10.2

**Rules:**

*Judicial Council Rule 4-903*

## **STATEMENT OF THE CASE**

### **Nature of the Case & Procedural History**

This is a child custody matter between Mr. Chad J. Hanson (Mr. Hanson) and Allison S. Hanson (Ms. Hanson). At the time of the parties' divorce, they entered into a stipulated custody arrangement regarding their four (4) children. The children are currently ages 10, 12, 14, and 14. All four children expressed a desire to live in Utah rather than Louisiana and desire a closer relationship and more time with Mr. Hanson and extended family that live in Utah. Mr. Hanson has a very vibrant active extended family in Utah and Ms. Hanson's parent's also live in Utah.

Ms. Hanson admitted in trial that over about a three years period she deprived Mr. Hanson his visitation rights as set forth in the Divorce Decree and had refused to grant minimum visitation required in *Utah Code Ann.*, § 30-3-37. Ms. Hanson has repeatedly denied the children a meaningful relationship with Mr. Hanson. Further, Ms. Hanson admitted that she hung up the telephone on Mr. Hanson when he was talking with the children and the Child Custody Evaluator found that Ms. Hanson was an obstructionist when it came to Mr. Hanson visiting with his children. In one instance, Mr. Hanson's request to see his children was denied and the police were called to assist. Ms. Hanson stated that Mr. Hanson had already had his 28 days and was not entitled to any more.



When the children visited Mr. Hanson in Utah, Ms. Hanson would incessantly call the children's cell phones and send numerous text messages so that Mr. Hanson's uninterrupted parent time was never interrupted.

Ms. Hanson moved from Utah two times and ultimately stayed in Louisiana. Ms. Hanson first moved to Louisiana with the children so that she could pursue a romantic relationship with her ex-husband; Ms. Hanson cohabitated with him while he was married to another woman. The relationship failed.

On or about September 24, 2004, Mr. Hanson filed a Verified Answer to Petition to Modify Decree of Divorce and Counterclaim wherein he denied Ms. Hanson's Petition to Modify and requested custody of the children. After spending over two years trying to make a workable visitation plan, and having failed, Mr. Hanson set the matter for trial which began May 8, 2007.

After a two day trial, the trial court ruled that it was in the best interest of the children to reside with Ms. Hanson within 150 miles of Salt Lake City, Utah or if she refused to relocate, then Mr. Hanson would be granted custody. Ms. Hanson refused to relocate and Mr. Hanson has had custody of the children since About August 2007. There have been no issues with visitation in the 18 months Mr. Hanson has had custody of the children.

## **STATEMENT OF FACTS**

1. Mr. Hanson and Ms. Hanson were husband and wife from January 16, 1993, until a Decree of Divorce (“Decree”) was entered by the Court on October 26, 2001. (*See* R. at 2; and R. at 44-52.)

2. The custody and visitation provisions in the Decree resulted from the parties’ negotiation and ultimate stipulation and were not litigated (R. 16-17) and Ms. Hanson was granted primary physical custody (R. at 45).

3. The parties had four children of issue of the marriage: Tylar J. Hanson (born June 26, 1993); Skylar S. Hanson (born June 26, 1993); Mackenzie R. Hanson (born January 25, 1995); and Brenna K. Hanson (born June 19, 1997). (*See* R. at 33.) At the time of the trial, Tylar and Skylar were one month shy of 14 years old, Mackenzie was 12 and Brenna was almost 10 years old.

4. About 1 year after the divorce, Ms. Hanson decided to move Louisiana to pursue a relationship with her ex-husband Charles Murphy; at the time, Mr. Murphy was still married (R. 599:27:16-24; 599:191:14-24). Ms. Hanson and Mr. Murphy cohabitated for about 10 months (R. 599:191:14-24) and the relationship failed *Id.*

5. In 2003, Ms. Hanson moved back to Utah for a short period of time and then without providing 30 days notice as required by the Decree and statute (R. 45), moved the children back to Louisiana (R. 599:38:13-25 and 39:1-7).

6. The parties stipulated and the Court ordered that Kim Peterson, MSW, LCSW, could conduct a Child Custody Evaluation and a commensurate report (R. 252).

