

1997

Graves v. Clements : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO. 970103-CA

IN THE UTAH COURT OF APPEALS

LORIN DAVID GRAVES,	:	
	:	
Plaintiff / Appellant,	:	Appellate Case No. 970103-CA
v.	:	
	:	
TRICIA KRISTINA CLEMENTS	:	
(f.n.a. GRAVES),	:	Priority 4
	:	
Defendant / Appellee.	:	

BRIEF OF APPELLEE

TRICIA KRISTINA CLEMENTS

:

:

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE WILLIAM A. THORNE, PRESIDING

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FILED

SEP 22 1997

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LORIN DAVID GRAVES,	:	
Plaintiff / Appellant,	:	Appellate Case No. 970103-CA
v.	:	
TRICIA KRISTINA CLEMENTS	:	
(f.n.a. GRAVES),	:	Priority 4
Defendant / Appellee.	:	

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STATEMENT OF JURISDICTION

The Court of Appeals of the State of Utah has appellate jurisdiction over district court orders involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity. The Court of Appeals of the State of Utah has jurisdiction to hear this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h) (1996).

STATEMENT OF THE ISSUE

1. **Issue:** Whether the trial court abused its discretion in finding material change(s) in circumstance?

Standard of Review: Abuse of Discretion.

Authority: Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989) (citing Myers v. Myers, 768 P.2d 979, 984 (Utah App. 1989)).

STATUTES AND RULES

A. STATUTES.

Utah Code Ann. § 30-3-10.4 (1990).

- (1) On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:
 - (a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and
 - (b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.
- (2) The order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court.

B. RULES.

Rule 33 Utah R. App. P.

- (a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.
- (b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.
- (c) **Procedures.**
 - (1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.
 - (2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. This order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.
 - (3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION.

On August 21, 1995, Defendant / Appellee Tricia Kristina Clements (“Clements”) petitioned the Third Judicial District Court in and for Salt Lake County, State of Utah, to modify that court’s joint legal custody order contained in the parties’ Decree of Divorce which was entered on April 7, 1992. On September 25, 1995, Clements amended her Petition to include additional allegations supporting her claim of material change in circumstance. On September 26, 1995, Plaintiff / Appellant Lorin David Graves (“Graves”) filed his Answer and Verified Counter Petition wherein he also sought “the sole custody, care, and control of the minor children of the parties. . . .” On September 27, 1997, Graves filed his Verified Answer and Counter Petition to Defendant’s Amended Petition to Modify Decree of Divorce, wherein he again prayed for “an Order that [he] be awarded the sole custody, care, and control of the minor children of the parties. . . .” A custody evaluator was appointed and a custody evaluation was performed by that evaluator. At trial Clements sought and received leave of the court to amend her Amended Petition to conform to the evidence by including therein a prayer for the sole care, control and custody of the parties’ minor children (the “Children”). After hearing the parties’ witnesses, including the court-appointed custody evaluator, meeting with the Children, and receiving argument from the parties’ counsel, the trial court found material changes of circumstance warranting reopening the custody issue and, concomitant thereto, found that awarding the sole care, control, and custody of the Children to Clements was in the Children’s best interests.

B. STATEMENT OF FACTS.

1. The parties were divorced by Decree of the Third Judicial District Court in and for Salt Lake County, State of Utah, on April 7, 1992. (R. at 72.)

2. Pursuant to said Decree, the parties were awarded joint legal custody of the Children and Graves was awarded physical custody of the Children subject to reasonable rights of visitation in Clements. (R. at 70.)

3. The parties' Decree of Divorce arose from a stipulation between the parties in their divorce proceeding. (R. at 558).

4. Prior to the parties' separation and following their divorce, the parties worked well together for the benefit of the children by obtaining counseling in anticipation of their separation and divorce, (R. at 746), participating in family counseling together with the Children following their divorce, (R. at 748), attending parent / teacher conferences together, (R. at 774), remaining flexible about visitation, (R. at 773, 784-85), sharing child care and even residences, (R. at 784-85), maintaining an open and productive dialogue about the Children and their needs, (R. at 774), discussing parenting issues such as discipline and informal changes in the physical custody arrangement, (R. at 777), and informally changing the physical custody arrangement to meet the Children's needs, (R. at 776-77).

5. Clements married her present husband, Garry Waye Clements, in March of 1995. (R. at 780.)

6. The parties' joint custodial / co-parenting relationship began to "break down significantly" upon Clements' marriage to Mr. Clements. (R. at 775, 779-80).

7. The breakdown of the parties' joint custodial / co-parenting relationship following Clements' marriage to Mr. Clements and prior to Clements' filing of her Petition to Modify is

demonstrated by Graves' unilateral termination of the parties' informal joint physical custody arrangement, (R. at 779), Graves' efforts to restrict and inflexibility regarding Clements' visitation with the Children, (R. at 770, 776), Graves' decision to no longer attend parent / teacher conferences with Clements, (R. at 775-76), the virtual non-existence of a working relationship between the parties by August of 1995, (R. at 779), the fact that the parties were no longer communicating by August of 1995, (R. at 779), even regarding the Children's welfare, (R. at 775), Graves' refusal to involve Clements in decisions regarding the Children's welfare, including counseling and medication, (R. at 775), and Graves' declaration to Clements in May of 1995 that what went on in his home with the Children was not Clements' concern, (R. at 784).

8. The adverse effects of Graves' conduct on the parties' joint custodial / co-parenting relationship were demonstrated by the following: Graves' refusal to accept or allow the Children to accept Clements' telephone calls to the Graves home, (R. at 775, 782), Clements' sense that she could not call the Children at Graves' home, (R. at 775), Graves' refusal to permit the parties' daughter to call Clements after the daughter sprained her ankle, (R. at 783), Graves' declaration to Clements that Clements would only get the visitation Graves allowed her to have, (R. at 788), the fact that the parties no longer had any relationship by the date of trial, (R. at 781), and the custody evaluator's determination that the parties' joint custodial / co-parenting relationship was unhealthy / nonfunctioning, (R. at 413-14).

