

1987

# K. Russell Myers v. Tawnya Myers (Luke) : Brief of Appellant

Utah Court of Appeals

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**BRIEF**

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DOCKET NO. 870379-CA

IN THE COURT OF APPEALS

STATE OF UTAH

\* \* \* \* \*

K. RUSSELL MYERS,  
Plaintiff/Appellant,  
v.

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)  
)  
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)  
)

APPELLANT'S BRIEF

TAWNIA MYERS (LUKE),  
Defendant/Respondent.

Civil No. D85-1828

870379-CA

\* \* \* \* \*

AN APPEAL FROM THE DECISION OF THE THIRD  
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,  
STATE OF UTAH, THE HONORABLE MICHAEL R.  
MURPHY, PRESIDING.

\* \* \* \* \*

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ARGUMENT PRIORITY CLASSIFICATION: CATEGORY 14b

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IN THE COURT OF APPEALS

STATE OF UTAH

\* \* \* \* \*

K. RUSSELL MYERS,	)	
	)	APPELLANT' S BRIEF
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
TAWNIA MYERS (LUKE),	)	Civil No. D85-1828
	)	
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IN THE COURT OF APPEALS

STATE OF UTAH

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K. RUSSELL MYERS,	)	
	)	APPELLANT'S BRIEF
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	
TAWNYA MYERS (LUKE),	)	Civil No. D85-1828
	)	
Defendant/Respondent.	)	

\* \* \* \* \*

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Ann. Section 78-2a-3(g) (1987) and Rule 4(a) of the Rules of the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

On October 14, 1986, the defendant filed a Motion for Order modifying the parties' divorce decree to permit her to move from the State of Utah with the parties minor children. On December 23, 1987, the plaintiff filed a Motion for Immediate Change of Custody [of the parties' minor children] and Determination of Contempt against defendant. A trial on both Motions was held on February 10, 1987. This is an appeal from the decision denying plaintiff's motion and granting defendant's, rendered by the Third Judicial District Court for Salt Lake County, State of Utah, the Honorable Michael R. Murphy presiding, as announced, after trial, in open court on February 26, 1987, and formalized

by Findings of Fact and Conclusions of Law and Order entered July 23, 1987. Copies of said Findings of Fact and Conclusions of Law and Order are attached hereto as Addendum Exhibit "A".

#### ISSUES PRESENTED ON APPEAL

1. Did the trial court err by disregarding the parties' stipulation and permitting the defendant to move from the State of Utah to reside in the State of Washington with the parties' minor children without a determination that the move was not in the children's best interest and in the face of overwhelming evidence that the move was not in the children's interest.

2. Did the trial court err in awarding defendant custody of the parties' minor children when the custody evaluator who recommended that defendant retain custody admitted that his opinion was rendered without the benefit of recent psychological evaluations that he considered important to such a degree that he might change his mind on the issue of custody if the evaluations merited such a change?

3. Did the trial court err by refusing to find the defendant in contempt in the face of uncontested evidence that she knowingly violated a court order prohibiting her from moving from the state with the parties' children without court approval?

#### STATEMENT OF THE CASE

On May 20, 1985 plaintiff filed a Complaint for dissolution of the parties' marriage. (R. 2) In that Complaint plaintiff sought custody of the parties' minor

children, Nathan and Melanie. (R 3) The matter was scheduled for trial on May 22, 1986. Prior to the date set for trial, a custody evaluation was conducted by Kim Peterson (R. 38; Ex. 3-P) and psychological evaluations of the parties were performed by Dr. Barbara Liebroder. (Ex. 4-P) Mr. Peterson and Dr. Liebroder concluded that both parties were fit and proper parents to be awarded custody and control of their children (Ex. 3-P at p. 8; Ex. 4-P at p. 1, R. 100) Kim Peterson recommended that custody be awarded to defendant, but emphasized that "the children's relationship with their father is felt to be very important and should not be interrupted. [Plaintiff] has a lot to offer the children and his interest in the children needs to be utilized." (Ex. 3-P at p. 8) Dr. Liebroder conditioned her recommendation that the defendant be awarded custody by noting that "Ms. Myers should continue to reside in Utah so that Mr. Myers can have frequent visitation to their children." (Ex. 4-P at p. 1) On the date set for trial, the parties entered into a Stipulation, which was incorporated into the court's Findings of Fact and Conclusions of Law and Decree of Divorce. (R. 99-118) Paragraph 5 of the Findings of Fact and Conclusions of Law provides that:

The parties stipulated that care, custody and control of the minor children of the parties should be awarded to the defendant provided that she remain in and reside with the children in Salt Lake County, State of Utah, or within 50 miles of Salt Lake County, State of Utah and that she should not move from that area without either the permission of the plaintiff or the court, obtained by petitioning the

court for permission to leave the area and establishing that such move would be in the best interest of the children after evaluation by follow-up evaluation to be performed by Kim Peterson, the evaluator who performed the custody evaluation preceding this divorce.

(R. 100-101 and 111). The Decree of Divorce was entered on June 10, 1986.