7. Mr. Peterson interviewed the children in Louisiana and in Utah (R. 599:75:21-24).

8. At trial Mr. Peterson testified:

“all the children very definitely preferred Utah over Louisiana and would prefer living in this state which has a lot to do with the fact that not only is their father here but a substantial number of their relatives” (R. 599:76:18-21).

9. Mr. Hanson and Kim Hanson are husband and wife and are purchasing a five bedroom home in South Jordan (R. 599:14-17).

10. Mr. Hanson has worked at Hinckley Dodge since the divorce. His monthly gross income is approximately \$10,522.00 (R. 599:142:18-19).

11. Ms. Hanson has worked for CARE, Inc., since she moved to Louisiana and is struggling financially despite getting a substantial raise in 2006 (R. 600:239:9-10). Her monthly gross income is approximately \$2,742.62 based upon Ms. Hanson's 2006 W-2 submitted to the Court (600:239:9-10).

12. Ms. Hanson openly acknowledge under oath to the Court that she has deprived Mr. Hanson of his visitation rights and she started denying Mr. Hanson his visitation when in her mind Mr. Hanson became unreasonable (R. 600:264:8-12). Further, Ms. Hanson admitted under oath that she has not given Mr. Hanson the visitation rights set forth in their Decree and she has not granted him visitation rights according to the statutory minimum for out-of-state visitation pursuant to *Utah Code Ann.* § 30-3-37 (R. 599:273:2-13).

13. From the time of the divorce in 2001 and up to trial in 2007, Ms. Hanson routinely denied Mr. Hanson visitation (R. 598:23:19-25 and 34:1-10).

14. The Child Custody Evaluation notes that Ms. Hanson has been an obstructionist about Mr. Hanson visiting with his children (R.599:84:25 and 85:1-4). For example, prior to leaving to Louisiana in 2003, Ms. Hanson took the kids to her parents' house. *Id.* Mr. Hanson tried to visit the children and Ms. Hanson refused (R. 599:36:10-17). Mr. Hanson called the police to assist him in seeing his children. *Id.* Ms. Hanson told the police officer that Mr. Hanson had already had his 28 days and was not entitled to any more time. *Id.* Ms. Hanson did not allow the children to even pack their things most of which were at Mr. Hanson's home; she then took the children to Louisiana (R. 599:37:1-25 and 38:1-22).

15. The only visitation Ms. Hanson currently allows Mr. Hanson is every other Christmas and part of the summer break (R. 599:85:23-25 and 86:1-6).

16. Ms. Hanson admits she has refused to pay the travel costs required of her in the Decree to permit Mr. Hanson to have his visitation/parent time (R. 45). Ms. Hanson's refusal/failure to comply with the Decree, which specifically ordered Ms. Hanson to assume all costs of out-of-state visits, has occurred on more than one occasion (R. 600:272 and 273-2-13).

17. At least one of the children reported Ms. Hanson hanging up on Mr. Hanson when the children attempted to talk to him (R. 599:87:16-23). Prior to her move to Louisiana in 2002, on one occasion, Ms. Hanson dropped the minor children off at a parking lot rather than at Mr. Hanson's home (599:11-25).

18. Ms. Hanson makes the children feel guilty about visiting Mr. Hanson (599:88:9-15). The children have reported that Ms. Hanson "feels sad" about them (the children) visiting Mr. Hanson. *Id.*

19. Ms. Hanson has eavesdropped in on conversations and telephone calls between Mr. Hanson and the children (R. 599:67:13-25 and 68:1-4).

20. When Mr. Hanson has visitation with the children in Utah, Ms. Hanson frequently calls or sends text messages to the minor children, including during the periods of what are to be uninterrupted visitation (R. 599:43:17-25 and 44:1-6; 599:69:15-25). In

addition, sometimes as a condition of allowing Mr. Hanson to have visitation in the first place, Ms. Hanson has required her parents (grandparents) to get visitation with the children prior to Mr. Hanson getting to exercise his visitation with the children (R. 599:43-17-25 and 44:1-6).

21. Mr. Hanson has not denied or attempted to limit these calls and messages by Ms. Hanson or her parents' visitation, which demonstrates that he has not and would not hamper Ms. Hanson's contact with the children (R. 599:43-17-25 and 44:1-6).