9. Graves' own testimony clearly evinces the disintegration of the parties' joint custodial / co-parenting relationship -- Graves admitted: that while the parties enjoyed a "good" co-parenting relationship immediately following their divorce, (R. at 586, 663), the parties' co-parenting relationship was not good at the time of trial, (R. at 587), that while he was initially flexible with Clements' visitation to the point of instituting an informal joint physical custody

arrangement, (R. at 592), after August of 1996 he limited Clements to a strict construction of Utah's standard visitation schedule , (R. at 576), that by trial he was no longer discussing the Children's welfare with Clements, (R. at 565-66), on at least one occasion he called Clements a "cunt" and told her to get used to the vulgarities because they would continue, (R. at 572-53), he regularly refused Clements' telephone calls, (R. at 573), and told Clements not to call his home anymore because he did not want Clements to speak with the Children while they were at his home, (R. at 607), he refused to list Clements in any way on any of the Children's school registration forms for the 1996-97 school year, (R. at 576-80), he told teachers and administrators not to call Clements regarding problems with the Children, (R. at 582), he refused to tell Clements about the Children's parent / teacher conferences, (R. at 584), he had not spoken with Clements in at least the nine to ten months preceding trial, (R. at 586), on at least one occasion he restricted Clements' visitation because he was angry with her, (R. at 603), on other occasions he refused to accommodate reasonable requests by Clements to adjust her visitation, (R. at 604-5), he refused to inform Clements that the parties' daughter had been injured, (R. at 606), he disparaged Clements to the Children, (R. at 607), he not only told the Children Clements abandoned them and left them to starve, (R. at 608), but defended the propriety of that statement at trial, (R. at 608), he told the Children Clements loves her new husband more than she loves them, (R. at 609), he told the Children Clements does not love them, (R. at 612), he told the Children Clements hid drugs in her sock drawer, (R. at 611), he told the Children Clements was tired of being their mother, (R. at 612), he told the parties' daughter Clements was sending her away so Clements could be alone with Clements' new husband, (R. at 612-13), he not only told the Children that Clements new husband does not love them, (R. at 610), but defended the propriety of that statement at trial, (R. at 610), he refused to consult with Clements regarding

their sons' attention deficit and hyperactivity disorder condition and treatment, (R. at 647), and he believes it is inappropriate for Clements to ask him to care for the Children when Clements is ill, injured, or has a doctor's appointment, (R. at 654, 662).

10. The change in Graves' relationship with the Children and the adverse effect on the Children of the breakdown of the parties' joint custodial / co-parenting relationship was equally apparent, as demonstrated by: Graves' statement to the Children, on at least one occasion, that they "are more trouble than they are worth," (R. at 613), Graves' anger / frustration with the Children when they wanted to spend additional time with Clements, (R. at 602), Graves frequently became angry with the Children, (R. at 397), the parties' daughter felt more comfortable and safer at Clements' home, (R. at 397-98, 531-32), the custody evaluator's determination that Graves' treatment of the Children was, in many respects, emotionally abusive, (R. at 405, 423), the custody evaluator's determination that the Children were not happy and well-adjusted in Graves' home, (R. at 410-11), Graves' use of his eleven-year-old son to attempt to negotiate a custody settlement with Clements, (R. at 616), Graves' contrived objection to his daughter's trip to visit her grandparents in St. George, Utah, because he wasn't "absolutely sure" she had been vaccinated against the measles, (R. at 618 -20, 635-37, 965-66), Graves' decision not to allow the Children to take their bicycles with them to Clements' home if Clements was awarded custody, (R. at 638), Graves frequently leaving the Children home alone and unsupervised, (R. at 418, 639), Graves' failure to provide for the Children's healthcare needs, (R. at 794-96), the custody evaluator's determination that Graves had obviously attempted to influence / manipulate the Children for his benefit in the custody proceeding, (R. at 428), the custody evaluator's determination that the Children enjoy a healthier bond with Clements, (R. at

410), and the custody evaluator's determination that the Children's preferences definitely favored awarding custody to Clements, (R. at 404).

11. As a consequence of the breakdown of the parties' joint custodial / co-parenting relationship and the adverse effects that breakdown was having on the Children, Clements Petitioned to modify the parties' Decree of Divorce to obtain sole care, control, and custody of the Children. (R. at 770, 853.)

12. In his Answer and Verified Counter Petition and his Verified Answer and Counter Petition to Defendant's Amended Petition to Modify Decree of Divorce, Graves, himself, sought termination of the joint custody order by seeking "an Order that [he] be awarded the sole custody, care, and control of the minor children of the parties. . . ." (R. at 118, 128, 567-68.)

13. The custody evaluator and his supervisor, both of whom were involved in performing the custody evaluation, both strongly concluded that placing the Children in Clements' custody was in the Children's best interests. (R. at 395, 410, 429, 542, 544-45.)

SUMMARY OF ARGUMENT

The issue on appeal, as stated and argued by Graves, reflects a fundamental misunderstanding of the law governing this appeal and ignorance of the facts of this case. Second, inasmuch as the original custody order in this case arose from a stipulation between the parties, the lower court was not required to find a material change in circumstance in the custodial relationship, but rather could have relied on changes in circumstance affecting the Children's best interests. Significantly, the lower court's findings of fact in that regard have not been challenged by Graves. Third, whether there was a material change in circumstance and whether the custodial relationship had been affected are not distinct issues. Rather, to the extent material change of circumstance is relevant, the appropriate inquiry is whether the trial court

abused its discretion in finding a material change of circumstance in the parties' joint custodial / co-parenting relationship. Utah Code Ann. § 30-3-10.4(1) (1990); Moody v. Moody, 715 P.2d 507, 509 (Utah 1985). That inquiry was absolutely proper and Graves has not even attempted to challenge the trial court's findings of fact on that question. Fourth, Section 30-3-10.4(2) of the Utah Code, as applied to the facts of the present case, makes consideration of material change in circumstance irrelevant and mandates affirmation of the lower court's ruling. Fifth, Graves' statement and argument of the issue on appeal is merely a convoluted debate with the factual findings of the trial court -- Graves merely attempts to reargue select facts of the case. Significantly, however, Graves does not even attempt to discharge his duty to marshal the evidence supporting the trial court's ruling. Graves' failure to marshal the evidence is fatal to his appeal. Finally, each of the foregoing arguments independently justifies affirmation of the trial court's ruling and demonstrates that Graves' appeal is without reasonable legal or factual basis. Accordingly, this court should award Clements her attorney's fees and double costs incurred herein.