Four months later, on October 14, 1986, the defendant filed a Motion for an Order permitting her to move from Utah with the children. (R. 138) The matter was initially set for hearing in October, 1986, but was continued to allow follow-up custody evaluations to be performed. (R. 134, 136, 142; Tr. 3-5)

In mid-December, 1986, the defendant took the children and left Utah without obtaining permission from either the court or the plaintiff. (R. 147-152; Tr. 150-151, 153-154, 176-177, 181, 184-185, 191). In fact, in December of 1986 when defendant met with Barbara Liebroder, the psychologist performing evaluations to assist the court in determining whether defendant should be allowed to remove the children from Utah, she gave no indication that she intended to leave without court approval. (Tr. p. 43) Defendant's husband indicated to Dr. Liebroder that, if the court denied defendant permission to move the children, he and the defendant would move and leave the children in Utah (Tr. p. 43).

Nevertheless, without even permitting the children to say goodbye to the plaintiff, the defendant moved with the parties' children to Washington. (Tr. pp. 118-119) That



action was taken, in part, because defendant's husband realized that, if they left the children in Utah, as per the court order, they would have less chance in prevailing in their Motion for permission to move from Utah. (Tr. 192) As a result of the defendant's actions, plaintiff was unable to see his children during the Christmas holidays.

In response to the defendant's move, on December 23, 1986 plaintiff filed a Motion for Immediate Change of Custody and Determination of Contempt. (R. 153) Plaintiff's Motion was heard on January 5, 1987, the Honorable Michael Murphy, Judge, presiding. Judge Murphy determined that the matter should be reserved for trial. (R. 159-162) Plaintiff expressed concern that his position would be adversely impacted by the fact that the children had already been moved to Washington. The court responded to that concern by holding that the issues would be resolved as if the children had not been moved. (R. 161) The court further ordered that, pending trial, evaluations of the parties and their children should be conducted by Dr. Liebroder and Kim Peterson. (R. 160-161)

Trial on plaintiff's Motion was held on February 10, 1987. Dr. Liebroder and Kim Peterson testified at the trial, and their follow-up reports were received into evidence. (Exhibits 1-P and 2-P)

Dr. Liebroder's report recommended that custody of the children be awarded to plaintiff (Tr. 23-24). The Doctor's recommendation was based upon several factors

including: (1) a finding that defendant's priorities had shifted - placing a higher priority on her new marriage and her unborn child than she placed on the best interests of the parties' children (Tr. 32-33); and (2) results of a battery of psychological tests performed on the parties, defendant's new husband and the children (Tr. 32, 38), which indicated that, since the divorce, plaintiff had made significant gains in his ability to handle stress while defendant's stability had deteriorated. (Tr. 25, 43-46)

Kim Peterson's report states:

Although I'm quite unhappy with the way [defendant] left the state against the court order, not even allowing the children and [Plaintiff] to say goodbye, I would see placement with the mother as being slightly more desirable as this approach would seem less disruptive.

(Ex. 1-P at p. 8) Mr. Peterson noted that the ideal situation would be for plaintiff to continue to reside in Utah so that the children would have continued access to plaintiff (Exhibit 1-P at p. 7; Tr. 139-140). Mr. Peterson testified that, although he had reviewed the results of psychological tests performed on the parties prior to their divorce, he had not reviewed the results of Dr. Liebroder's most recent tests. (Tr. 143-144). Mr. Peterson noted that he had confidence in Dr. Liebroder's abilities (Tr. 105) and that his opinion of the custody issue might be impacted if he discovered that Dr. Liebroder concluded that plaintiff should be granted custody. (Tr. 116)

After trial the court issued Findings of Fact. The

plaintiff considers the following findings central to the instant appeal:

4. Defendant filed a Motion for Permission to Leave the State of Utah based on defendant's husband's employment, but when the hearing of said motion was continued, defendant removed herself and the minor children to the State of Washington without the court's permission and in knowing violation of the Order of this court. (R. 173)

5. As a further change and circumstance, the plaintiff has undergone therapy in an effort to improve the emotional problems he was advised existed when the original custody evaluations were performed. (R. 173)

6. Defendant's stability has degenerated since the entry of the Decree of Divorce herein, a large part of which degeneration has been caused by post-divorce problems. (R. 174)

7. Dr. Barbara Liebroder has conducted psychological and custodial evaluations on the parties, their children, the husband of the defendant and the girlfriend of plaintiff, and concluded that it would be in the best interests of the parties' minor children for the plaintiff to be awarded the care, custody and control of said minor children even though the minor children are bonded to the defendant, the defendant has been the primary caretaker of said children and can spend more time with said children. (R. 174).

8. Kim Peterson, MSW, LCSW, recommended that it would

be in the best interests of the parties' minor children for the defendant to retain custody of the said minor children based upon the findings of the plaintiff's prior conduct and psychological problems contained in previous psychological reports, and based upon the plaintiff's being a full-time caretaker, having bonded with said children, and to avoid unnecessary trauma to the children of a change of custodial parent. He also recommended that the first choice of action in the best interest of the children would be that they remain in Salt Lake City, Utah with the defendant as their custodial parent. If that was not the order of the court, then it was slightly better that they remain in the custody of the defendant and reside in Washington than if custody was transferred to plaintiff. (R. 174)

9. The court find (sic) that both parents are fit and proper persons to be awarded custody of said minor children. (R. 175).