22. The conduct by Ms. Hanson has negatively affected the relationship between Mr. Hanson and the children (R. 444:23).

23. None of the children report Mr. Hanson saying anything negative about Ms. Hanson but at least one of the children indicated that Ms. Hanson speaks negatively about Mr. Hanson (599:87:16-18).

24. Each and every one of the four children expressed a desire to live in Utah and want to spend more time with Mr. Hanson and with both extended families which are in Utah (R. 599:76:18-21). The children need meaningful relationships with both extended families that live in Utah and this includes grandparents on both sides and aunts and uncles on Mr. Hanson's side (R. 599:65:18-25 and 66:1-25 and 67:1-20).

25. Mr. Hanson's entire extended family gets together on a monthly basis for dinner and to spend time together (R. 599:65:18-25 and 66:1-25 and 67:1-20). The

relationships of the children to the extended family, including Mr. Hanson, however, are being hampered due to the children residing in Louisiana. *Id.*

26. Because Ms. Hanson is at work, the children are unsupervised every day from the time they get out of school until Ms. Hanson gets home from work (R. 599:100 3-16). The period of unsupervised time averages at least 2.5 hours daily *Id.*

27. Mr. Hanson's wife, Kim Hanson, is at home and she is available to be with the children after they return home from school. The children and Mr. Hanson's wife have a close and warm relationship (R. 599:159:10-25; 160:1-25, 161:1-25). Kim Hanson actively involved Mr. Hanson's children in the planning and participation of her wedding to the children's father. *Id.* Kim Hanson clearly cares for and loves the children and will be fully involved in their lives and activities. *Id.* Mr. Peterson, the custody evaluator, found that Kim Hanson also has good parenting skills and is nurturing and attentive (R. 599:841-25). Mr. Peterson indicates the children have developed a good relationship with Kim Hanson. *Id.*

28. Mr. Hanson and his wife have a baby boy that was born in December, 2006 (R. 599:161:3-7). This baby boy is the children's half-brother. *Id.* If the children remain in Louisiana they will be unable to develop as meaningful a relationship with their half-brother as they would if they lived in Utah and had contact with him on a regular basis (R. 599:86:1-6).

29. Mr. Peterson testified to the following conclusions, which the Court found persuasive and which are listed in no particular order (R. 446-448):

- All the children prefer to live Utah over Louisiana.
- The children are not especially happy about living in Louisiana.
- Ms. Hanson's move to Louisiana is a concern, especially given her unwillingness to return to Utah once her relationship with her ex-husband did not work out.
- In the long run, the children would be happier if they were to live in Utah.
- The twins, Tylar and Skylar, differ as to which parent they desire to live with. Tylar desires to live with his father and Skylar would rather live with her mother. The third child, Mackenzie would rather live with her father, unless her mother returned to Utah, then she would rather live with her, but later indicated that she would rather live with her father. The youngest child, Brenna, indicated that she would like to live with her mother and then had no opinion.
- Tylar, was slightly more bonded to his father, while Skylar was more bonded to her mother, and Mackenzie and Brenna appeared to be equally bonded to both parents. The Court finds that this really benefits both parents.



- All of the children preferred Utah to Louisiana which has to do with the children missing their father, but also wanting to spend more time with extended families.
- The children have a significant bond with each other and “separating them, especially if they were to live in different states, is not in their best interests.”
- Ms. Hanson struggles to find time to do things with the children.
- Ms. Hanson is somewhat rigid in how she deals with the children’s emotions and is less sensitive to their feelings than Mr. Hanson.
- Mr. Hanson is more tuned to the children’s feelings than is Ms. Hanson and they have a good relationship with him.
- Ms. Hanson was “somewhat obstructionistic about visits.”
- With regard to the children’s needs and capabilities, the parents compliment one another and have unique strengths and weaknesses.
- Both parents are adequate and capable and one does not appear to be significantly better than the other.
- The children needed to spend significantly more time with their father and extended family and that it was in their best interests to do so.