ARGUMENT

I. GRAVES' FAILURE TO MARSHAL THE EVIDENCE MANDATES AFFIRMATION OF THE TRIAL COURT'S RULING.

It is axiomatic that a party challenging a Utah trial court's findings of fact must marshal all of the evidence supporting those findings, Duncan v. Howard, 918 P.2d 888, 891 (Utah App. 1996) (citing Rudman v. Rudman, 812 P.2d 73, 79 (Utah App. 1991)), and then demonstrate that the trial court's findings based upon those facts when viewed in the light most favorable to the court below, State v. Larsen, 828 P.2d 487, 490 (Utah App. 1992), are clearly erroneous. Id.;

Riche v. Riche, 784 P.2d 465, 467 (Utah App. 1989) (citing In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); State v. Walker, 743 P.2d 191, 192-3 (Utah 1987); Utah R. Civ. P. 52(a)).

Accordingly, Graves was required in his principal brief to set forth all of the evidence supporting the trial court's findings and then analyze and argue the sufficiency thereof. Graves unequivocally fails to do so. Rather, Graves has elected merely to reargue a very few select facts -- behavior clearly proscribed by this court. In Larsen, this court criticized the appellant for selecting only evidence favorable to his position and not adducing evidence supporting the trial court's findings. Larsen, 828 P.2d at 491 (citing Crookston v. Fire Ins. Exch., 817 P.2d 789, 800 (Utah 1991)). Graves' approach herein "does not begin to meet the marshaling burden [he] must carry." Id.

Graves' failure to marshal the evidence is fatal to his appeal. "If an appellant fails to marshal the evidence, 'the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.'" Id. at 490 (citing Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991)) (emphasis supplied). The effect in this, a custody case, is clearly demonstrated by this court's application of the marshaling rule in Riche. In that case this court refused "to further consider Husband's attack on the court's findings as to custody." Riche 784 P.2d at 468.

Enforcement of the marshaling rule in the present case is dispositive for at least two reasons. First, the trial court very specifically found that Graves' relationship with the Children had adversely and materially changed. Consequently, even if this court determines that the relationship between Graves and the Children is the focus of the change of circumstance inquiry, this court must affirm the lower court's ruling. Specifically, Judge Thorne found that a change in Graves' perception of his role as physical custodian and joint custodian had caused the Children

to suffer. (R. at 964.) Judge Thorne further found that Graves had become “very inflexible, controlling, and not acting with the kids’ best interest at heart, but his own,” (R. at 965) (emphasis supplied), Graves began doing everything he could to obstruct the Children’s relationship with Clements, (R. at 965), Graves prevented the kids from speaking with Clements on the phone, (R. at 965), and Graves has “developed some unrealistic expectations of kids’ abilities, particularly when they conflict with [his] own needs,” (R. at 966). Those findings are clearly sufficient to constitute a material change in Graves’ relationship with the Children. Accordingly, and inasmuch as Graves does not challenge the trial court’s finding that vesting the Children’s sole care, control, and custody in Clements is in the Children’s best interest, Graves cannot prevail in his appeal.

Second, if, as will be demonstrated below, Section 30-3-10.4 of the Utah Code Ann. (1990) and governing case law permit the trial court to examine Graves’ joint custodial relationship with Clements for a material change in circumstance, any findings in that regard will be indisputable and will, again, sustain the lower court’s ruling. In that vein, Judge Thorne found: that as of March of 1995 when Clements married Mr. Clements, that “[Graves’] desire to carry on as co-parents seemed to have evaporated,” (R. at 964), that Graves began to view his relationship with Clements as a “tug of war to see who was going to keep [the Children],” (R. at 964), that the parties’ joint custodial / co-parenting relationship had broken down, (R. at 964), that Graves’ began doing everything he could to obstruct Clements’ relationship with the Children, (R. 965), that the parties were not “co-parenting anymore,” (R. at 965), that Graves had become “autocratic,” (R. at 965), and that the joint custodial relationship had ceased to be equal, (R. at 965). As with the foregoing analysis, given these undisputed findings and inasmuch as

Graves does not challenge the trial court's finding that vesting the Children's sole care, control, and custody in Clements is in the Children's best interest, Graves cannot prevail in his appeal.

II. SECTION 30-3-10.4(2) IS DISPOSITIVE OF THIS APPEAL.

The issue on appeal, as stated by Graves, is implicitly predicated on the assumption that the lower court was required to find a material change in circumstance. Graves does not attempt to challenge the lower court's findings regarding which custodial placement was in the Children's best interest. Consequently, if the lower court did not need to find a material change of circumstance, even a successful challenge to such a finding would be futile. Such is the case in this appeal.