10. The court finds that it is in the best interest of the parties' minor children to remain in the custody of the defendant who is a full-time caretaker and who has bonded with said children, and that it would not be in the best interest of said children to change custody. (R. 175)

11. Plaintiff's motion to hold defendant in contempt of court should be denied. (R. 178)

Pursuant to those Findings of Fact the court concluded, as a matter of law, that:

1. The parties' minor children shall remain in the custody of the defendant subject to plaintiff's right to visitation, (R. 179); and

2. Plaintiff's motion to hold the defendant in contempt is denied. (R. 182)

Those conclusions were incorporated into the court's Order. (R. 185 and 188)

#### SUMMARY OF ARGUMENTS

##### POINT I

As part of the parties' divorce settlement, the defendant agreed that she would reside in the State of Utah with the parties' minor children unless the plaintiff agreed to allow her to move with the children or there was a judicial determination that the move was in the children's best interest. The defendant breached her agreement and moved the children to Washington without a determination that the move was in the best interest of the children. Absent compelling circumstances indicating that a modification of the parties' agreement was necessary, the trial court was bound to uphold the terms of the parties agreement. Furthermore, even absent an agreement, Utah law requires a trial court to determine that a move is in the best interest of the children before awarding custody of children to a parent who has moved. Thus, the trial court erred in awarding defendant custody of the children without determining that the move was in the children's best interest and in the face of overwhelming

evidence that the move was not in the children's best interest.

Moreover, the trial court erred in awarding custody to the defendant although Kim Peterson, who recommended that custody remain with the defendant, admitted that he had not reviewed the most recent psychological reports or reviewed the recommendation of Dr. Liebroder and acknowledged that his opinion might be altered if he discovered that those reports recommended that plaintiff be awarded custody.

#### POINT II

The evidence indicated, and the trial court found, that the defendant knowingly and willfully violated a court order when she moved the children to Washington without permission from either the court or the plaintiff. Therefore the court erred in refusing to find the defendant in contempt.

#### ARGUMENT

##### POINT I

THE COURT ERRED IN PERMITTING DEFENDANT TO  
MOVE THE PARTIES' CHILDREN FROM UTAH IN  
CONTRAVENTION TO THE STIPULATION OF THE PARTIES  
AND THE CHILDREN'S BEST INTEREST.

The instant matter came before the court pursuant to plaintiff's Motion for Immediate Change of Custody and Determination of Contempt. It is important to note that the characterization of that motion was necessitated by the fact that the defendant had moved the children to Washington, in

defiance of the terms of the parties' divorce decree, without permission of the court or even notice to the plaintiff. The plaintiff did not contest the custody award, to which the parties had agreed, prior to the move. At the hearing initially set for plaintiff's motion, he expressed concern that the fact that the children had already been moved to Washington would weigh against him when the court heard defendant's motion to permit her to make the move. Thus, the court held that the matter would be considered at trial as if the children were still living in Utah. As a result, at trial, the court was faced not only with the issues of custody and contempt, but with the issue of whether the defendant, as custodial parent, should be permitted to move with the children to Washington.

The custody evaluations performed by Kim Peterson and Dr. Liebroder prior to the parties' divorce, emphasized that the children's best interest would be served if the defendant, the custodial parent, remained in Utah so that the plaintiff could have easy access to the children. Their reports found that both parties were fit parents and that the children were bonded to both parents but the reports noted a slight preference for placement of custody with the defendant, principally because she was the primary caretaker.

With those recommendations in mind, the parties entered into a stipulation regarding custody, which was incorporated into their divorce decree. In that stipulation,

plaintiff agreed that defendant would be granted custody of the children and defendant agreed to reside with the children within 50 miles of Salt Lake County. Defendant further agreed that she would not breach this agreement without a determination by the court, after follow-up evaluations "that such a move is in the best interest of the children." (R. 111) Note that the Stipulation does not require only that the defendant establish that it is in the best interest of the children that she retain custody before she can move the children out of Utah. It requires that she establish that the move is in their best interest.

Both this Court and the Utah Supreme Court have made it clear that stipulations executed to settle disputes in domestic relations matters are not to be taken lightly. This position is amply illustrated in Despain v. Despain, 627 P.2d 526 (Utah 1981); 620 P.2d 1303 (Utah 1980). In Despain, the parties entered into a Stipulation and Property Settlement which was incorporated into their divorce decree. The Stipulation provided, in relevant part, that the plaintiff, in return for cash settlement, waved all other claims against the defendant, 627 P.2d at 1306, and that the defendant would provide support for the parties' children so long as they resided with the plaintiff and were full-time students. 627 P.2d at 526. Sometime later, the plaintiff in Despain determined that she had not adequately taken into account the value of a trust fund. Consequently, she moved the court for



an order granting her one-half of the trust res. The trial court granted the motion. In reversing the trial court, the Supreme Court noted that the plaintiff "totally ignored the terms of the property settlement agreement whereby she relinquished any and all claims to that part of the marital estate." 610 P.2d at 1306. The court held that the trial court erred, "for in the absence of compelling equitable considerations, the terms of the property settlement agreement are not to be abrogated." Id.