- Mr. Hanson is remarried and has a two-parent household. Mr. Peterson believes this to be an advantage to Mr. Hanson and that his being married adds some stability.
- It is in the children's best interest to have more contact with their relatives.
- Mr. Hanson has greater resources and Ms. Hanson has less money and is struggling financially.

(R. 446-448).

30. Kim Peterson, the child custody evaluator believed, that Mr. Hanson is the parent most likely to allow frequent and continuing contact with the non-custodial parent (R. 599:112:23-25 and 113:1-2).

31. When the court asked Mr. Peterson "you indicate there's a recommendation that the kids return to Utah, correct?" Mr. Peterson responds with "[t]hat's what I'm saying would be in their best interest" (R. 599:109:12-15).

32. Mr. Peterson the child custody evaluator testified that:

aside from whatever strengths and weaknesses each one of these parents have, I've come to the conclusion that if I'm really just taking about the children's best interest that I believe that if they lived in Utah, things would actually be better for them (R.599:110:5-9).

33. When Mr. Peterson was asked if it would be better for the children to be in Utah he stated: That's my opinion, yes." And when asked why, Mr. Peterson stated:

Two reasons; first reason - well, actually there's three. First reason is the relationship with their father, I believe they would benefit from having more frequent contact with him. Second reason is the extended family which includes both members of the father's as well as the mother's family that live here. I feel the children would benefit from being able to have more interaction and contact with members of their extended family; and the third reason would be simply the fact that the children do prefer Utah to Louisiana.

(R. 599:79:12-25 and 80:1)

34. Ms. Hanson's parents are and remain an important support factor for her and they live in Utah (R. 600:226:10-14), as evidenced by the fact that Ms. Hanson's mother flew from Utah to Louisiana to care for the children, while Ms. Hanson was in Utah for the hearing on this matter (R. 600:224:22-25 and 225:1-10).

### **SUMMARY OF ARGUMENT**

The trial court carefully considered all of the relevant factors set forth in *Moon v. Moon*, 790 P.2d 52 (Utah Ct. App. 1990) and carefully considered the child custody evaluator's opinion and report which considered the factors set forth in Rule 4-903 of the

Judicial Council Rules. The trial court properly found that it would be in the best interest of the children to reside in Utah. The court ruled that if Ms. Hanson would return to Utah, she would retain custody, but that if Ms. Hanson did not return to Utah, Mr. Hanson would be granted custody. The court's decision is in the best interest of the children and is amply supported by the evidence and findings of fact; further, the court properly considered the children's relationship to Ms. Hanson as primary caregiver. In no way was the court's decision an abuse of discretion or in violation of any principle articulated by this Court.

A decree divorcing the parties was entered on October 26, 2001, and the custody arrangement in the Decree was a result of the parties' negotiation and stipulation and not litigation. Over a period of 6 years, Ms. Hanson routinely denied Mr. Hanson his visitation rights both pursuant to the Decree of Divorce and pursuant to *Utah Code Ann.*, § 30-3-37. Even when Mr. Hanson obtained his visitation, Ms. Hanson incessantly called and sent text messages to the children so that he had no uninterrupted parent time. At the time of trial the ages of the children were: Tylar J. Hanson (13); Skylar S. Hanson (13); Mackenzie R. Hanson (12); and Brenna K. Hanson (9). (*See R. at 33*). All of the children desire to live in Utah, to be by their father and extended family. Ms. Hanson's parent's live in Utah, and nearly all of Mr. Hanson's family lives in Utah. Mr. Hanson and his extended family get together on a monthly basis for family parties and they also

get together on holidays, birthdays, etc. Mr. Peterson, the child custody evaluator, found that it is in the best interest of the children to live in Utah for three reasons: 1) the children want more contact with their father and they would benefit from more contact with him; 2) extended family on both sides live in Utah; and 3) all four children desire to live in Utah rather than Louisiana.

Additionally, Ms. Hanson has cohabitated with a married man since the divorce and has had a couple other boy friends but is not married. Mr. Hanson has remarried and is in a stable loving relationship and his wife, Kim Hanson and they recently had a baby boy, a half brother to the children. Kim Hanson is very involved with Tylar, Skylar, Mackenzie, and Brenna, she even had them help plan her wedding to their father.