Section 30-3-10.4 provides, "The order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination." Utah Code Ann. § 30-3-10.4(2) (1990) (emphasis supplied). That is precisely what happened in the present case. Clements petitioned to terminate the joint legal custody order and for an award of sole care, control and custody of the Children, (R. at 770, 853), as did Graves in his Answer and Verified Counter Petition and his Verified Answer and Counter Petition to Defendant's Amended Petition to Modify Decree of Divorce when he sought "an Order that [he] be awarded the sole custody, care, and control of the minor children of the parties. . . , " (R. at 118, 128, 567-68). In view of the plain language of Section 30-3-10.4(2), Judge Thorne gave Graves much more consideration than was necessary. Actually, the lower court was not required to make any findings as to material change of circumstance because Section 30-3-10.4 mandates termination of the joint legal custody order and entry of a sole legal custody order under the facts of this case. That is precisely what the lower court did after finding that placing the Children in the sole care, control, and custody of

Clements was in the Children's best interest -- a finding which Graves has not challenged. Consequently, regardless of this court's disposition of the issue raised by Graves for appeal, the lower court's ruling must be affirmed.

III. SECTION 30-3-10.4(1) IS DISPOSITIVE OF THIS APPEAL.

The issue on appeal, as stated by Graves, is fallaciously predicated on the assumption that the material change of circumstance, if required, must have been in Graves' relationship with the Children. That error is fatal because Graves has not challenged in any way the lower court's findings relating to the parties' joint custodial / co-parenting relationship. Accordingly, if Clements can demonstrate that a material change in the parties' joint custodial / co-parenting relationship is sufficient to warrant modification of a joint legal custody order, resolution of the issue raised by Graves is absolutely irrelevant to this court's decision to affirm the lower court's ruling.

Significantly, Graves' discussion of this issue amounts to the proverbial ostrich placing its head in the sand. Graves does not even acknowledge the existence of Section 30-3-10.4(1) which provides:

On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:

(a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and

(b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.

Utah Code Ann. § 30-3-10.4(1) (1990) (emphasis supplied). Similarly, the Supreme Court of the State of Utah has held that "the nonfunctioning of a joint custody arrangement is clearly a substantial change in circumstances which justifies reopening the custody issue." Moody, 715

P.2d at 509. As previously demonstrated in Section “I” of this Argument, the lower court made very precise findings that the parties’ joint custodial / co-parenting relationship had ceased functioning and had become unworkable or inappropriate under the circumstances. (R. at 965-65.) Again, Graves does not even attempt to challenge the sufficiency of the facts underlying those findings. Moreover, the facts of this case clearly establish that the lower court’s findings were not clearly erroneous and that the trial court did not abuse its discretion in reopening the custody issue. Graves’ failure to challenge the trial court’s findings regarding the functioning of the joint custodial / co-parenting relationship and which custodial placement was in the Children’s best interests make it impossible for Graves to credibly challenge that court’s ruling.

IV. THE TRIAL COURT’S FINDINGS OF THE CHILDREN’S BEST INTERESTS ARE DISPOSITIVE OF THIS APPEAL.

As previously indicated, the original custody order in this case was non-adjudicated and, instead, arose out of a stipulation between the parties. (R. at 558.) Consequently, regardless of any of the foregoing analysis and argument, the trial court properly considered the effects of the then-existing custody order on the Children. In Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989), this court wrote:

If, on the other hand, the initial custody award is premised on . . . a default decree, or similar exceptional criteria, the trial court may properly focus its “inquiry into the effects on the child of the established custodial relationship as it has developed over time.” This inquiry is necessarily less rigid because the trial court has not previously had an opportunity to make a thorough examination of the child’s best interests, or, if so, has been compelled to make a choice between “the lesser of two evils.” Under those circumstances, the court may accept a greater range of evidence under Hogge’s first prong regarding the initial custody arrangement, the events that have since transpired, and the resulting effects on the child.

Id at 160 (citing Kramer v. Kramer, 738 P.2d 624, 627 n. 5 (Utah 1987)) (emphasis supplied); Elmer v. Elmer, 776 P.2d 599, 603-05 (Utah 1989); Hardy v. Hardy, 776 P.2d 917, 922 (Utah App. 1989). In the present case, Graves only indirectly challenges the trial court's findings regarding the relationship between Graves and the Children. As previously noted, Graves makes absolutely no effort to challenge the lower court's findings regarding the collapse of the parties' relationship, the adverse effects of Graves' conduct on the Children, the adverse effects of the collapse of the parties' relationship on the Children, or which custodial placement was in the Children's best interest. Consequently, it is impossible for Graves to challenge the trial court's ruling, which this court must affirm.

**V. GRAVES' ARGUMENT
CANNOT WARRANT REVERSAL
OF THE TRIAL COURT.**

Graves' argument, that the lower court "[ignored] the detrimental effect the child custody litigation had on the joint custody co-parenting relationship," (Brief of the Appellant p. 12), is specious, factually unsupported and unsupportable, and contrary to fact. This argument is logically flawed for at least two reasons. First, Graves cannot cite any support in the Record demonstrating that Judge Thorne "ignored" the evidence cited by Graves. It is, after all, impossible to prove a negative. Consequently, Graves must rely only the logical nonsequitur that the lower court's rejection of Graves' evidence and argument proves that court ignored the same. That clearly is not the case. As demonstrated above, both Clements and Graves testified to facts supporting the trial court's conclusion that the breakdown of the parties' joint custodial / co-parenting relationship correlated in time to Clements' marriage to Garry W. Clements nearly five months prior to the filing of Clements' Petition to Modify. Consequently, the trial court could

easily consider Graves' argument and reject the same in favor of Clements' evidence and argument.

Further, Graves' statement that "the record contains no evidence indicating that the breakdown in the co-parenting arrangement was tied to or caused by Clement's remarriage" simply demonstrates Graves' ignorance of the facts of this case and is illustrative of the reason appellants are required to marshal the evidence. Among others, the following facts demonstrate the collapse of the parties' joint custodial / co-parenting relationship prior to Clements' initiating the custody litigation: Graves' unilateral termination of the parties' informal joint physical custody arrangement, Graves' efforts to restrict and inflexibility regarding Clements' visitation with the Children, Graves' decision to no longer attend parent / teacher conferences with Clements, the virtual non-existence of a working relationship between the parties by August of 1995, the fact that the parties were no longer communicating by August of 1995 -- even regarding the Children's welfare, Graves' refusal to involve Clements in decisions regarding the Children's welfare -- including counseling and medication, and Graves' declaration to Clements in May of 1995 that what went on in his home with the Children was not Clements' concern.