Not long after that ruling, the defendant in Despain decided that the settlement was no longer to his liking. Specifically, because the law had changed from the time of the decree so that the court had power to award child support only until the child was 21 years old, the defendant argued that he should be relieved from his obligation to support his children after they reached the age of 21. 627 P.2d at 527. The Supreme Court was not sympathetic, noting that:

Equity is not available to reinstate rights and privileges, voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where the property settlement agreement has been incorporated into the decree and the outright abrogation of the provisions of such agreement is only to be resorted to with great reluctance and for compelling reasons.

Id. at 527. The Court ruled that in matters involving child support the court retains powers of modification, even in the

face of a stipulation, but the court should exercise that power to abrogate a stipulation only where compelling circumstances necessitating the modification exist. Id.

Similarly, in Kinsman v. Kinsman, 73 Utah Adv. Rep. 110 (January 12, 1988), this Court held that a simple change of circumstances will not overcome a stipulated waiver of alimony incorporated into a divorce decree. The Kinsman Court reasoned that allowing a change of circumstances to overcome a stipulation "opens the door to abuse" as it would allow parties to negotiate settlements that hold up only so long as both parties considered the settlement beneficial, at which time they would be back in court arguing for modification based upon a change of circumstances. Id. at n.2. Consequently, permitting a court to disregard a divorce stipulation without substantial justification, promotes the likelihood that the parties will litigate their disputes in the hope of establishing finality. Id.

In the instant case, the defendant agreed not to move from Utah absent a judicial determination that the move was in the best interest of the parties' children. In fact, in Utah, such a concession is nothing more than is required by law. In Ebbert v. Ebbert, 744 P.2d 1019, 1023 (Utah App. 1987), this Court held that, even absent a stipulation, failure of a court to find that a move is in the children's best interest when awarding custody to a parent who has moved constitutes reversible error. See also Bloss v. Bloss, 711

P.2d 663 (Ariz. App. 1985)(holding that the balance between the right of a parent to travel and the interest of the children tips in favor of the children; therefore, a custodial parent must establish that a move away from the non-custodial parent is in the children's best interest before the move can be made) Thus, in the instant case, the court was bound by law, as well as by the parties' stipulation, to determine whether the move to Washington was in the children's best interest before awarding custody to the defendant.

The trial court herein failed to find that the move was in the children's best interest. The court found only that it was in the best interest of the children to remain in the defendant's custody. See Addendum Exhibit "A" at Findings of Fact paragraph 13. In truth, virtually all of the evidence introduced at trial indicates that it is not in the best interest of the children to move from Utah.

Dr. Liebroder recommended, not only that the move would not be in the best interest of the children, but that the psychological profile of the parties indicate that awarding custody to the plaintiff would be in the children's best interest. The Doctor's conclusion was based upon the fact that, as a result of therapy, plaintiff had gained in emotional stability, while defendant's stability had degenerated. The Doctor's conclusion was further supported by a finding that the defendant was not placing the best interests of her children above her own.

Kim Peterson noted that he saw placement with the mother as being "slightly more desirable, as this approach would seem less disruptive." (Ex. 1-P) Mr. Peterson's report notes that "the ideal situation would be for [defendant] to continue to reside in Utah to allow [plaintiff] continued access to his children." (Ex. 1-P, p. 7) The report also notes that the move could benefit the children if it were the only way that defendant could be a full-time mother. (Ex. 1-P at p. 7) However, at trial, Mr. Peterson testified that he had some doubt that defendant's husband could not obtain a job in Utah with wages similar to those earned in Washington. (Tr. 142).

In short, it appears that the court lost sight of a central issue in this case. The court made no finding that the move to Washington was in the best interest of the parties' children. Further, it ignored overwhelming evidence that the move was not in their best interest. By doing so, the court permitted the defendant to escape the restrictions of a stipulation which she entered into voluntarily.

Unfortunately, the fact that defendant moved to Washington before it was determined that the move was in the children's best interest adds a substantial complication to the issue now before the Court. Should defendant refuse to return to Utah, the issue, unavoidably, becomes one of custody.

It is beyond dispute that the trial court has broad

discretion in resolving custody disputes. However, the evidence in this case indicates that the court abused its discretion in granting custody to the defendant. It is true that the two custody evaluators testifying before the court came to two different conclusions. Yet, Mr. Peterson, who recommended that custody remain with defendant, admitted that he relied upon plaintiff's conduct prior to divorce and psychological problems documented in the psychological report administered prior to that divorce. Mr. Peterson acknowledged that he had not reviewed the most recent psychological reports because he believed the court wished his recommendation to be independent of Dr. Liebroder's. He also acknowledged that he often relied upon psychological reports and respected the work of Dr. Liebroder. In fact, Mr. Peterson admitted that he might change his mind about the custody issue if he discovered that Dr. Liebroder took a position contrary to his own. It is inconceivable that, in the face of those admissions, the court accepted Mr. Peterson's recommendations and awarded the custody of the children to the defendant.