In 2007, at the conclusion of the trial, the Court's order stated that Ms. Hanson would retain custody of the children if she resided 150 miles of Salt Lake County, Utah. However, if she failed to comply with the Court's order, custody would transfers to Mr. Hanson. Because Ms. Hanson refused to relocate, the children have been with Mr. Hanson since August 2007. The children are happy and there have been no issues with visitation Between Mr. Hanson and Ms. Hanson since Mr. Hanson has had the children.

## **ARGUMENT**

### **I. Introduction**

The trial court's decision should be affirmed. The trial court's central focus in this case is "the best interest of the children." The trial court properly considered all of the facts, testimony and evidence. The facts, testimony and evidence at trial overwhelmingly supported the trial court's decision that it is in the best interest of the children to reside in Utah. If Ms. Hanson would move to Utah, she would retain custody, if she would not, Mr. Hanson is awarded custody. Statutory factors for "best interest of the child" found at *Utah Code Ann.*, § 30-3-10(1)(a) include:

(i) the past conduct of and demonstrated moral standards of each of the parties; (ii) which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent; and (iii) those factors outline in Section 30-3-10.2

The court of appeals in *Moon v. Moon*, 790 P.2d 52, 54 (*Utah Ct. App.* 1990), has set forth some factors which may be used to determine the "best interest of the children" and they include the following:

The need for stability in custodial relationship and environment; maintaining an existing custodial bond; the relative strength of parental bonds the relative strength of parental bonds[;] [t]he relative abilities of the parents to provide care, supervision, and a suitable environment for the children to meet the needs of the children; [p]reference of a

child able to evaluate custody questions; [t]he benefits of keeping siblings together, enabling siblings bonds to form; [t]he character and emotional stability of the custodian; [t]he desire for custody; and the apparent commitment of the proposed custodian to parenting.

*Id. Citations omitted.* The court in *Moon* went on to state that the “factors are highly personal and individual” and the “trial court is in a much better position to gain the necessary understanding to make the best decision possible under the circumstances” and the trial court is accorded broad discretion so that it may use its first-hand proximity to the parties to resolve the delicate and highly personal problems presented in custody disputes.” *Id.* at 55-55. See *Erwin v. Erwin*, 773 P.2d 847, 849 (Utah Ct. App. 1989); see also *Nutter v. Nutter*, 688 P.2d 454, 455 (Utah 1984).

Additional factors articulated by this Court include whether the custodial parent is denying visitation; that is “[i]nterference by the custodial parent with a noncustodial parent’s visitation rights as ordered by the court may clearly be contrary to a child’s best interest” *Smith v. Smith*, 793 P.2d 407, 411 (Utah Ct. App. 1990). “In determining permanent physical custody of a minor child, trial judges are accorded broad discretion. ‘Only where the trial court’s judgment is so flagrantly unjust as to be an abuse of discretion, will [an appellate court] interpose its own judgment.’” *Tucker v. Tucker*, 910 P.2d 1209, 1214 (Utah 1996) citing *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988);

*Moody v. Moody*, 715 P.2d 507, 510, (Utah 1985) and *quoting Shioji v. Shioji*, 712 P.2d 197, 201 (Utah 1985). And, “The determination of custody ‘may frequently and necessity require a choice between good and better.’” *Tucker v. Tucker*, 910 P.2d 1209, 1214 (Utah 1996) *quoting Hogge v. Hogge*, 649 P.2d 51, 55 (Utah 1982).

While Ms. Hanson’s brief does mention the two step process set forth in *Hogge v. Hogge*, 649 P.2d 51, 53 (Utah 1982), it does not substantively argue that the process was not followed. Ms. Hanson argues the trial court did not properly weigh the following factors: 1) Ms. Hanson as the primary caregiver; 2) the need for the stability of custody; and 3) there was no compelling interest in having the children in Utah, *see* Appellant’s Brief at p. 14, 16-17. Ms. Hanson’s brief completely ignores the overwhelming evidence presented in this case that supports the position that it is in the best interest of the children to reside in Utah. The trial court’s decision was not an abuse of discretion but was founded firmly on statutory requirements, and the principles, standards and guidelines articulated by this court in case law.