Graves' second error is his assertion of Fullmer v. Fullmer, 761 P.2d 942 (Utah App. 1988) in support of the proposition that material changes of circumstance precipitated by the child custody litigation could not be considered by the trial court. In this context, it must be emphasized that there was considerable evidence presented at trial which Graves has elected not to marshal, which is set forth herein, which supports the trial court's findings, and which strongly contradicts Graves' interpretation of the facts. Nevertheless, a careful reading of Fullmer and an understanding of the facts of that case demonstrates that the trial court would have been fully

justified in relying on Graves' conduct in reaction to the child custody litigation to support its findings of material change in circumstance and best interests of the Children.

In Fullmer, this court relied heavily on the custody evaluator's conclusions that the appellant was an excellent parent, the child responded well to both parents, and the child was well-adjusted. Id at 947. Moreover, this court emphasized that there "was no allegation that the existing custodial arrangement caused a deterioration in [the child's] mental or physical health." Id. Finally, in Fullmer this court reasoned that the appellant's unemployment, temporary living accommodations, and financial difficulties were all attributable to the appellee's surprise initiation of litigation "on the eve appellant was scheduled to move to New York" for a new job. Id at 948. Fullmer is easily and significantly distinguished from the case at bar on each of those significant facts. In the case at bar, the facts plainly demonstrate that the custody evaluator had significant concerns about Graves, to the point of deeming his treatment of the Children emotionally abusive. Moreover, the custody evaluator found that the children were not well-adjusted and happy living with Graves, Graves often became angry with the Children, and the parties' daughter felt more comfortable and safer at Clements' home. Further, Graves' often left the Children home alone and unsupervised and failed to provide for the Children's healthcare needs. Those facts, among others, clearly demonstrate a threat to the Children's emotional and physical health which was not present in Fullmer.

Moreover, the facts of this case are easily distinguished from the appellant's unemployment, temporary living accommodations, and financial difficulties in Fullmer. In this case, the facts plainly demonstrate that the trial court based its findings on changes in Graves' joint custodial / co-parenting relationship with Clements, Graves' interference with Clements' relationship with the Children, Graves' relationship with the Children, and changes affecting the

best interests of the Children. Clements could not have and did not create those facts by initiating the custody litigation. Even assuming, arguendo, that Graves changed his behavior in reaction to the custody litigation, Clements had no control over Graves, could not possibly have anticipated Graves' reaction, and certainly did not force Graves to engage in such conduct. The facts of the present case are hardly analogous to appellee's conduct in Fullmer. In the case at bar, it was Graves, not Clements, who created the facts underlying the trial court's decision to award Clements custody of the Children.

Lastly, in this regard, Graves errs in relying exclusively on his own testimony to support his assertion that the changes in circumstance were caused by the custody litigation. (Brief of Appellant at p. 15-16.) In Utah, appellate courts defer to the trial court to judge the credibility of witnesses. Riche at 467 (citing Utah R. Civ. P. 52(a)). In the present case, the trial court's unchallenged finding in this regard was that Graves is absolutely incredible:

And I'm going to find for the record, Mr. Graves, I think you've been disembling [sic.] tremendously a hypertechnical [sic.] interpretation of words and questions when it suits you, suits your ends, uncooperative in providing information, discovery, the answers that you provided in the interrogatories. I'm absolutely convinced you're playing games, as demonstrated by the vaccinations. You sign under oath a belief that vaccinations are morally objectionable to you, while at the same time saying that you knew [the Children] were vaccinated. And then when it suits your purposes, you say you don't know [the Children] are vaccinated.

(R. at 965-66.) In view of Graves' incredibility and the unmarshaled evidence contradicting Graves, the trial court's findings regarding the timing and cause of the changes in circumstance cannot be clearly erroneous. Moreover, in view of the nature of the changes in circumstance and the clear distinctions between the present case and Fullmer, while the trial court did not, it could have relied on Graves' post-petition conduct to sustain its determinations of change in circumstance and best interests of the Children.

Graves' second argument is that the trial court's change of circumstance inquiry should have focused exclusively on Graves' relationship with the Children. This argument is also seriously flawed. First, all of the cases but one, Crouse v. Crouse, 817 P.2d 836 (Utah 1991), propounded by Graves are sole custody cases. Inasmuch as the case at bar involves joint custody, those cases have limited application. Second, as previously argued, Graves has ignored the plain language of Section 30-3-10.4. Subsection "(1)" of that statute and Moody permit the trial court to focus its change of circumstance inquiry on the parties' joint custodial / co-parenting relationship. Moreover, Section 30-3-10.4(2) required the trial court to terminate the existing joint custody order in this case because both parties' had petitioned for sole custody, thereby obviating the need for any change of circumstance inquiry at all. Third, Graves has ignored the fact that the original custody order in this case arose from a stipulation between the parties. It is well-established in Utah, as has been previously argued, that in such cases the trial court less is less rigidly bound to the Hogge test and may consider the effects on the child of the established custodial relationship as it has developed over time and may accept a greater range of evidence under Hogge's first prong regarding the initial custody arrangement, the events that have since transpired, and the resulting effects on the child. Maughan 770 P.2d at 160 (citing Kramer, 738 P.2d at 627 n. 5); Elmer, 776 P.2d 603-05; Hardy, 776 P.2d at 922. Thus, had it been necessary, the trial court could easily have relied on the facts supporting its unchallenged best interests findings to support its findings of material change in circumstance.