Very simply, while plaintiff sympathizes with the court's difficult position in determining where custody should be placed, plaintiff believes that the trial court erred in accepting the recommendation of a custody evaluator when the evaluator admitted that he had not taken into account all factors that he considered relevant before reaching his conclusion. Consequently, plaintiff herein requests that,

should defendant refuse to return to Utah with the children, and, again, forces the issue of custody, this Court should require that a new hearing on custody be conducted.

POINT II.

THE COURT ERRED IN FAILING TO FIND  
THE DEFENDANT IN CONTEMPT IN THE  
FACE OF UNDISPUTED EVIDENCE THAT  
SHE KNOWINGLY AND WILLFULLY VIOLATED  
THE TERMS OF A COURT ORDER.

It has been long established in this jurisdiction that the "duty to hold contempt in a civil matter in order to afford relief to another party does not lie within the discretion of the trial court, although the form of punishment necessary to insure compliance with orders is, and should be, within the sound discretion of the court." Butler v. Butler, 461 P.2d 727, 729-30 (Utah 1969). Thus, where undisputed facts indicate that a party has failed or refused to "do or to refrain from doing an act ordered by the court for the benefit of the other party," the court must find the recalcitrant party in contempt. Id.

In this case, the failure of the court to find the defendant in contempt defies reason. In its Findings of Fact, the court notes that "defendant removed herself and the minor children to the state of Washington without the court's permission and in knowing violation of the order of this court." See Addendum Exhibit "A" at Findings of Fact paragraph 4. That conclusion was unavoidable, as the evidence

on the point was uncontradicted.

Moreover, no satisfactory explanation was offered for the defendant's conduct. Defendant explained that she left because the hearing on her Motion for Permission to Leave the State of Utah was continued. However, that continuation was to allow completion of follow-up evaluations. As stated in the parties' divorce decree, defendant agreed that those evaluations would be performed before she moved. Further, there was evidence that defendant's motivation was due at least in part to a belief that, if she complied with the Order and left the children in Utah, she would be less likely to prevail on her Motion. She preferred to saddle the Plaintiff with the possible disadvantage of having to argue his case in the face of the fact that the children had already moved and would have to be moved back if the court ruled in his favor. In short, the defendant sought to deny the plaintiff the protection to which she had agreed. In view of the court's ruling, it may well be that she succeeded. While it is certain that the court made every attempt to consider the matter as if the move had not taken place, it is not likely that either the court or Mr. Peterson could totally disregard the fact that if the plaintiff were granted custody the children would have to be moved from Washington.

Further, this is not a case where defendant's conduct was a slight breach, causing mere irritation to the plaintiff and the parties' children. Defendant's actions effectively

eliminated the plaintiff's rights of visitation including visitation to which he was entitled during the Christmas holidays.

Moreover, the defendant made no attempt to mitigate the impact of her actions. She did not tell the plaintiff of her plans (and she may well have intentionally concealed the plans from the court appointed psychologist). Most egregiously, she did not allow the children a chance to say "good-bye" to their father. Even Kim Peterson, who recommended that the children be awarded to the mother, termed such conduct "unconscionable."

In view of these undisputed facts, the court's decision to deny plaintiff's Motion for Contempt is both insupportable and unjust. As a result of the court's decision, the defendant is given the full benefit of her malfeasance. The plaintiff, on the other hand, is left with a reasonable question in his mind whether there is any real judicial protection of his parental rights.

#### CONCLUSION

Based upon the foregoing points and authorities, plaintiff herein requests that this Court:

1. Order the defendant to return to Utah with the parties' minor children as it is not in their best interest to reside in Washington where they do not have easy access to their father; or


2. If the defendant refuses to return to Utah,



plaintiff requests that this Court order a new hearing on custody; and

3. Plaintiff requests that this Court reverse the trial court and find the defendant in contempt for leaving Utah with the parties' minor children without permission from the court and remand the matter to the trial court to determine an appropriate sanction.

RESPECTFULLY SUBMITTED this 22 day of January, 1988.

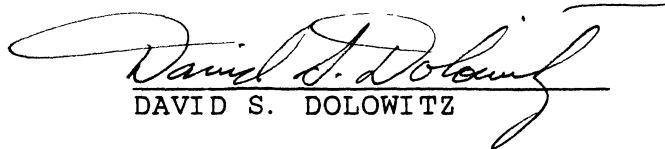
  
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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true copy of the above and foregoing Appellant's Brief, this 22 day of January, 1988, to:

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## ADDENDUM

EXHIBIT "A"

FILED IN CLERK'S OFFICE  
Salt Lake County Utah

JUL 20 1987

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By William B. Hill  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \* \*

K. RUSSELL MYERS,	)	
	)	
Plaintiff,	)	FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW
vs.	)	
	)	
TAWNYA MYERS (LUKE)	)	Civil No. D-85-1828
	)	
Defendant.	)	Judge Michael R. Murphy

\* \* \* \* \*

The plaintiff's Petition for Modification of Decree of Divorce and defendant's Petition to Leave the State of Utah came on for hearing on the 20th day of February, 1987, before the Honorable Judge Michael R. Murphy, one of the judges of the above-entitled court. The plaintiff appeared in person and was represented by counsel, David S. Dolowitz, and defendant appeared in person and was represented by counsel, James C. Haskins. The court heard testimony of the parties and the expert testimony of Dr. Barbara Liebroder and Mr. Kim Peterson and the argument of respective counsel, and the court being fully advised in the premises and having taken the matter under advisement, now makes and enters its:

### FINDINGS OF FACT

1. The Decree of Divorce was entered in this matter on the 9th day of June, 1986.

2. There have been substantial changes in circumstances since entry of the Decree of Divorce herein.

3. Pursuant to the Decree of Divorce, based on the stipulation of the parties, defendant was awarded custody of the parties' minor children provided that she remain in and reside within the jurisdiction of the court unless she obtain permission from the court to remove from the specified area.