**C. A Finding of Change In Circumstance Where Custody Arrangement Is Stipulated and Non-litigated Has Been Satisfied.**

Ms. Hanson’s brief argues that the two step approach to reopening a custody determination as set forth in *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982) must be followed. Ms. Hanson does not seem to substantively argue that *Hogge* has not been satisfied. Mr.



Hanson addresses the requirement in *Hogge* as follows: “In *Hogge*, the supreme court established a bifurcated procedure to obtain a change of custody: first, the parent seeking modification must establish a substantial change of circumstances occurring subsequent to the divorce; and second, that a change in custody is in the best interest of the child.” *Smith v. Smith*, 793 P.2d 407, 410 (Utah Ct. App. 1990) *citing Hogge v. Hogge*, 649 P.2d 51, 53 (Utah 1982).

Where a change of custody is sought in a non-litigated custody decree such as this case, the trial court “should receive evidence on changed circumstances and that evidence may include evidence that pertains to the best interest of the child[ren]” *Elmer v. Elmer*, 776 P.2d 599, 605 (Utah 1989); *see Smith v. Smith*, 793 P.2d 407, 410 (Utah Ct. App.) (holding that where the custody arrangement was non-litigated, the court could include evidence on the best interest of the children in establishing a change of circumstances); *see also Hudema v. Carpenter*, 989 P.2d 491, 498 (Utah Ct. App. 1999) (holding that where custody is stipulated and not litigated the substantial change of circumstances test is at a particularly low ebb).

Ms. Hanson does not substantively argue that there has not been a substantial change of circumstances but only that the factors under the “best interest of the child” were not properly considered by the court. But she raises the issue. Mr. Hanson argues that the substantial change in circumstances test has been satisfied pursuant to *Elmer v.*

*Elmer* because the custody decree was non-litigated and stipulated to by the parties and the “best interest of the children” prong satisfies both elements in this case.

Alternatively, there is a substantial change of circumstances that satisfied the *Hogge* test.

**B. The “Best Interest of The Children” Factors Were Carefully Considered By The Court.**

The trial court carefully considered the best interest of the children factors and found that it is in the best interest of the children to reside in within 150 miles of Salt Lake County, Utah. Ms. Hanson argues the trial court did not properly weigh the children’s need stability and that she has been the children’s primary caregiver. The court did consider these issues, and the evidence is overwhelming that it is in the best interest for the children to reside in Utah and when all the factors are given due weight, the trial court ruled properly. Ms. Hanson is sabotaging a relationship between the children and Mr. Hanson and the children being in Louisiana encourages or promotes Ms. Hanson’s obstructionist behavior, Ms. is not setting a good moral standard for the children and Mr. Hanson has remarried and is cooperative in ensuring visitation will be accomplished.

**i.) Ms. Hanson has been an obstructionist and has repeatedly denied Mr. Hanson visitation and has undermined his relationship with the children.**

Ms. Hanson admitted under oath that she had denied Mr. Hanson visitation both pursuant to the Decree of Divorce and *Utah Code Ann.*, § 30-3-37 (R. 599:273:2-13); she started denying him visitation because in her mind he was being unreasonable (R. 600:264:8-12). She routinely denied him visitation from 2001 up until trial in 2007 (R. 599:23:19-25 and 34:1-10). Kim Peterson, the child custody evaluator, also found that Ms. Hanson has been an obstructionist (R. 599:84:25 and 85:1-4), that Ms. Hanson has hung up on Mr. Hanson when he was talking to the children (R. 599:87:16-23), dropped the children off at a parking lot rather than his house (R. 599:11-25), and that she makes the children feel guilty and sad about visiting Mr. Hanson (R. 599:88:9-15). Further, she eavesdrops on phone calls between Mr. Hanson and the children (R. 599:67:13-25 and 68:1-4), and when Mr. Hanson does have visitation with the children she incessantly calls and text messages so that Mr. Hanson has no uninterrupted parent time (R. 599:43:17-25 and 44:1-6; 599:69:15-25).

This Court has stated:

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

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

*Smith v. Smith*, 793 P.2d 407, 411 (Utah Ct. App. 1990) citations omitted.