Graves' most damning error relating to his change of circumstance argument is his disregard of the following facts which, among others, clearly demonstrate Graves' relationship with the Children had materially changed: Graves' statement to the Children, on at least one occasion, that they "are more trouble than they are worth," Graves' anger / frustration with the

Children when they wanted to spend additional time with Clements, Graves' frequently became angry with the Children, the parties' daughter felt more comfortable and safer at Clements' home than at Graves' home, the custody evaluator determined that Graves' treatment of the Children was, in many respects, emotionally abusive, the custody evaluator determined that the Children were not happy and well-adjusted in Graves' home, Graves told the Children Clements abandoned them and left them to starve and defended the propriety of that statement at trial, Graves told the Children Clements loves her new husband more than she loves them, Graves told the Children Clements does not love them, Graves told the parties' daughter Clements was sending her away so Clements could be alone with Clements' new husband, Graves told the Children that Clements' new husband does not love them and defended the propriety of that statement at trial, Graves attempted to use his eleven-year-old son to negotiate a custody settlement with Clements, Graves' contrived objection to his daughter's trip to visit her grandparents in St. George, Utah, because he wasn't "absolutely sure" she had been vaccinated against the measles, Graves' decision not to allow the Children to take their bicycles with them to Clements' home if Clements was awarded custody, Graves frequently left the Children home alone and unsupervised, and Graves failed to provide for the Children's healthcare needs. In short, the facts support a finding of material change of circumstance in the parties' joint custodial / co-parenting relationship, the way the existing joint custody order was affecting the Children, and Graves' relationship with the Children. Consequently, the trial court's findings of material change in circumstance cannot constitute an abuse of discretion.

Graves' final argument, that the trial court could not consider changes in Clements' circumstances for the purpose of finding a material change in circumstance, is absolutely irrelevant. Clements did not, at trial, and does not now contend that changes in her circumstance

would justify modifying the original custody order. Second, the trial court did not rely on changes in Clements' circumstance. Rather, the court found that the parties' joint custodial / co-parenting relationship -- a factor which is not unique to Clements and a relationship which directly impacts the Children's best interests -- had materially changed. In short, regardless of how this court reads Crouse, a case which is factually inapposite to the case at bar, Graves has again failed to provide this court with any basis for reversing the trial court's ruling.

**VI. CLEMENTS' NEED AND
THE FRIVOLOUS NATURE OF
GRAVES' APPEAL ENTITLES
CLEMENTS TO ATTORNEY'S
FEES AND DOUBLE COSTS.**

This court has defined a frivolous appeal as "one without reasonable legal or factual basis." Maughan, 770 P.2d at 162 (citing Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157, 1160 (Utah App. 1988)). In the present case there are several uncontestable facts demonstrating the frivolous nature of Graves' appeal. First, Graves neglected to marshal the evidence, thereby rendering his appeal without reasonable factual or legal basis per se. Second, Graves neglected to address clearly relevant governing authority which he knew or should have known about, to wit: Utah Code Ann. § 30-3-10.4 and Moody. Third, Graves did not even attempt to challenge the trial court's findings relating to the best interests of the Children, thus making his success on appeal impossible because the original custody order in this case arose from a stipulation between the parties. Finally, Graves' argument distorts case law and the facts of this case to support specious arguments which are neither factually nor legally cognizable.

Furthermore, this court has recognized that attorney fees on appeal may be awarded in "conformance with statute or rule." Id at 162 (citing Management Services Corp. v. Development Assocs., 617 P.2d 406, 408 (Utah 1980); Utah Code Ann. § 30-3-3 (1984)). In the

present case, Clements has been forced to obtain legal counsel to defend, on appeal, a custody award based upon innumerable unchallenged facts and findings of fact which was reflected in a well-reasoned and legally sound trial court opinion. Clements cannot afford to pay her attorney the fees she has incurred in this appeal. Graves is now employed and should be ordered to pay Clements' fees.

Accordingly, Clements is entitled to recover all fees and double costs incurred by her in the course of this appeal. That award should be predicated, first, on the frivolous nature of Graves' appeal and, second, on Clements' need.

CONCLUSION

Graves' entire argument is predicated on the assumption that the trial court was required to find a material change of circumstance before it could make a finding of best interests of the Children -- a finding which Graves has not even attempted to challenge on appeal. Graves is wrong. Section 30-3-10.4(2) clearly required the trial court to terminate the joint custody order in the present case without regard to whether a material change in circumstance had occurred and to then award custody based upon that court's finding of best interests of the Children. Consequently, Graves' entire appeal, even if well-taken, cannot upset the lower court's ruling.

Assuming, arguendo, that the trial court was required to find a material change of circumstance, Graves also incorrectly argues that the trial court's inquiry must focus on the relationship between Graves and the Children. Under the facts of the case at bar, that is only one of the options. Because this case involved the stipulated entry of a joint custody order, the trial court was also entitled to look to the parties' joint custodial / co-parenting relationship and the effect of that relationship on the Children's best interests to find a material change of circumstance. Significantly, Graves does not even attempt to challenge the trial court's factual

and legal findings in either of the latter two scenarios. Moreover, the record is replete with evidence that Graves' relationship with the Children had also materially changed. Accordingly, there is sufficient evidence and findings of fact, under each of the three scenarios, to sustain the trial court's conclusion that a material change of circumstance had occurred.

Finally, none of Graves' arguments are factually or legally cognizable and Graves indefensibly neglects to marshal the evidence supporting the trial court's ruling. Consequently, this court must affirm the trial court and award Clements her attorney's fees and double costs incurred herein.

RESPECTFULLY SUBMITTED this 22nd day of September, 1997.

HANKS & ROOKER

John C. Rooker
Attorneys for Defendant / Appellee

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing *BRIEF OF APPELLEE* was hand-delivered on the 22nd day of September to:

Len R. Eldridge
ATTORNEY FOR DAVID GRAVES
925 East 900 South
Salt Lake City, Utah 84105

Amber H. Livsey

ADDENDUM

- (A) Transcript of the Trial Court's Oral Decision / Judge's Ruling

9-5002622

NOV 25 1996

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

* * *

LORIN DAVID GRAVES,

Plaintiff,

vs.

TRICIA KRISTINA CLEMENTS,
f/n/a GRAVES,

Defendant.