4. Defendant filed a Motion for Permission to Leave the State of Utah based on defendant's husband's employment, but when the hearing of said motion was continued, defendant removed herself and the minor children to the State of Washington without the court's permission and in knowing violation of the Order of this court.

5. As a further changed circumstance, the plaintiff has undergone therapy in an effort to improve the emotional problems he was advised existed when the original custody evaluations were performed.

6. Plaintiff has acted in the best interests of the children of the parties.

7. Defendant's stability has degenerated since the entry of the Decree of Divorce herein, a large part of which degeneracy has been caused by post-divorce problems.

8. Dr. Barbara Liebroder has conducted psychological and custodial evaluations on the parties, their children, the husband of the defendant and the girlfriend of plaintiff, and concluded that it would be in the best interests of the parties' minor children for the plaintiff to be awarded the care, custody and control of said minor children even though the minor children are bonded to the defendant, the defendant has been the primary caretaker of said children and can spend more time with said children.

9. Kim Peterson, MSW, LCSW, recommended that it would be in the best interests of the parties' minor children for the defendant to retain custody of the said minor children based upon the findings of the plaintiff's prior conduct and psychological problems contained in previous psychological reports, and based upon the plaintiff's being a full-time caretaker, having bonded with said children, and to avoid unnecessary trauma to the children of a change of custodial parent. He also recommended that the first choice of action in the best interest of the children would be that they remain in Salt Lake City, Utah with the defendant as their custodial parent. If that was not the order of the court, then it was slightly better that they remain in the

custody of the defendant and reside in Washington than if custody was transferred to plaintiff.

10. The court finds that the parties' minor child, Nathan, is hyperactive and is in need of therapy and that continued psychological reports of Nathan's progress should be provided to the court and to the plaintiff.

11. It is reasonable that the parties should equally divide the cost of therapy for the minor child, Nathan.

12. The court find that both parents are fit and proper persons to be awarded custody of said minor children.

13. The court finds that it is in the best interest of the parties' minor children to remain in the custody of the defendant who is a full-time caretaker and who has bonded with said children, and that it would not be in the best interest of said children to change custody.

14. The continued custody of defendant should be conditioned upon defendant forthwith beginning psychological therapy, and continuing such until an appropriate report and evaluation is submitted to the court and plaintiff's counsel indicating no further therapy is required.

15. All evaluations and reports including future and past psychological and custodial reports made part of the court file should be confidential and sealed and not made available to the public.

16. The court finds that the defendant, by her acts, has not encouraged a close father/child relationship between the plaintiff and the parties' minor children, and that both parties should be ordered to do all in their respective power to encourage a healthy and close relationship between the parties' minor children and the other party.

17. The plaintiff should be awarded a specific minimum visitation schedule with the parties' minor children based upon said children residing out of the State of Utah, as follows:

a. Monthly visitation of at least one weekend with reasonable prior notice, no less than two weeks before visitation;

b. Two (2) months during the summer, upon sixty (60) days prior notice;

c. Christmas vacation commencing the day before Christmas Day and the day after Christmas Day on alternating years running until January 2 of each year;

d. Alternate Thanksgiving or Easter holiday visitation with plaintiff electing which holiday to commence with in 1987;

e. Holiday vacations should be upon prior notice of at least thirty (30) days;

f. Prior notice of intent to exercise visitation should be made in writing;



g. The plaintiff should be entitled to free telephone access to the parties' minor children.

18. It is reasonable that the defendant should notify the plaintiff when the parties' minor children are visiting with the children's grandparents in Salt Lake City, Utah so that plaintiff may visit with said children during such visits.

19. It is reasonable that since defendant has moved with said minor children from Salt Lake County, State of Utah, that the plaintiff should pay one-third (1/3) and the defendant pay two-thirds (2/3) of the cost of transporting the minor children to Salt Lake County, Utah for plaintiff to exercise visitation.

20. It is reasonable that each party should be ordered to keep the other party apprised at all times of his or her current residence address and telephone number.

21. The court finds that plaintiff is past due in the payment of his child support obligation for the months of December, 1986 and January and February, 1987.

22. The defendant should be granted judgment against the plaintiff in the sum of \$1,350.00 (retroactive from court date) for said past due support, provided that no execution should be issued on said judgment as long as the plaintiff makes his ordered child support payments each month plus \$100.00 on the arrearage until it is paid in full.

23. It is reasonable that the plaintiff's child support obligation should be abated on a pro rata basis during the times when the minor children are visiting with the plaintiff for periods in excess of a weekend.

24. It is reasonable that since plaintiff is a resident of Salt Lake County, State of Utah, that he above-entitled court should maintain jurisdiction over the parties' minor children.