And, It is readily apparent that the respondent's very act of preventing the [minor] children from being with their father is an act so inconsistent with the best interest of the children as to, per se, raise a strong probability that the mother is unfit to act as the custodial parent. *Id. citing Entwistle v. Entwistle*, 61 A.D.2d 380, 402 N.Y.S.2d 213, 215-16 (1978).

Ms. Hanson's actions in denying visitation and incessantly interrupting visitation clearly outweigh her being the primary caregiver and Mr. Hanson would argue even necessitates that she not have primary custody of the children. Ms. Hanson is effectively violating every trust and attribute of good character that a primary caregiver should have. Even so, the court in being cautious ordered that she would retain custody if she would move back to Utah. Arguably, many of the issues would have disappeared if she would have moved back to Utah and the children would have had more frequent contact with Mr. Hanson and extended family. However, Ms. Hanson declined to move to Utah and therefore custody was awarded to Mr. Hanson in Utah. The child custody evaluator stated that Mr. Hanson is much more likely to facilitate visitation (R. 599:112:23-25 and

113:1-2) and he has never said anything negative to the children about Ms. Hanson (R. 599:87:16-18) even though the petitioner has said negative things about him to the children. *Id.*

In sum, Ms. Hanson's denial of visitation and obstructionist behavior outweighs her as the primary caregiver and stability factors. Her actions have demonstrated that she should not be the primary caregiver.

**ii.) Lack of good moral standards, and stability by Ms. Hanson and Mr. Hanson's good moral standards and stable home environment are substantial factors in having the children in Utah.**

Ms. Hanson did not set a good moral standard; she originally moved herself and the children out to Louisiana to pursue a relationship with her ex husband Charles Murphy who was still married at the time (R. 599:27:16-24; 599:191:14-24); Ms. Hanson and Mr. Murphy cohabitated for about 10 months (R. 599:191:14-24) and the relationship failed. *Id.* Ms. Hanson also has had sexual relations with another man and admits to staying at his house but is not married to him (R. 600:262:10-25 and 263:1-14).

Additionally, Ms. Hanson has not provided stability of location with the children. Over a period of about three years, Ms. Hanson moved the children from Utah to

Louisiana and back to Louisiana (R. 599:27:16-24; 599:191:14-24 and 599:38:13-25 and 39:1-7). Ms. Hanson works and the children are unsupervised every day from the time they get out of school until Ms. Hanson gets home from work which is about 2.5 hours every day (R. 599:100 3-16).

On the other hand, Mr. Hanson has remarried to Kim Hanson. Kim Hanson is at home and available to be with the children after they return home from school and the children and Kim Hanson have a close and warm relationship (R. 599:159:10-25; 160:1-25, 161:1-25). Kim Hanson actively involved Mr. Hanson's children in the planning and participation of her wedding to the children's father. *Id.* Kim Hanson clearly cares for and loves the children and will be fully involved in their lives and activities. *Id.* Mr. Peterson, the custody evaluator, found that Kim Hanson also has good parenting skills and is nurturing and attentive and the children have developed a good relationship with Kim Hanson (R. 599:841-25).

Mr. Hanson and wife Kim Hanson have a baby boy that was born in December, 2006 (R. 599:161:3-7). This baby boy is the children's half-brother, *id*, and if the children remain in Louisiana they will be unable to develop as meaningful a relationship with their half-brother as they would if they lived in Utah and had contact with him on a regular basis (R. 599:86:1-6).

Mr. Hanson also has more financial capacity to care for the children (R. 599:142:18-19) and Ms. Hanson is struggling financially (R. 600:239:9-10).