Case No. 914902572

Judge William A. Thorne

Partial Transcript
Judge's Ruling

BE IT REMEMBERED that the above-entitled case

came on regularly for trial before the Honorable Timothy
R. Hanson, a Judge of the Third Judicial District Court
of the State of Utah, at Salt Lake City, Salt Lake
County, State of Utah on the 18th day of October 1996, at
10:00 a.m., and that the following proceedings were had.

* * *

ORIGINAL

000058

A P P E A R A N C E S

FOR THE PLAINTIFF:

Samuel M. Barker
BARKER & BARKER
2452 Emerson Ave.
Salt Lake City, Utah 84108

FOR THE DEFENDANT:

John C. Rooker
HANKS & ROOKER
740 Judge Building
8 East Broadway
Salt Lake City, Utah 84111

1 P R O C E E D I N G S

2 October 18, 1996

3 THE COURT: So as not to drag this out and
4 add to the additional stress of the children, I'm going
5 to issue my ruling from the bench now and ask counsel to
6 draft appropriate findings and a decree. First let me
7 indicate that I find very little relevance to Mr. Graves'
8 characterization of Ms. Clements leaving the marriage as
9 one of abandonment, simply leaving them high and dry
10 without notice. What particularly troubles me is that's
11 done irrespective of the fact that he did exactly the
12 same thing a year -- eighteen months before for six
13 months where he left and provided no support. And at
14 this time there is evidence that when Ms. Clements left,
15 they went to counseling beforehand to try and get help to
16 try and figure out the best way to explain to the
17 children what was going on. There was counseling that
18 they both participated in that. There's also evidence
19 that until the AFDC kicked in that Ms. Clements provided
20 \$500.00 a month. Clearly she had an obligation to
21 support the family after the AFDC kicked in, and she
22 didn't meet that.

23 But I'm troubled by the fact that the children are
24 told that mom abandoned them, left them to starve, when I
25 don't believe the facts support that. The record should

1 reflect that I interviewed the four children together and
2 then individually in chambers by stipulation. And I told
3 the children that I would not tell the specifics of what
4 I was told by them to any adult. That I additionally
5 told them as I did when I interviewed Nicole only the
6 first time, that it was not fair to the kids to be put in
7 the middle of this, so that if the adults were to ask
8 them what was said to me, they were to tell them whatever
9 they thought the adult wanted to hear. I gave them
10 permission to lie, because I don't think they should be
11 put in a position of being instruments in a tug of war.

12 But there are some themes that run through what they
13 told me that I'm going to share with you. First,
14 unanimously the kids were absolutely indignant with the
15 idea that mom tried to influence them, and that dad
16 thought they were were lying. They appeared to be very
17 hurt by that as well as outraged that somebody would
18 think that that was being done.

19 And I'm convinced after doing these kind of
20 interviews for seventeen years that those kids were not
21 put up that to that position. That was genuinely held by
22 them. The kids' concerns -- they are very much torn
23 between both parents. I think they hold a very deep,
24 abiding love for both. But they are genuinely distressed
25 by the feeling that if they express any affection, or

1 caring for the other parent that that's viewed as a sign
2 of disloyalty. That's extremely distressing to them if
3 they think they can not love the other parent, or if they
4 do they have to do it in secret. And I hope the two of
5 you will take this to heart, because I think it's not too
6 far away before those kids may start to resort to
7 something very drastic to get out of the middle of having
8 to feel like they are betraying somebody's love by loving
9 the other one. Those kids seem to be genuinely almost
10 distracted at not being able to love both, and they
11 clearly do.

12 And without telling you what their preference was,
13 each one of them wanted to make sure that I understood
14 that wherever they were placed, whether I agreed with
15 their choice or not, and I made sure they understood it
16 was not their choice, that I would listen to them just as
17 I listen to the adults, that that was only fair, that it
18 was not their choice. But that wherever I placed them,
19 they wanted to spend lots of time with the other parent,
20 not just a weekend. They wanted to spend, in their own
21 words, lots of time with the other parent. And they
22 don't think they can do that now. And quite frankly I
23 see the kids behaving much more adult-like than the
24 grown-ups. And I think you're about to mess up four nice
25 little kids who love you both if you two can't seem to

1 get this together. If you're going to be dictatorial in
2 terms of I'm going to allow this, and I'm going to make
3 decisions there, you have to put that aside and put the
4 kids first, what's necessary for them to have a healthy
5 relationship so they can grow up understanding what a
6 healthy relationship is, and what it's like to love
7 somebody.

8 Message from the kids is they want you to be nice to
9 each other. They want you to act like parents where you
10 put the kids first and not your own interests. And I'm
11 going to find for the record that when the custody was
12 initially placed with Mr. Graves, that that seemed to be
13 an extremely good way of doing things. He was there for
14 the kids, and he was in one sense a rock that they could
15 come to depend on. And he was flexible in terms of
16 allowing the kids to love both, going back and forth.
17 And he did the extra things, in addition to the things of
18 learning to cook and other things. Mr. Graves went to
19 the parenting classes. He was trying to do the right
20 thing for those kids. And when this started out, I think
21 Mr. Graves, you were as close to an ideal parent as I see
22 when it comes to court. But something has changed and
23 changed very drastically.

24 And I also find for the record that Mrs. Graves at
25 that time, Ms. Clements now, also did what a parent was

1 supposed to do, and that's to put the kids first. It's
2 clear from the testimony that she was on medication and
3 went through a substantial period of counseling to deal
4 with the separation from the children. And yet she
5 didn't attempt to get the kids back, because she knew at
6 that point Mr. Graves was doing a good job with them.
7 She put the kids first, and her own need for those kids
8 second. So at that point, I think the two of you were
9 doing what parents are supposed to do.