25. It is reasonable that any and all previous disputes between the parties involving money matters, including but not limited to plaintiff's nonpayment of rent and attorney's fees as ordered by the court and defendant's interception of plaintiff's funds, should be washed and considered equal, with the exception of the above-described judgment for past due child support.

26. Plaintiff's motion to hold defendant in contempt of court should be denied.

27. The parties have agreed that because of the change in economic circumstances, to-wit: the remarriage of the defendant, the child support paid to the defendant should be reduced to the sum of \$225.00 per month per child, for a total of \$450.00 per month as child support, which shall be due and payable as set forth in the Decree of Divorce.

28. The parties agreed that defendant should be required to obtain health insurance on the minor children of parties and maintain that insurance as part of the agreement setting child support at \$450.00 per month on the children.

29. Each party should be ordered to pay his or her own attorney's fees and court costs incurred in bringing this action.

From the foregoing Findings of Fact, the court now makes and enters its:

#### CONCLUSIONS OF LAW

1. The parties are subject to the jurisdiction of the court.

2. The parties' minor children shall remain in the custody of the defendant subject to plaintiff's right to visitation.

3. The continue custody of the children in the defendant is conditioned upon defendant forthwith beginning psychological therapy, and continuing such until an appropriate report and evaluation is submitted to the court and plaintiff's counsel justifies termination of this requirement.

4. All evaluations and reports including future and past psychological and custodial reports made part of the court file are confidential and are to be sealed and not made available to the public, but shall be available to the court and counsel for each of the parties.

5. The parties' minor child, Nathan, shall be enrolled in therapy and continued psychological reports of Nathan's progress shall be provided to the court and to the plaintiff.

6. The parties hereto shall equally divided the cost of therapy for the minor child, Nathan.

7. Both parties are ordered to do all in their respective power to encourage a healthy and close relationship between the parties' minor children and the other party.

8. The plaintiff is awarded a specific minimum visitation schedule with the parties' minor children based upon said children residing out of the State of Utah, as follows:

a. Monthly visitation of at least one weekend with reasonable prior notice of no less than two weeks before visitation.

b. For two (2) months during the summer, upon sixty (60) days prior notice;

c. Christmas visitation commencing the day before Christmas Day and the day after Christmas Day on alternating years running until January 2 of each year;

d. Alternate Thanksgiving or Easter holiday visitation with plaintiff electing which holiday to commence with in 1987;

e. Holiday vacations upon prior notice of at least thirty (30) days;

f. Plaintiff's prior notice of intent to exercise visitation should be made in writing;

g. Plaintiff is entitled to free telephone access to the parties' minor children.

9. Defendant should notify the plaintiff when the parties' minor children are visiting with the said minor children's grandparents in Salt Lake County, Utah so that plaintiff may visit with said children during such visits to Utah.

10. Plaintiff should pay one-third (1/3) and the defendant is to pay two-thirds (2/3) of the cost of transporting the minor children to Salt Lake County, Utah for plaintiff to exercise visitation.

11. Plaintiff's child support obligation shall abate on a pro rata basis during visitation extending longer than weekends.

12. Each party should be ordered to keep the other party apprised at all times of his or her current residence address and telephone number.

13. The defendant should be granted judgment against the plaintiff in the sum of <sup>1,350.00 D.C.H.</sup> ~~\$1,800.00~~ past due support for the months of December, 1986 and January and February, 1987; provided, however, that execution on said judgment should be stayed so long as the plaintiff pays \$100.00 per month on this arrearage and is current in his ongoing child support obligation.

14. The child support obligation of the plaintiff to the defendant should be reduced to the sum of \$225.00 per month per child, for a total of \$450.00 per month as child support, the same to be due and payable as set forth in the Decree of Divorce.

15. The plaintiff should maintain health and accident insurance on the minor children of the parties for so long as he is paying child support on their behalf and if he may do so for a longer period of time under the terms and conditions on the health insurance policy obtained, he should do so.

16. The above-entitled court shall maintain jurisdiction over the parties' minor children.

17. Any and all previous disputes between the parties involving money matters, including but not limited to plaintiff's non-payment of rent and attorney's fees as ordered by the court and defendant's interception of plaintiff's funds, are washed equal, and are hereby deemed satisfied with the exception of the above-described judgment for past due child support.

18. Plaintiff's motion to hold the defendant in contempt of court is denied.

19. Each party is ordered to pay his or her own attorney's fees and court costs incurred in bringing this action.

DATED this 20<sup>th</sup> day of July, 1987.