**iii.) All of the children desire to live in Utah and the custody evaluator found that it would be in the best interest of the children to reside in Utah. Mr. Hanson is also more “tuned” into the children’s feelings than Ms. Hanson.**

All four children were asked by the evaluator where they desired to live and all four children “very definitely” preferred Utah to Louisiana and want to spend more time with Mr. Hanson and with both extended families which are in Utah (R. 599:76:18-21). The evaluator also testified that the children need meaningful relationships with both extended families that live in Utah and this includes grandparents on both sides and aunts and uncles on Mr. Hanson’s side (R. 599:65:18-25 and 66:1-25 and 67:1-20). Mr. Hanson’s entire extended family gets together on a monthly basis for dinner and to spend time together (R. 599:65:18-25 and 66:1-25 and 67:1-20). The relationships of the children to the extended family, including Mr. Hanson, however, are being hampered due to the children residing in Louisiana. *Id.*

Mr. Peterson also testified that:

aside from whatever strengths and weaknesses each one of these parents have, I’ve come to the conclusion that if I’m really just taking about the children’s best interest that I

believe that if they lived in Utah, things would actually be better for them (R.599:110:5-9).

Mr. Peterson went on to state the three reasons why Utah is better for the children:

First reason is the relationship with their father, I believe they would benefit from having more frequent contact with him. Second reason is the extended family which includes both members of the father's as well as the mother's family that live here. I feel the children would benefit from being able to have more interaction and contact with members of their extended family; and the third reason would be simply the fact that the children do prefer Utah to Louisiana.

(R. 599:79:12-25 and 80:1).

Despite the clear evidence to the contrary, Ms. Hanson still held the untenable position that the children should not be and did not want to live in Utah; she testified that she did not know that Tylar preferred to live in Utah until 2005 and she testified that the other three children still did not want to live in Utah (R. 600:259:10-25 and 260:1-9).

Ms. Hanson is either continuing to be an obstructionist or is clearly not in touch with her children to the degree that a primary caregiver should be. *Id.* However, the child custody evaluator found that Mr. Hanson is “more sensitive and tuned into their feelings” than Ms. Hanson (R. 599:261:5-5).



**iv.) The Children Have Significant Extended Family In Utah Which Love and Support The Children.**

The children have significant extended family in Utah that love and support them. Not in the least, Ms. Hanson's parents live in Utah (R. 600:226:10-14). Furthermore, Mr. Hanson has extensive family here in Utah (R. 599:65:18-25 and 66:1-25 and 67:1-20). Mr. Peterson testified that the children need meaningful relationships with both extended families that live in Utah and this includes grandparents on both sides and aunts and uncles on Mr. Hanson's side. *Id.* Mr. Hanson's entire extended family gets together on a monthly basis for dinner and to spend time together. *Id.* The relationships of the children to the extended family, including Mr. Hanson, however, are being hampered due to the children residing in Louisiana. *Id.*

**v.) The court also considered other relevant factors and realized that any decision would have controversy but it was a choice between good and much better.**

Mr. Hanson believes it is not necessary to recite all the factors cited by the court and set forth in the statement on facts above. However, it is clear that the court considered many, many important factors in trying to determine the best interest of the

children including other conclusions testified to by Mr. Peterson which the Court found persuasive; not all will be restated here. Some of the children desired to live not only in Utah, but also wanted to live with Mr. Hanson rather than Ms. Hanson and some wanted to live with Ms. Hanson, but only if she lived in Utah (R. 446-448). But all the children, children, that are of an age and maturity to choose where they want to live, desire to live in Utah.

While the court realized that the decision it was going to make would be hard, the court believed that it is in the best interest of the children to live in Utah.

### **CONCLUSION**

The trial court decision should be affirmed. The trial court made its decision that is in the best interest of the children. The trial court carefully and painstakingly considering the statutory requirements, and those factors articulated and set forth in case law in making its decision. The trial court did not abuse its discretion and there is not manifest injustice; therefore, the trial court's decision should be affirmed.

//

//

//

Mr. Hanson should be awarded his attorney fees of this appeal of not less than \$5,000.00 and costs in defending this appeal.

DATED this \_\_\_\_\_ day of May 2009.

\_\_\_\_\_  
Bradley G. Nykamp  
Attorney for Appellee Chad J. Hanson

**CERTIFICATE OF SERVICE**

I certify that two true and correct copies of the foregoing Appellee's Appeal Brief was mailed by first class mail this \_\_\_\_\_ day of May 2009 to the following:

Scott L. Wiggins  
Counsel for the Appellant  
ARNOLD & WIGGINS, P.C.  
57 West 200 South  
Salt Lake City, Utah 84101

\_\_\_\_\_