10 And I'm going to further find for the record that
11 there's no evidence of physical abuse. But I'm going to
12 find that there's a change of circumstance, and I'm going
13 to date it from March of 95 when Ms. Graves became Mrs.
14 Clements. That the desire to carry on as co-parents
15 seemed to have evaporated at that point. All the
16 evidence that I've heard over the last two days seems to
17 pin that as the time, Mr. Graves, when you started to
18 look at this as a different relationship instead of one
19 of sharing responsibilities as a parent -- began to be a
20 tug of war to see who was going to keep them. And the
21 kids have suffered from that since then. And I'm going
22 to find that the blame for that breakdown is not
23 one-sided, but that Mr. Graves bears the greater portion
24 of that responsibility for the breakdown. And I have
25 some genuinely significant concerns over whether Mr.

1 Graves' prediction that things will be all better when
2 the litigation is over is accurate. I hope so.

3 From March of 95 I'm going to find that Mr. Graves
4 has been very inflexible, controlling, and not acting
5 with the kids' best interest at heart, but his own. You
6 went through a period, Mr. Graves, where you were
7 facilitating the relationship to one where the evidence
8 shows that you did everything possible to obstruct it.
9 You prevented the kids from talking with their mother on
10 the phone. You limited the contact physically, you
11 limited the contact with the school, and one of the
12 things that I think demonstrates that, there weren't any
13 more joint decisions, this wasn't co-parenting any more
14 is when things get troubled. Instead of being angry at
15 the decisions, you used words like cunt to describe your
16 co-parent to her. That's just symptomatic, I think, of
17 the breakdown; that it's no longer equal participating
18 and making the decisions of what's best, but it's a sign
19 that things are becoming autocratic. And I'm going to
20 find for the record, Mr. Graves, I think you've been
21 disembling tremendously a hypertechnical interpretation
22 of words and questions when it suits you, suits your
23 ends, uncooperative in providing information, discovery,
24 the answers that you provided in the interrogatories.
25 I'm absolutely convinced you're playing games, as

1 demonstrated by the vaccinations. You sign under oath a
2 belief that vaccinations are morally objectionable to
3 you, while at the same time saying that you knew they
4 were vaccinated. And then when it suits your purposes,
5 you say you don't know they are vaccinated. I think
6 you've developed some unrealistic expectations of kids'
7 abilities, particularly when they conflict with your own
8 needs.

9 I'm going to find that Mrs. Clements is better
10 suited to encourage a positive relationship between the
11 non-custodial parent and the kids and a better -- and is
12 more capable of putting the kids' needs first. I'm going
13 to order an end to the joint custody arrangement, and I'm
14 going to award custody to Mrs. Clements. I'm going to
15 set this for further review in thirty days. I expect
16 that the two sides can work out in detail a liberal
17 visitation plan so the kids get to spend lots of time
18 with both sides. But if you can't work that out, I will.
19 And the reason I'm giving you that flexibility is that
20 both of you apparently have schedules that are not eight
21 to five kinds of days. You have days that are heavier
22 and days that are easier, and you ought to be able to
23 spend the days you have free with your kids, and when
24 you're not able to spend time with the kids, you're
25 co-parent ought to be able to. I'm going to give you

1 thirty days to work that out. If you can't, we'll come
2 back and work it out in the courtroom.

3 Mr. Graves, I'm genuinely sorry that it's come to
4 this, because from all the indications, you were
5 providing everything those kids needed for a long period
6 of time. And I congratulate you on being able to do
7 that. But in the last year and a half things seem to
8 have fallen apart. And based on the fact that a joint
9 custody arrangement depends on cooperative co-parenting,
10 that's not present any more, and under the statute 33.10,
11 I'm required now to make a finding of what's in the best
12 interest of the children.

13 Mrs. Clements, let me indicate as well that if you
14 can't meet the needs of those children and provide a
15 positive relationship with their father, we may be back
16 in here again looking at something else. If you revert
17 to the same kind of controlling behavior that Mr. Graves
18 has done where you limit contact, you limit visits, you
19 limit the ability of the children to be with their dad,
20 we're going to be back in here again. If you can truly
21 provide a positive atmosphere where the kids feel safe
22 and good about themselves for loving both parents, then
23 this will be the right decision. If you can't, we're
24 going to be back here again.

25 Sally do you have the schedule book? I'll set a

1 time. The 18th, we're looking at the middle of November.
2 MR. ROOKER: I can do it a month from today.
3 MR. BARKER: That would be fine with me, Your
4 Honor.
5 THE COURT: The 18th is as full as is the --
6 we can do it the afternoon of the 27th.
7 MR. ROOKER: That's fine for me.
8 MR. BARKER: Yeah, that would be fine.
9 THE COURT: I'll set it at two o'clock, 27th of
10 November.
11 MR. ROOKER: If we can reach an agreement, I
12 will promise the Court that we will have prepared finding
13 and an order ready for you to sign at that time.
14 THE COURT: Okay. Mr. Graves and Ms.
15 Clements, if you can't put the needs of those kids first,
16 as bad as you're hurting over all of this, they are going
17 to be so much worse. Those kids, in seventeen years of
18 interviewing kids to make these kinds of decisions, I
19 don't think I've ever seen more that are as distraught
20 and feeling like they are not allowed to love the other.
21 And you're going to destroy those kids if you don't put
22 their needs first. I hope the way that you used to love
23 them you can do again so that they know that you both
24 love them and it's okay for them to love each of you.
25 Okay. Court will be adjourned.

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, BUNNY CAROL NEUENSCHWANDER, do hereby
certify:

That I am a Certified Shorthand Reporter,
License No. 152, and one of the official court reporters
of the State of Utah; that on the 18th day of October,
1996, a trial was held and recorded on videotape; that
later I transcribed into typewriting from the videotape a
transcript of the Judge's ruling, and the foregoing
pages, numbered from 3 to 11, inclusive, constitute a
partial transcript, true and correct account of the same
to the best of my ability.

Dated at Salt Lake City, Utah, this 29th day of
October, 1996.


BUNNY CAROL NEUENSCHWANDER, CSR, RPR