BY THE COURT:

Michael R. Murphy  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE

Approved as to form and content:

David S. Dolowitz  
DAVID S. DOLOWITZ  
Attorney for Plaintiff

ATTEST  
H. DIXON HINDLEY  
BY Michael R. Murphy  
Deputy Clerk

2012:032387D

JAMES C. HASKINS (1406)  
HASKINS & HANSON  
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FILED IN CLERK'S OFFICE  
Salt Lake County Utah

JUL 20 1987

H Dixon Hudley, Clerk 3rd Dist. Court  
By Marlene Bill  
Deputy Clerk

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

\* \* \* \* \*

K. RUSSELL MYERS,	)	
	)	ORDER
Plaintiff,	)	Bk 213 No. 2904
	)	7-23-87-8.31am.
vs.	)	
	)	
TAWNYA MYERS (LUKE)	)	Civil No. D-85-1828
	)	
Defendant.	)	Judge Michael R. Murphy

\* \* \* \* \*

The plaintiff's Petition for Modification of Decree of Divorce and defendant's Petition to Leave the State of Utah came on for hearing on the 20th day of February, 1987, before the Honorable Judge Michael R. Murphy, one of the judges of the above-entitled court. The plaintiff appeared in person and was represented by counsel, David S. Dolowitz, and defendant appeared in person and was represented by counsel, James C. Haskins. The court heard testimony of the parties and the expert testimony of Dr. Barbara Liebroder and Mr. Kim Peterson and the argument of respective counsel, and the court being fully advised in the premises and having previously entered its Findings of Fact and Conclusions of Law, now therefore,



IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The parties' minor children shall remain in the custody of the defendant, subject to plaintiff's right to visitation at minimum as outlined hereinafter.

2. The continued custody of the minor children in the defendant is conditioned upon defendant forthwith beginning psychological therapy, and continuing such until an appropriate report and evaluation is submitted to the court and plaintiff's counsel which would justify termination of this requirement.

3. All evaluations and reports including future and past psychological and custodial reports made part of the court file are confidential and are to be sealed and not made available to the public, but shall be available to the court and counsel for each of the parties.

4. The parties' minor child, Nathan, shall be enrolled in therapy and continued psychological reports of Nathan's progress shall be provided to the court and to the plaintiff.

5. The parties hereto shall equally divided the cost of therapy for the minor child, Nathan.

6. Both parties are ordered to do all in their respective power to encourage a healthy and close relationship between the parties' minor children and the other party.

7. The plaintiff is awarded a specific minimum visitation schedule with the parties' minor children based upon said children residing out of the State of Utah, as follows:

a. Monthly visitation of at least one weekend with reasonable prior notice of no less than two weeks before visitation.

b. For two (2) months during the summer, upon sixty (60) days prior notice;

c. Christmas visitation commencing the day before Christmas Day and the day after Christmas Day on alternating years and continue thereafter until January 2 of each year;

d. Alternate Thanksgiving or Easter holiday visitation with plaintiff electing which holiday commencing in 1987;

e. Holiday vacations upon prior notice of at least thirty (30) days;

f. Plaintiff's prior notice of intent to exercise visitation shall be made in writing;

g. Plaintiff is entitled to free telephone access to the parties' minor children.

8. Defendant is to notify the plaintiff when the parties' minor children are visiting with the said minor children's grandparents in Salt Lake County, Utah so that plaintiff may visit with said children during such visits to Utah.

9. Plaintiff is to pay one-third (1/3) and the defendant is to pay two-thirds (2/3) of the cost of transporting the minor children to Salt Lake County, Utah for plaintiff to exercise visitation.

10. Plaintiff's child support obligation shall abate on a pro rata basis during visitation extending longer than weekends.

11. Each party is ordered to keep the other party apprised at all times of his or her current residence address and telephone number.

12. The defendant is granted judgment against the plaintiff in the sum of \$1,350.00 (retroactive from court date) past due support for the months of December, 1986 and January and February, 1987; provided that execution on said judgment is stayed as long as the plaintiff makes payments of \$100.00 per month on the arrearage and is current in his ongoing child support.

13. The child support that the plaintiff is to pay to the defendant for the care and maintenance of the minor children of the parties is reduced to the sum of \$225.00 per month per child, for a total of \$450.00 per month to be due and payable as set forth in the Decree of Divorce.

14. The defendant shall obtain and maintain health and accident insurance for the minor children of the parties as agreed upon by plaintiff in turn for the \$450.00 child support.

15. The above-entitled court shall maintain jurisdiction over the parties' minor children.

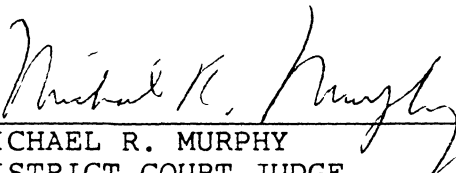
16. Any and all previous disputes between the parties involving money matters, including but not limited to plaintiff's non-payment of rent and attorney's fees as ordered by the court and defendant's interception of plaintiff's funds, are washed, considered equal, and resolved with the exception of the above-described judgment for past due child support.

17. Plaintiff's motion to hold the defendant in contempt of court is denied.

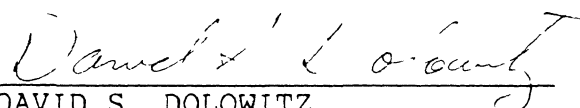
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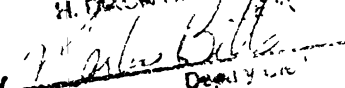
DATED this 20<sup>th</sup> day of July, 1987.

BY THE COURT:

  
MICHAEL R. MURPHY  
DISTRICT COURT JUDGE

Approved as to form and content:

  
DAVID S. DOLOWITZ  
Attorney for Plaintiff  
2012:032387E

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